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INSURANCE LAW IN MISSOURI*

JULES B. GERARD**

Missouri courts faced a variety of tough insurance problems last year. The Supreme Court twice overruled established doctrine: once on the burden of proof in actions on policies; once on imputing an agent's knowledge to his company. Other developments were confined largely to vexing problems of automobile liability insurance.

I. LIABILITY INSURANCE

A. *Overlapping Coverages.*

How should a court distribute rights and duties between two liability insurers who have issued policies covering the same loss? This question first appeared in Missouri three years ago¹ in *Arditi v. Massachusetts Bonding & Ins. Co.*² The Supreme Court then ordered the insurers to share the loss. When the question appeared for the second time last year, in *Fidelity & Cas. Co. v. Western Cas. & Sur. Co.*,³ the St. Louis Court of Appeals chose to distinguish rather than to follow *Arditi*. It held one insurer primarily liable and the other liable only for excess.

Arditi arose from a collision between a bus in which plaintiffs were passengers and a truck being returned to Shell Oil Company by the servant of a maintenance shop. The shop's policy covered its servants but contained a provision making the insurance excess if the automobile was not owned by the shop, and the driver was covered by other insurance. The policy issued to Shell covering the truck contained a rider making it excess if other insurance covered the driver.⁴ Adapting the language of a federal

*This article contains a discussion of selected 1960 and 1961 Missouri court decisions reported in volumes 333 through 345 of South Western Reporter, Second Series.

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1. See Seiler, *Insurance Law in Missouri*, 24 MO. L. REV. 442 (1959). For a general discussion analyzing and grouping the early cases, see Note, 13 VAND. L. REV. 409 (1959). See also Note, 1 WILLAMETTE L. REV. 485 (1961).

2. 315 S.W.2d 736 (Mo. 1958).

3. 337 S.W.2d 566 (St. L. Ct. App. 1960).

4. 315 S.W.2d at 742.

court,⁵ the Supreme Court disregarded these provisions as “mutually repugnant,” and affirmed a judgment prorating the loss between the insurers in the ratio their respective policy limits bore to the sum of both policy limits. In doing so it rejected the argument that the owner’s (Shell’s) insurance is primarily liable whenever there are overlapping coverages, saying “we [do] not think this is always true, depending instead on the policy provisions and other circumstances.”⁶

Fidelity also arose from a collision. It was a suit for declaratory judgment by the insurer of the car owner (*Fidelity*) against the insurer of the driver (*Western*). Both policies contained an “other insurance” provision:

If the *insured* has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to . . . *other automobiles* . . . shall be excess insurance over any other valid and collectible insurance.⁷ (Emphasis added.)

The trial court granted plaintiff *Fidelity*’s prayer that the insurers apportion the loss as in *Arditi*. The court of appeals reversed, holding that *Western* was an excess insurer only. The court reasoned that because the driver was driving an “other automobile” (*i.e.*, one he did not own), *Western*’s provision making the insurance excess was applicable. But, explained the court, because the driver was an “insured” under *Fidelity*’s policy,⁸ *Fidelity*’s provision apportioning the loss was applicable. Thus the court found one policy provided for apportioning the loss while the other provided only excess insurance, whereas *Arditi* concerned policies both of which provided only excess insurance.⁹ The court believed this distinction justified a different result.¹⁰ Whether or not the Supreme Court would agree,¹¹ the result

5 *Oregon Auto Ins. Co. v. United States Fid. & Guar. Co.*, 195 F.2d 958, 960 (9th Cir. 1952).

6. 315 S.W.2d at 743.

7. See 337 S.W.2d at 576.

8. The standard “omnibus” clause defines the word “insured” to include “any other person using the owned [or “described”] automobile, provided the actual use thereof is with the permission of the named insured.”

9. See text at note 4, *supra*.

10. See especially 337 S.W.2d at 577.

11. In order to hold *Fidelity* solely liable up to its policy’s limits the court of appeals had to disregard *Fidelity*’s clause apportioning the loss and give controlling effect to *Western*’s excess clause. No compelling reason why an excess clause should be disregarded when it conflicts with another excess clause but should

does accord with the majority of decisions involving one "excess" and one "apportion" clause.¹²

The disturbing question, however, is not whether *Fidelity* correctly interprets *Arditi*, but whether its tacit willingness to leave the solution of this problem to policy draftsmen is wise. The public, it is submitted, also has interests that ought to be considered.

The *Fidelity* decision means that one or another insurer will be primarily liable in almost every case of overlapping coverages. Two consequences are virtually certain to follow. First, more suits for declaratory judgments to determine insurers' respective rights and duties will be filed. Fact questions that normally would be resolved in the personal injury action will have to be decided.¹³ This means the injured persons will have to be joined as parties.¹⁴ They will have to litigate two actions instead of one. Second, the named insureds of both policies often will have to hire private counsel to represent them, even though the insurers expressly agreed to do just that.¹⁵

Holding one insurer primarily liable also raises some difficult subsidiary questions. During the period that primary liability remains uncertain, with whom does the injured person negotiate if his thoughts run to settlement

be controlling when it conflicts with an apportion clause occurs to me. It is at least arguable the Supreme Court intended to hold two clauses "mutually repugnant" any time giving effect to one of them required disregarding the other. This is precisely what has been decided by the courts of Oregon, whose law was being applied in the federal case relied upon by the Supreme Court (see text at note 5, *supra*). See Annot., 76 A.L.R.2d 502, 512-13 (1961).

In any event, the question was whether *Fidelity* was primarily or proportionately liable. To say, "since we have held [*Fidelity*'s] 'excess insurance' limitation inapplicable, it follows that the coverage afforded by the *Fidelity* policy *must be primary*" (337 S.W.2d at 578; emphasis added) is to beg the question, not answer it. The only conclusion that "must be" is that *Fidelity*'s policy is not excess.

Finally, since the provision quoted in the text at note 7, *supra*, is standard in automobile liability policies, *Fidelity* means that the car owner's policy will be primarily liable in almost every case of overlapping coverage. See Hawkes, *Liability Guiding Principles*, 1960 INS. L.J. 481; O'Kelley, *Primary and Excess Coverage in View of the "Other Insurance" Provision*, 22 INS. COUNSEL J. 404 (1955). But this is what the Supreme Court indicated should not happen. See text at note 6, *supra*.

12. Annot., 76 A.L.R.2d 502 (1961).

13. It was uncertain which of three occupants of the automobile insured by *Fidelity* was the driver at the time of the accident. The trial judge impanelled a special jury to resolve the question. 337 S.W.2d at 568.

14. Nineteen defendants were served in *Fidelity*. *Ibid*.

15. The executrix of *Fidelity*'s named insured was a defendant in *Fidelity*. *Ibid*. Both insurers refused to defend the shop owner in *Arditi*. 315 S.W.2d at 740. See also *American Fid. & Cas. Co. v. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co.*, 280 F.2d 453 (5th Cir. 1960). The money expended for this purpose will be recoverable, of course, but why should the insured be put to the trouble?

rather than litigation? Would either insurer dare settle? Wouldn't it be a "volunteer" and forfeit its subrogation rights against the other insurer if it later were held liable only for excess?¹⁶ Who protects the allegedly negligent insured during this period? Which company owes him a defense; or, looking at the other side of the coin, which company has the right to control settlement and litigation?¹⁷ If the eventual judgment exceeds the total amount of insurance money available, against which company might the insured have a cause of action for the excess?¹⁸

Requiring the insurers to apportion all losses irrespective of the overlapping policies' terms would reduce the number of declaratory judgment suits. Such a rule would relieve injured persons of the double litigation burden and would aid the administration of justice by reducing the courts' caseload. It might be objected the rule would not decrease the number of suits because it would be no more certain in application than the rule imposing primary and secondary liability. But the companies have nothing to lose by bringing suit under the latter rule, and nothing to gain under the former. John Alan Appleman, author of the insurance treatise bearing his name, recently said this about his experience:

It is surprising, in view of the almost unanimous nature of the results, that many companies will still contest this matter and try to insist that the other company share its burden. The writer has a case pending where one insurance company is insisting that a declaratory judgment be sought requiring a second company to carry the burden or to share it equally—even though it has been explained that no obligation would arise upon the second company until the first company has spent its policy proceeds.¹⁹

At the very least, if requiring apportionment in all cases seems too mechanical, the courts should rule that declaratory judgment suits between insurers are premature until after judgment has been entered in the personal

16. See *General Acc. Fire & Life Assur. Corp. v. Continental Cas. Co.*, 287 F.2d 464 (9th Cir. 1961). See also Annot., 31 A.L.R.2d 1324 (1953).

17. The standard auto liability policy provides that "the company shall defend any suit . . . seeking damages which are payable under the terms of this policy . . . but the company may make such investigation and settlement of any claim or suit as it deems expedient." See generally 8 APPLEMAN, *INSURANCE LAW & PRACTICE* §§ 4681, 4685 (1942).

18. See *Columbia So. Chem. Corp. v. Manufacturers & Wholesalers Indem. Exch.*, 190 Cal. App. 2d 229, 11 Cal. Rep. 762 (Dist. Ct. App. 1961).

19. Appleman, *Overlapping Coverages in Liability Contracts; Subrogation*, 13 VAND. L. REV. 897, 898 (1960). See also the quotation in the text at note 21, *infra*.

injury action.²⁰ The fight is between the insurers, and there is no reason why the injured persons or the insureds should have to participate.

If to the above is added a rule requiring companies to defend their named insureds, and to be responsible in damages for failing to do so properly, irrespective of whether the company is primarily, secondarily, or proportionately liable, the plight of insureds will be substantially improved. Their plight was recently depicted in these words:

This is another, and undoubtedly not the last, of those cases of which we have many, in which one insurer having the good fortune to find some other insurer who has written a policy for someone else attempts to engraft itself upon the contract to which it was not a party in the hopes that what it bound itself to do, it need not perform. The result, if successful, is that its contractee, the assured, must look elsewhere for the promised protection.²¹

All commentators agree the insurer ought to bear the duty of defending its named insured whether or not it will be liable only for damages in excess of the other policy's limits.²² Such a rule not only would protect insureds during any period of uncertainty about primary liability, but also would resolve most of the subsidiary difficulties mentioned above.²³

Whatever solution is thought best, however, it is submitted that consideration should be given these problems before a body of law requiring them to be solved solely by interpreting the policies is established.

B. *Permissive User.*

The automobile liability policy contains an "omnibus clause" extending coverage beyond the named insured to "any other person using the owned automobile, provided the actual use thereof is with the permission of the

20. So held in *American Fid. & Cas. Co. v. Pennsylvania Threshermen & Farmer's Mut. Cas. Ins. Co.*, 280 F.2d 453 (5th Cir. 1960).

21. *Id.* at 455.

22. 8 APPLEMAN § 4691, at 44 (1942) and at n. 66.10 (Supp. 1960); 2 RISJORD & AUSTIN, *AUTOMOBILE LIABILITY INSURANCE CASES* 2569 (1961) (hereafter cited RISJORD & AUSTIN); Keeton, *Ancillary Rights of the Insured Against His Liability Insurer*, 13 VAND. L. REV. 837, 843-45 (1960).

23. Another question, but one which does not directly affect policyholders, is whether, and how, to apportion the fees and expenses incurred in disposing of a claim. See 8 APPLEMAN § 4691; 2 RISJORD & AUSTIN 2569. It was raised in both Missouri cases, but the opinions fail to show clearly how it was answered. The question was answered in opposite ways in *General Acc. Fire & Life Assur. Corp. v. Continental Cas. Co.*, 287 F.2d 464 (9th Cir. 1961), and in *Columbia So. Chem. Corp. v. Manufacturers & Wholesalers Indem. Exch.*, 190 Cal. App. 2d 229, 11 Cal. Rep. 762 (Dist. Ct. App. 1961).

named insured." Whether the driver had "permission" is one of the most litigated questions in insurance law. By last year it was settled in Missouri that the driver did not have permission if he disobeyed the named insured's specific instructions.²⁴ On the other hand it was settled also that permission could be implied from the named insured's acquiescence in a known use where no instructions had been given.²⁵ *Speidel v. Kellum*²⁶ raised the intermediate question: Does the driver have permission if he is given only general instructions and deviates from the best way of carrying them out for purposes of his own?

Kellum worked in a grocery store managed by the named insured. The insured told him to fetch the insured's car from a repair shop "and to hurry back because it was Friday, their busy day."²⁷ Kellum picked up the car, picked up some friends and went driving. The accident occurred thirty-two blocks from the store, two and one-half miles from the usual route between the store and the garage.²⁸ In this garnishment action in aid of judgments against Kellum, the Kansas City Court of Appeals affirmed a directed verdict for the insurer. It canvassed three "permission rules" used by various courts and adopted the "minor deviation rule."

Under this rule a minor deviation from the purpose for which the employer granted the employee permission to use the vehicle will not be sufficient to exclude the employee from coverage under the clause, while a material deviation is held to constitute a use of the automobile without the employer's permission.²⁹

The court held that because Kellum's deviation was "marked and decided," (a) he did not have permission and (b) there was no issue to submit to the jury.

This decision imports into insurance litigation the historic difficulties encountered under the respondeat superior doctrine of deciding whether a servant was "within the scope of employment." Given the alternatives, however, either of granting coverage to any driver any time the named

24. *M.F.A. Ins. Co. v. Lawson*, 336 S.W.2d 123 (K.C. Ct. App. 1960).

25. *Haynes v. Linder*, 323 S.W.2d 505 (K.C. Ct. App. 1959).

26. 340 S.W.2d 200 (K.C. Ct. App. 1960).

27. *Id.* at 201.

28. *Id.* at 203. The court also stated it normally would take twenty minutes to drive between the store and the garage. *Id.* at 201. It did not say, however, how much time had elapsed between Kellum's leaving the garage at four p.m. and the accident. This was apparently an oversight, since it seemingly would be important in view of the order to "hurry back."

29. *Id.* at 202.

insured has given permission to anyone to use his car, or of denying insurance money to injured persons whenever the driver is using the car for his own purposes, the choice probably was the best that could be made.

II. CONSTRUCTION OF POLICY TERMS

Automobile policies also were the objects of the year's most curious "constructions." At one pole, gauged by its approach to the construction process, was *Wise v. Strong*,³⁰ which held there was no ambiguity in words that meant exactly the opposite of what they said. At the diametric pole was *Smith v. M.F.A. Mut. Ins. Co.*,³¹ which resorted to metaphysics in order to find an ambiguity that didn't exist.

The *Wise* case began when one Garver, who owned two cars, loaned one of them to defendant Strong. Strong hurt Wise, Wise sued Strong, and Strong tried to implead Garver's insurance company. Garver had gotten one of the new Family Automobile Policies just two days before the accident. Its pertinent provisions were:

[The company agrees] to pay on behalf of the insured all sums the insured shall become legally obligated to pay as damages

The following [persons] are insureds . . . (a) with respect to the owned automobile, . . . (2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured

"Owned automobile" means a private passenger or utility automobile . . . owned by the named insured³²

It was undisputed (a) that the Nash driven by Strong was a private passenger automobile, (b) that it was owned by Garver, (c) that Strong had Garver's permission to use it, and (d) that the policy was in effect at the time of the accident. Under these circumstances, does it not seem plain that Strong was covered, *i.e.*, was an "insured"? To the Springfield Court of Appeals it seemed just as plain he was not.

Garver bought the Nash that Strong drove on December 6; on December 12 he bought a Hillman Minx, and also purchased the policy in suit. The policy described the Hillman in detail. It also contained a declaration that Garver owned "one" automobile on its date of issuance. The Nash

30. 341 S.W.2d 633 (Spr. Ct. App. 1960).

31. 337 S.W.2d 537 (K.C. Ct. App. 1960).

32. 341 S.W.2d at 636-37.

was nowhere mentioned.³³ The court looked at the phrase "arising out of the ownership, maintenance or use of *the* owned automobile" and said that the use of "the" instead of "any" was of the "utmost significance"; looked at the phrase "with respect to the owned automobile" and said "again, we find that the use of 'the' restricts the automobile to the car described in the policy"; and looked at the phrase "any other person using such automobile" and said "the clear meaning of the language thus used, 'such automobile,' means the described automobile in the policy."³⁴ The court concluded "that there would have been no purpose in specifically describing the Hillman Minx car in the policy if the intent of the parties was to the effect that the coverage extended to every automobile owned by Garver."³⁵

On the contrary. The use of "the" instead of "any" has no significance whatever. The policy clearly anticipated that more than one car should be covered.³⁶ The court's argument would buttress a conclusion that only one car is covered even when two are described. The argument concerning the words "such automobile" has even less to recommend it. These words plainly refer to the antecedent "owned automobile," which is specifically defined, *not* as "the motor vehicle described in this policy," but as an "automobile owned by the named insured." The former definition has been used for years in the Standard Automobile Liability Policy.³⁷ The adoption of the latter in the 1958 Family Automobile Policy was deliberate; its purpose was to bring "under the policy all such automobiles . . . owned by the named insured."³⁸ Furthermore, the words "automobile described in this policy" are used only once in the Family Policy form,³⁹ and in such a way as to show they definitely are not synonymous with "owned automobile":

33. *Id.* at 637. The opinion does not reveal how or why this came about.

34. *Id.* at 638.

35. *Id.* at 641.

36. See *id.* at 638.

37. KEETON, BASIC INSURANCE LAW 629, 634 (1960). The whole provision as it appears in the model policy form is instructive:

[T]he word "automobile" means . . . the motor vehicle or trailer described in this policy [or, if none is so described, . . . any private passenger automobile owned on the effective date of this policy by the named insured or by his spouse if a resident of the same household]

A footnote following the bracket reads: "Omit matter in brackets if the policy is to include the description of each automobile."

38. 1 RISJORD & AUSTIN 39.

39. Published, as in the model form of the Standard Policy (see note 37 *supra*), by the National Bureau of Casualty Underwriters. I have assumed the policy in litigation did not differ from the model form in any material respect.

The limit of the company's liability for loss shall not exceed the actual cash value of the property, . . . nor, with respect to *an owned automobile described in this policy*, the applicable limit of liability stated in the declarations⁴⁰

The location of this provision in the "physical damage" section of the policy discloses the feebleness of the court's final argument, viz., that "there would have been no purpose in specifically describing" one car if coverage extended to both. That purpose was to provide insurance against *property damage* to the *described* car; *liability* coverage was provided exactly as the policy says: to all "*owned automobiles*."⁴¹ This was clearly the intention of the Family Policy form draftsmen:

Item 5. Description of owned automobile or trailer (*Required only if Coverage D, E, F, G or H is afforded*).⁴² (Emphasis added.)

Those mentioned are all property damage coverages ("D," for example, is comprehensive; "E" is collision); none has any bearing on liability

40. (Emphasis added.) This provision, labelled "Limit of Liability," occurs in "Part III—Physical Damage" of the policy. The "Declarations" section of the policy is similar to the application. Item three of the declarations lists the coverages granted with the premiums and liability limits applicable to each. The limits of liability applicable to comprehensive coverage, as shown on the model form of the Family Policy, may be either of two values, viz., "stated amount" or "actual cash value." The effect of the provision quoted in the text is to make the "stated amount" instead of "actual case value" the limit of recovery for loss of a *described* car. Most companies refuse to write comprehensive insurance on certain types of vehicles, e.g., antique cars, except in "stated amount." See National Auto. Underwriters Ass'n, Rules, Rates & Premiums Governing the Insuring of Automobiles 1, 1st rev., Oct. 19, 1960. For a case noting the operation of such a provision as a limitation on liability and not as a measure of damages, see *Wrinkle v. Imperial Cas. & Indem. Co.*, 343 S.W.2d 90 (K.C. Ct. App. 1961).

41. The format of the Family Policy ("Part I—Liability"; "Part II—Expenses for Medical Services"; "Part III—Physical Damage") is the feature that most easily distinguishes it from the Standard Policy. This change in format had a purpose:

The inclusion of the defense and settlement provision with the liability coverages is new—in an effort to further emphasize that these provisions pertain only to claims and suits for which insurance is afforded by the policy *under the liability coverages*. (Emphasis added.)

1 RISJORD & AUSTIN 37. The whole form was intended to emphasize the differences between the three types of coverages granted by it.

42. This is contained in the declarations. A footnote says the parenthetical matter may be omitted, as it probably was in the litigated policy.

That draftsmen of the Family Automobile Policy plainly intended it to cover all owned automobiles is further proved by the "Amendment of Definition of Owned Automobile." This Amendment is supposed to be endorsed on the policy whenever the named insured owns an automobile that is not insured, or is not insured with the company issuing the policy. As might be expected, the Amendment's definition of "owned automobile" is an "automobile described in the policy"—*i.e.*, the Standard Policy's definition. See BRAINARD, AUTOMOBILE INSURANCE 152-55,

coverage.⁴³ Two liability insurance experts have criticized this decision by saying:

[T]he court laid too much stress upon the description of the Hillman Minx automobile as making the coverage confined to that automobile. If Garver had not owned the Nash automobile and, sometime after the effective date of the policy, had purchased the Nash automobile, the policy would have covered the Nash automobile at the time of the accident. *The coverage under the family policy (so far as bodily injury liability and property damage liability are concerned) is not confined to the automobile described in the policy.* Rather it is confined to one owned automobile if that is the total number of automobiles specified as such in the declarations. . . .⁴⁴ (Emphasis added.)

Ultimately the court rested its decision upon a fancied "intent of the parties."⁴⁵ It would be a novel doctrine in this day and age to hold that the intention of parties to a contract, particularly an insurance contract, controls their precise language when the two conflict.⁴⁶ Here the court faced a dilemma. If the language was clear, the intent of the parties was immaterial; if it was ambiguous, the ambiguity had to be resolved in favor of Strong.⁴⁷ The court cleaved the dilemma with a fiat: the policy

540 (1961). See also National Auto. Underwriters Ass'n, Rules, Rates & Premiums Governing the Insuring of Automobiles, Rule 25a(1)(b), 2d rev., Sept. 1, 1959; National Bur. of Cas. Underwriters, Manual of Automobile Insurance, Rule 21(B), July 1, 1961.

Even supposing *this* company's intention was to the contrary, it can still be said (a) that the Standard Policy's definition of "automobile" clearly would have excluded coverage in this instance, (b) that the Standard definition was well known to the company, having been in use for years, and (c) that the company had been warned against using the definition it did in a policy which also required automobile descriptions. See note 37, *supra*. Under these circumstances, it is hard to see why the company's alleged "intention" should have been considered at all.

43. Parcher, *The New Family Automobile Policy*, 24 INS. COUNSEL J. 13, 16 (1957) (" . . . the policy does not require a description of the insured's automobile unless physical damage coverage is being provided . . . ") This article was cited to the court, which quoted and ignored it with the brusque statement: "We are cited to no opinions in this State or in any other State . . ." 341 S.W.2d at 640.

44. 2 RISJORD & AUSTIN 2773. The quotation begins with the words, "The result was correct but . . ." The authors apparently mean the decision was correct because of the declaration that only "one" car was owned. It is at least questionable, however, that this false declaration, even if it were a misrepresentation by the owner Garver, would have entitled the company to deny liability. See note 51, *infra*, and text supported by it.

45. See especially 341 S.W.2d at 641.

46. *Contra, e.g.*, 13 APPLEMAN §§ 7384, 7482.

47. *Id.* at § 7483. A third person is entitled to the benefit of this rule. *Ibid.*

was not ambiguous;⁴⁸ it meant exactly the opposite of what it said.⁴⁹

This hard case spotlights an anomaly: liability insurance can be classified neither as insurance of the interests in property nor as insurance of the interests in a person. The court emphasized the lack of connection between the policy and the Nash automobile, but at issue was the connection between the policy and Strong, the driver.⁵⁰ The court undoubtedly was influenced by the declaration that only "one" car was owned. This may have been due to a misrepresentation by the owner Garver or it may have been due—the opinion doesn't discuss the matter—to the agent who sold the policy. But assuming the former, was the misrepresentation a "material" one, such as would avoid the policy?⁵¹ No other case construing these provisions of the new Family Policy has been found. It is too bad this inadequate opinion had to be the first in the field.

Noticeably absent from the *Smith* case at the other end of the spectrum is any mention of the parties' intent. *Smith* concerned a comprehensive policy covering a propane gas delivery truck. The policy provided:

48. 341 S.W.2d at 641. How it reached the conclusion the policy was not ambiguous while holding it did not cover a person clearly an "insured" under its terms the court did not reveal. It simply said:

Judged by the standards in the above case cited and in all of the other cases cited in this opinion, we are satisfied that there is no ambiguity in the terms of the insurance contract under consideration

Ibid.

49. By way of contrast, *Sperling v. Great Am. Indem. Co.*, 7 N.Y.2d 442, 166 N.E.2d 482 (1960), illustrates the result traditionally reached in cases like this. The named insured's sixteen year old daughter stole a car. While trying to escape from pursuing police, she caused an accident in which plaintiff's decedent was killed. The company conceded that the daughter was a "relative" of the named insured and a "resident of the same household," and thus, *prima facie*, an "insured." But it tried to justify refusing to defend the daughter on the ground she did not have "permission" to drive the car. It was replied that the policy did not require "permission" when the car was not owned by the named insured. The insurance company argued it had not "intended" to cover thieves, and that it had "intended" to cover only those non-owned automobiles voluntarily furnished the insured. *Held*, the words, not the "intentions," control. The insurance company was liable for refusing to defend.

50. *Hall v. Weston*, 323 S.W.2d 673 (Mo. 1959). See PATTERSON & YOUNG, *INSURANCE* 69 (4th ed. 1961), for a discussion of the fact that liability insurance is an anomaly.

51. See *Minich v. M.F.A. Mut. Ins. Co.*, 325 S.W.2d 56 (K.C. Ct. App. 1959). The policy in the principal case contained the following:

If the named insured dispose of, acquires or replaces a private passenger or utility automobile or, with respect to Part III, a trailer, he shall inform the company during the policy period of such change. Premium shall be adjusted as of the date of such change, in accordance with the manuals in use by the company. The named insured shall, upon request, furnish reasonable proof of the number of such automobiles or trailers and a description thereof.

341 S.W.2d at 638.

MFA Mutual will pay for direct and accidental loss of . . . the owned automobile . . . caused by . . . fire

In consideration of the premium charged, it is agreed that the insurance provided in this policy does not cover nor include any loss . . . caused by bottled or compressed gas⁵²

A roaring noise was heard while the truck, loaded with propane gas, was parked in front of plaintiff's office. A cloud of vapor enveloped the truck, but no fire was seen.⁵³ Seconds later the vapor ignited, no one knows how, and the ensuing fire destroyed the truck. The Kansas City Court of Appeals, Presiding Judge Hunter and Commissioner Maughmer dissenting, affirmed a directed verdict for the plaintiff. The majority's reasoning is stated in one paragraph:

It is conceded that propane gas will not burn in its liquid state, nor in its gaseous state either, unless it comes into contact with fire. How, then could this loss have been "caused" by bottled or compressed gas? Fire came into contact with the gas, converted the gas itself into fire. While there is no direct evidence as to what *caused* the fire, it was not caused by bottled or propane gas.⁵⁴

This case is the subject of a student note⁵⁵ and the problem it raises is analyzed at length in a recent article,⁵⁶ so these comments will be brief. First, meeting the majority on its chosen ground—the morass of causation metaphysics—if "cause" is the "necessary antecedent of an effect," as it said,⁵⁷ and if the gas was "converted" into the *fire that caused the loss*, as it said,⁵⁸ in what sense was the gas *not* a "cause" of the loss? Or if, as the majority said, "this language 'caused by' relates back to the initial cause,"⁵⁹ why was not a verdict directed for the insurance company? All

52. 337 S.W.2d at 538. (Emphasis deleted.)

53. The fact last mentioned is taken from the dissenting opinion of Judge Hunter, *id.* at 543.

54. *Id.* at 540.

55. 27 Mo. L. REV. 156 (1962).

56. Brewer, *Concurrent Causation in Insurance Contracts*, 59 MICH. L. REV. 1141 (1961). Mr. Brewer recommends a rule that recovery under a policy be denied whenever any one of the two or more "concurrent causes" is specifically denied coverage. *Id.* at 1171. Application of such a rule in this case would have resulted in an opposite decision because one of the causes of the loss, bottled gas, was an excepted cause. Mr. Brewer recognizes, however, a "tendency" to allow recovery when the excepted concurrent cause follows in point of time the other concurrent cause. *Id.* at 1181. As is indicated by the language quoted at note 54, *supra*, this tendency seems to have been followed by the majority.

57. 337 S.W.2d at 542.

58. See the quotation at note 54, *supra*.

59. 337 S.W.2d at 542.

the initial fire "caused" was the ignition of the gas; the *ignition* of the gas didn't "cause" the loss, the subsequent fire did. That hair can be split any number of times.⁶⁰ Second, the decision reads the exception right out of the policy. The majority recognized that propane, liquid or gaseous, is inert unless it comes into contact with fire. How, then, could it ever "cause" a loss in the understanding of the majority? To "construe" so as to make meaningless a provision for which the insured received an annual premium reduction of \$11.70⁶¹ hardly accords with accepted canons of construction.⁶²

The typical automobile policy excludes from the liability coverage injuries suffered by members of the insured's household. The Supreme Court ruled last year (a) that this exclusion was not ambiguous, and (b) that it applied "if the conditions therein specified existed at the time of the casualty."⁶³ Plaintiff had argued the exclusion was ambiguous because it did not specify *when* the injured person had to be a member of the household to be excluded.⁶⁴ Also before the Supreme Court came a peculiar and rather complicated life policy in an amount of 10,000 dollars. A "double benefit" provision made twice "the amount provided above" payable "in lieu of the face amount" if death should occur before age sixty. On top of that, a "double indemnity supplement" made payable "a sum equal to the face amount of the policy" if death was by accidental means. The insured died in a car wreck at age fifty-six. Plaintiff beneficiary argued that the "double benefit" provision made the face amount of the policy 20,000

60. Paratroopers used to say, "It's not the fall that hurts you, it's the sudden stop."

61. See *supra* note 55, at 156, n. 3.

62. See 13 APPLEMAN § 7403.

63. State Farm Mut. Auto. Ins. Co. v. Ward, 340 S.W.2d 635, 639 (Mo. 1960). The same result was implied in *Kelso v. Kelso*, 306 S.W.2d 534 (Mo. 1957). See generally Annot., 50 A.L.R.2d 120 (1956).

The principal case also held that the household exclusion clause was neither void as against the public policy expressed in, nor nullified by operation of, the Motor Vehicle Safety Responsibility Law, which reads:

Such owner's policy of liability insurance . . . shall insure the person named therein . . . against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle

§ 303.190.2(2), RSMo 1959. The same ruling had been made earlier by two courts of appeal. *Gabler v. Continental Cas. Co.*, 295 S.W.2d 194 (St. L. Ct. App. 1956); *Perkins v. Perkins*, 284 S.W.2d 603 (K.C. Ct. App. 1955).

64. Some questions remain open with respect to the court's holding that the injured person is excluded if a member of the insured's household "at the time of the casualty." Suppose, for example, that *H* is recalled to active duty and sent overseas and that *W* returns to her father's house for the duration with her two children. Would claims by the children of *H* and *W* be excluded if they were injured while passengers in a car negligently driven by their insured grandfather?

dollars until the insured reached age sixty, and claimed 40,000 dollars (20,00 dollars "face amount" plus "a sum equal to the face amount"). The insurance company contended that it owed only 30,000 dollars—10,000 dollars under each provision. Relying upon an earlier case which had defined "face amount" as "that amount which is in all events payable . . . without regard to any additional features of the policy,"⁶⁵ the court held for the insurance company.⁶⁶

Returning to the courts of appeal, an audacious health insurer who had promised to "pay the actual expense [of hospitalization] . . . at a rate not to exceed \$150 per month" argued to the St. Louis Court of Appeals that this meant five dollars a day. But the court held that an insured who had been hospitalized for ten days at fourteen dollars per day could recover 140 dollars.⁶⁷ And, finally, the words "vacant" and "unoccupied" as they appear in the standard fire policy received two comprehensive treatments by the Kansas City Court of Appeals.⁶⁸

III. DEFINING THE RISK TRANSFERRED

As a general rule, the plaintiff in an action to recover on a policy bears the burden of proving the loss was "covered," *i.e.*, was a risk insured against, and the company bears the burden of proving it was excepted from coverage.⁶⁹ One of the complexities of this deceptively simple rule confronted the Supreme Court in *Gennari v. Prudential Ins. Co.*⁷⁰

The insured had been an ice carver. He collapsed and died shortly after emerging from an icebox one very hot day. The policies on his life provided double indemnity for death occurring "as a result, directly and independently of all other causes, of bodily injuries, effected solely through external, violent and accidental means" except death caused "directly or indirectly from bodily or mental infirmity or disease in any form." Plaintiff beneficiary contended the death was due to a cerebral vascular accident

65. *Wilkins v. Metropolitan Life Ins. Co.*, 350 Mo. 185, 191-92, 165 S.W.2d 858, 861 (1942).

66. *Pierce v. Business Men's Assur. Co.*, 333 S.W.2d 97 (Mo. 1960).

67. *Tenney v. American Life & Acc. Ins. Co.*, 338 S.W.2d 370 (St. L. Ct. App. 1960).

68. *Drummond v. Hartford Fire Ins. Co.*, 343 S.W.2d 84 (K.C. Ct. App. 1960); *Bledsoe v. Farm Bureau Mut. Ins. Co.*, 341 S.W.2d 626 (K.C. Ct. App. 1960).

69. 46 C.J.S. *Insurance* § 1316b(6) (1946); 29A AM. JUR. *Insurance* § 1851 (1960).

70. 335 S.W.2d 55 (Mo. 1960).

precipitated by the sudden, extreme change in temperature. However, the insured had had a medical history of cardiovascular disease and arteriosclerosis; the company contended these caused his death. The trial judge refused to charge that the company had the burden of proof, and the jury returned a verdict in its favor. On appeal the plaintiff argued this refusal was error. After a careful canvass of the Missouri cases, the St. Louis Court of Appeals agreed.⁷¹ But

[B]ecause of the conflicts and confusion shown to exist in the decisions regarding the burden of proof when the defense of death by bodily or mental infirmity or disease is raised in suits on accidental death insurance policies . . .⁷²

it transferred the case to the Supreme Court instead of reversing. Without examining them, the Supreme Court overruled the cases upon which the court of appeals had relied. The court acknowledged that a company pleading an "exception to the general liability clause . . . assumes and has the burden of proving it," but held that "the allegation and proof of death by disease is not an exception . . . but rather is disavowal and disproof by refutation of an essential part of the general liability clause."⁷³ This was a sound result. But the opinion announces a rule that will be hard to apply.⁷⁴ The rule's effectiveness depends upon a definition of "exception" (a) that sufficiently identifies the characteristics a policy provision must have to be so classified,⁷⁵ but (b) that does not encompass the provision litigated here.⁷⁶ The trouble is, no such definition exists.

71. *Gennari v. Prudential Ins. Co.*, 324 S.W.2d 355 (St. L. Ct. App. 1959), from which the statement of facts, including the policy provisions (*id.* at 357), is taken.

72. *Id.* at 363. For documentation of the statement that the cases are confusing and conflicting, see the extensive Annotation, 144 A.L.R. 1416 (1943). See also 46 C.J.S. *Insurance* §§ 1317b(2)(b), 1319b(4)(c) (1946); 29A AM. JUR. *Insurance* § 1853 (1960).

73. 335 S.W.2d at 61. Other errors required a new trial, however. Two instructions the trial court had given were found prejudicially erroneous. In addition the court held that a hospital record recording the wife-beneficiary's statement of her husband-insured's past medical history was admissible against her.

74. Assuming, of course, the decision will be given significance in cases involving other kinds of policies, and will not be consistently "distinguished on its facts."

75. See PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 69-70 (1953).

76. Clauses of the type involved in the principal case "have been the subject of more American litigation than any other provision in insurance contracts." PATTERSON, ESSENTIALS OF INSURANCE LAW 243 (2d ed. 1957) (hereafter cited PATTERSON, ESSENTIALS). For an excellent summary of the results of this litigation, see VANCE, INSURANCE § 181 (3d ed. 1951) (hereafter cited VANCE).

Insurance terminology is notoriously fuzzy. What edges it has result from a lifetime of careful honing by the eminent Professor Patterson.⁷⁷ Patterson calls provisions that serve to identify the risk assumed by the insurance company "coverage provisions."⁷⁸ These he classifies into seven categories, three of which are "the insured event," "exceptions," and "exclusions."⁷⁹ An "exception" denies coverage in terms of causation;⁸⁰ if an insured event was brought about by a cause specified in the exception, there is no coverage. An "exclusion," on the other hand, denies coverage in terms of the event itself, irrespective of causation; thus the "warranted free of capture" clause in a "perils of the sea" policy is an exclusion because it denies liability if the vessel is captured, no matter what caused the capture.⁸¹ Patterson would classify the provision denying coverage for death caused "directly or indirectly from bodily or mental infirmity or disease" as an exception.⁸² But Patterson's terminology is a system of classifying cases which have already been decided; whether it also is supposed to determine how a case *should be* decided is unclear.⁸³ After discussing as though it were an exception a provision virtually identical to this one, for example, Patterson apparently acknowledges that it may operate as an exclusion in certain circumstances.⁸⁴

77. Professor Patterson's terminology is set forth and explained in PATTERSON, ESSENTIALS chs. 6-8. A perceptive criticism will be found in KEETON, BASIC INSURANCE LAW 292-95 (1961), which is also useful as a brief introduction to the terminology.

78. PATTERSON, ESSENTIALS 230.

79. *Id.* § 54, at 231-33. "Excepted causes" are the words used, but Patterson later says "exception" denotes the policy provision whereas "excepted cause" denotes the physical cause. *Id.* at 249.

80. *Id.* at 267.

81. See *id.* § 57.

82. Under the heading "Disease or Infirmity as Excepted Cause in Accident Insurance," he discusses a case (*Silverstein v. Metropolitan Life Ins. Co.*, 254 N.Y. 81, 171 N.E. 914 (1930)) concerning provisions virtually identical to those litigated in the principal case. PATTERSON, ESSENTIALS at 249-51. See also PATTERSON, INSURANCE 421 (3d ed. 1955) ("The exception as to disease or bodily or mental infirmity . . ."; ". . . the exception (as to disease or bodily or mental infirmity). . .").

83. "[Patterson] is not suggesting a distinction in the nature of the physical incidents, which would overlook the truth that every incident is alike cause, event and consequence, and appears to us in one or another of these aspects only because of the different perspectives from which we view it. Rather, he is expressing a difference between the clauses as to their legal effects, or perhaps as to the legal effects they will have if enforced according to their expressed meaning. . . .

[T]his terminology is not very helpful in deciding what result should be reached in a given case . . ." KEETON, BASIC INSURANCE LAW 293-94 (1961). (Emphasis added.)

84. See PATTERSON, ESSENTIALS 251. Whether it operates as the one or the other seems to depend upon whether the insured event is death, or death by accidental means.

Accordingly, the problem of defining "exception" was bad enough; the court made it worse by giving an example:

As pointed out in the St. Louis Court of Appeals opinion, if the insured was killed by accidental means while riding in a non-scheduled, casual flight, a defense to that effect would be an affirmative defense. See, *Wendorff v. Missouri State Life Ins. Co.*, 318 Mo. 363, 1 S.W.2d 99, 57 A.L.R. 615 [(1927)]. This is an example of a true exception to the general liability clause.⁸⁵

The insured in *Wendorff* was a passenger in a seaplane of the type where the fuselage is also a hull. The plane developed engine trouble on a flight from Miami to the Bahama Islands. The pilot successfully landed on the sea, intending to finish the trip as in a boat. But a wave capsized the plane and the insured drowned. The policy read:

The insurance hereunder shall not cover injuries fatal or nonfatal . . . sustained by the insured . . . *while in* or on any vehicle or mechanical device for aerial navigation, or in falling therefrom or therewith or *while* operating or handling any such vehicle or device.⁸⁶ (Emphasis added.)

If this language is given its literal meaning, no causal relationship between the death and the specified circumstances need be shown to avoid liability; all that need be shown is that death occurred "while in" a plane.⁸⁷ And, although the opinion is not entirely satisfactory, this seems to be what *Wendorff* held when it affirmed a directed verdict for the insurance company. The *Wendorff* court, however, did say the provision was an "exception."⁸⁸ But at the same time it endorsed an earlier case concerning a "while clause" in which proof of a causal connection *had* been required.⁸⁹ The policy in the earlier case denied coverage for death "while engaged in any military service." The insured died of pneumonia while home on furlough, but the insurance company was held liable.⁹⁰ Thus the *Wendorff* case discussed two

85. 335 S.W.2d at 61.

86. 318 Mo. at 366, 1 S.W.2d at 100.

87. A result recommended by Patterson, who denominates "while clauses" as "*suspensive conditions*; i.e., they suspend the assumption of risk during the time when the situation indicated continues." The insurer, by choosing a "while clause," "seeks to avoid the difficult proof of actual causal relation . . . between the situation and the insured event, and effect should be given to well-chosen language." PATTERSON, *ESSENTIALS* 254.

88. *E.g.*, 318 Mo. at 370, 1 S.W.2d at 102.

89. *Long v. St. Joseph Life Ins. Co.*, 248 S.W. 923 (Mo. 1923).

90. A typical, if not universal, result in cases of that kind. See VANCE § 101. *Contra*, *Bradshaw v. Farmers' & Bankers' Life Ins. Co.*, 107 Kan. 681, 193 Pac. 332 (1920) (death from flu while in training camp; cause of death held immaterial).

“while clauses,” for one of which a causal relationship between the stipulated circumstances and the insured event was required, and for the other not. Both were denominated “exceptions.”

To complicate the matter further, the court mentioned “some [other] stated exceptions” contained in the policy. One of these was suicide.⁹¹ A typical suicide provision reads:

The company shall not be liable for the payment of the Additional Benefit . . . (3) if such death results, directly or indirectly, or wholly or partially, (i) from any bodily or mental disease or infirmity, . . . or (iii) from suicide⁹²

The same operative language applies to both (i) and (iii), and the “bodily or mental disease” clause is virtually identical to the one litigated. If the quoted clause had been litigated in *Gennari*,⁹³ on what grounds could the court have held that (iii) was an exception, but (i) was not?

Nevertheless, the result in *Gennari* seems fair, and the point the court was trying to make seems reasonably clear, however incapable language might be of expressing it in general terms. The court emphasized that the risk insured against was not death, but death “as a result, directly and *independently of all other causes*, of bodily injuries, effected *solely* through . . . accidental means.”⁹⁴ A death from “bodily or mental infirmity or disease” obviously could not result *solely* through accidental means. Hence the “bodily or mental infirmity or disease” clause is an explanation, or elaboration, of the insured event;⁹⁵ it is “nothing more than a redundant

91. 335 S.W.2d at 61.

92. Quoted from *Ieppert v. John Hancock Mut. Life Ins. Co.*, 347 S.W.2d 436, 437 (St. L. Ct. App. 1961).

93. The precise language of the suicide clause in the principal case was not set out.

94. Especially 335 S.W.2d at 60-61.

95. Analogous to the provision common in automobile comprehensive coverages:

[The insurer agrees] to pay for . . . loss . . . to the automobile . . . except loss caused by collision . . . or upset Breakage of glass and loss caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, malicious mischief, vandalism, riot, or civil commotion shall *not* be deemed loss caused by collision or upset. (Emphasis added.)

The last sentence, by specifying some of the events not included within the exception, helps define the insured event. In *Gennari*, of course, the litigated provision specifies an event not included within the insured event itself. But it serves the same purpose of helping to define the latter. See PATTERSON, ESSENTIALS 231-32.

clause.”⁹⁶ This reasoning finds solid historical support. The “bodily or mental infirmity or disease” provision was added only after a number of courts had construed “solely through accidental means” to read “proximately through accidental means.”⁹⁷ It was added to make clear that the companies intended to pay only when the cause of death was patently accidental. It was supposed to operate as an explanation, not an exception. The decision carries out that intention. A choice of more appropriate language by the policy draftsmen could have avoided the difficulty, perhaps,⁹⁸ but the language actually chosen does not seem calculated to mislead even unsophisticated buyers. So it does not seem unfair to impose upon them the burden of proof. Nor does it seem unfair to say that such a defense need not be affirmatively pleaded. One purpose of affirmative defense rules is to prevent surprise. It is hard to visualize a set of circumstances where the claimant would be surprised by a “bodily or mental infirmity” defense. The decision dissipates the confusion generated by the overruled cases. That it created some problems in doing so was inevitable.

IV. DEFENSES TO CLAIMS

The single noteworthy case concerning the substance of defenses to policy claims confirmed Missouri as one of only two states which hold their misrepresentation statutes applicable to “delivery in good health” clauses. The policy in *Snead v. Union Life Ins. Co.*⁹⁹ issued August 14 and the insured died September 29. Evidence showed he was being treated for kidney disease, cystitis, nephritis and prostatitis when the policy issued. Relying upon the provision that

insurance under this policy shall not be effective on the life of any person who is not alive and in good health at the time this policy is delivered . . .¹⁰⁰

the company denied liability. The court of appeals reversed a judgment for the company and directed judgment for plaintiff. It relied upon the misrepresentation statute:

No representation made in obtaining or securing a policy of insurance on the life . . . of any person . . . shall be deemed mate-

96. 335 S.W.2d at 60.

97. VANCE § 188, at 977-78.

98. *E.g.*, “Death by accidental means shall not be deemed to include . . .” etc. See note 95, *supra*.

99. 340 S.W.2d 184 (K.C. Ct. App. 1960).

100. *Id.* at 186.

rial, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and if so contributed in any case, shall be a question for the jury.¹⁰¹

Noting that the cause of death was acute coronary occlusion and that "there was no proof . . . insured suffered from any cardiac disease . . . prior to the day of his death,"¹⁰² the court said:

Had defendant moved to cancel the contract during insured's lifetime, . . . it might have prevailed. But, we think, that after occurrence of the contingency insured against, defendant can avoid its contract only by showing that the matter misrepresented either caused or actually contributed to cause the contingency . . .¹⁰³

It is clear the good health clause creates a condition precedent to the policy taking effect.¹⁰⁴ But it obviously has nothing to do with "matter misrepresented."¹⁰⁵ Nevertheless, Missouri's courts for fifty years¹⁰⁶ have held the misrepresentation statute applicable to such clauses,¹⁰⁷ and it appears unlikely they will retreat now. The policy in *Snead*, however, was issued without a medical examination.¹⁰⁸ The opinion might have been improved had the court discussed whether this fact should make a difference.¹⁰⁹ Since the incontestable clause would have required the company to challenge the insured's good health within a year of delivery,¹¹⁰ it is difficult to see how a company issuing nonmedical policies can retain any control at all over the risks it undertakes. But maybe this is what the court had in mind.¹¹¹

101. § 377.340, RSMo 1959. This section is applicable to stipulated premium and assessment plan policies. Its counterpart for other life and accident policies is § 376.580, RSMo 1959. The latter's language is clearer: ". . . and whether it so contributed in any case shall be a question for the jury."

102. 340 S.W.2d at 188.

103. *Id.* at 189.

104. See generally VANCE § 102, at 641: "It [the good health clause] is often confused with a defense based on fraud or misrepresentation"

105. 1 APPLEMAN § 151, at 151.

106. See *Salts v. Prudential Ins. Co.*, 140 Mo. App. 142, 120 S.W. 714 (1909); *Kirk v. Metropolitan Life Ins. Co.*, 336 Mo. 765, 81 S.W.2d 333 (1935).

107. 1 APPLEMAN §§ 155 (at 162-63), 156 (at 167).

108. 340 S.W.2d at 185. The policy evidently was issued in violation of § 377.310, RSMo 1959, which requires a medical examination. The effect of the violation seemingly wasn't raised.

109. It does in some states. See 1 APPLEMAN § 154, at 160-61; VANCE § 102, at 641.

110. § 377.320, RSMo 1959. See VANCE § 97.

111. See note 108, *supra*.

Another decision followed earlier cases in holding that the incontestable clause does not preclude the company from cancelling the policy after the insured's death, so long as the action is brought within the period of contestability. *Randall v.*

V. WAIVER SITUATIONS¹¹²A. *The Winger Case.*

The year's gaudiest decision, *Winger v. General Am. Life Ins. Co.*,¹¹³ also involved a good health clause. A man named Rose had been hospitalized in January for "depressive [*sic*] reaction with marked restlessness," and in February for "depressive [*sic*] reaction with symptoms of agitation, insomnia [and] suicidal ideas."¹¹⁴ He received electro-convulsive therapy during the latter stay.¹¹⁵ He later became president of a corporation which wanted insurance on his life. So, in October, Rose applied for two 25,000 dollar policies. The application provided:

[N]o contract of insurance shall take effect until a policy has been . . . delivered to and accepted by the Proposed Owners of such policy, and an amount equal to the full first premium thereon has been paid in cash to the Company, all during the lifetime and continued sound health of the Proposed Insured.¹¹⁶

Rose was readmitted to the hospital on November 23 suffering from a "depressive [*sic*] state"; he was "extremely tense and anxious."¹¹⁷ Three days later the policies were delivered. And three days thereafter Rose hanged himself. Over defendant's objection that the policies had never taken effect because of the good health clauses, the Supreme Court affirmed a judgment for plaintiff, holding the defense had been "waived by estoppel."

Western Life Ins. Co., 336 S.W.2d 125 (K.C. Ct. App. 1960). (This assumes, of course, that the circumstances justifying cancellation "actually contributed" to the loss. See the quotation at note 103, *supra*.) The court also held the period of contestability begins, for policies that have lapsed, on the date of reinstatement.

112. The title is borrowed from PATTERSON, ESSENTIALS 475-76. It is intended to include every case in which an insurer loses a defense to a claim.

113. 345 S.W.2d 170 (Mo. 1961). Many complicating features of this case have been omitted for simplicity's sake. I have tried to summarize in various footnotes, however, all significant rulings without regard to their pertinence to the question of waiver.

114. *Id.* at 177.

115. *Id.* at 182. When Rose signed the applications for the policies in October, he characterized these periods of hospitalization as for "nervousness and routine checkup" with "excellent" results; he also answered "no" to a question whether he ever had had, or had had symptoms of, "Epilepsy, Fainting Spells, Mental Disorder, Other Disorder of Brain or Nervous System." *Id.* at 173. The court held (a) that whether these statements amounted to misrepresentations had properly been left to the jury, since one doctor testified "nervousness" was "a broad term covering" Rose's illness, and both doctors testified his trouble was an *emotional*, not a *mental*, disorder, and (b) if they were misrepresentations, that whether the "matter misrepresented" had "actually contributed" to the death (§ 376.580, RSMo 1959; see note 101, *supra*) had properly been left to the jury. *Id.* at 182. See note 119, *infra*.

116. *Id.* at 174.

117. *Id.* at 178.

It's easy to see why. The corporation acted scrupulously towards defendant throughout, whereas defendant's own agent disregarded its best interests. When the agent called to deliver the policies, for example, Sheffrey, the corporation's secretary, told him Rose was hospitalized with a "nervous breakdown."¹¹⁸ The agent phoned Rose's physician—the same doctor who had treated Rose during his earlier sicknesses and had completed the medical parts of his applications (which facts the agent knew)¹¹⁹—who told him that Rose was suffering from nervous exhaustion not nervous breakdown, that he was physically sound, and that he only needed a rest.¹²⁰ The agent then insisted on delivering the policies even though Sheffrey objected to them because they wrongly showed Rose instead of the corporation as owner.¹²¹ To meet this objection, Sheffrey and the agent prepared a memorandum under which revised policies could be substituted; the agent notified defendant's home office by telephone of the necessary correction. He took pains, however, to make sure the home office was not advised of Rose's whereabouts, because, he explained, "those things generally get bogged down in a lot of red tape."¹²² Small wonder the court permitted recovery under these circumstances.

But if seeing why the court reached this result is easy, understanding how it did is another matter. Partly the difficulty is due to the shape plaintiff gave his case. Partly it is due to subtle differences between the court's principal opinion and its opinion on rehearing. Largely it is due to the obscurity of the insurance doctrines of "waiver" and "estoppel."¹²³

The last difficulty can be eased somewhat by eliminating from the

118. One of defendant's contentions was that Sheffrey had concealed material facts from the agent. The court held Sheffrey had revealed everything of significance he knew and the few bits of information he had not volunteered were insufficient to constitute concealment. *Id.* at 181.

119. See *id.* at 186 ("... who was known to be Rose's personal physician..."). The doctor was surprisingly favorable to Rose throughout. Defendant seems to have argued the doctor conspired with Rose against it; it charged the statements in the application (see note 115, *supra*) had been inserted with the doctor's approval when he knew they were false. *Id.* at 182. The court merely pointed out that defendant, at the request of its agent (*id.* at 173), had especially authorized this doctor to conduct Rose's examination. *Id.* at 182. There it dropped what was potentially the nastiest question in the case, indicating the point was not vigorously pressed by defendant.

120. *Id.* at 174.

121. *Ibid.*

122. *Id.* at 175. "Other evidence . . . indicates . . . defendant's agents may have been influenced by a desire to effect the insurance, collect the premium and obtain the benefit of a commission." *Id.* at 180.

123. See PATTERSON, ESSENTIALS ch. 11.

discussion three other types of waiver situations. One type consists of situations where some term of an existing, valid policy was breached and the question is whether the insurer "waived" the breach. Another consists of situations where the application provided that a policy would be issued only under certain conditions, which were not met, and the question is whether the insurer, not having issued a policy, "waived" compliance with them.¹²⁴ Third are situations where the application imposed no conditions but the policy had not been issued when the loss occurred, and the question is whether the insurer is "estopped" to deny liability.¹²⁵ *Winger* is a fourth type: the policy was issued under circumstances which, by its terms, made it void, and the question is whether the insurer "waived" the effect of those terms.¹²⁶

B. "*Waiver in the Nature of Estoppel.*"

Plaintiff founded his right to recover solely upon a waiver of the good health clauses. Since, however, Missouri courts have defined "waiver" as "the *intentional* relinquishment of a known right,"¹²⁷ and since the company hadn't intentionally relinquished anything, there had been no waiver. Nor

124. Typical is *Summers v. Prudential Ins. Co.*, 337 S.W.2d 562 (St. L. Ct. App. 1960). Insured applied for a life policy on March 10. A week later he was seriously injured in an accident from which he died May 27. No policy was issued. The application provided "no insurance shall take effect unless a policy is issued by the Company . . ." A few days after the accident, the agent who had solicited the policy called upon plaintiff, insured's wife, and told her the company had held up the policy pending a hospital report, but "not to worry" because "it would go through." Plaintiff contended this conduct constituted a waiver. She admitted, however, having read the above provision and a provision contained in the premium receipt reading "no agent has authority . . . to bind the Company by making any promise . . ." The court affirmed a directed verdict for defendant, holding that the agent had no apparent authority to waive the requirement of delivery. It also held there had been no estoppel because there had been no detrimental reliance on defendant's conduct. A portion of the latter holding is quoted *infra*, note 130.

125. *Voss v. American Mut. Liab. Ins. Co.*, 341 S.W.2d 270 (St. L. Ct. App. 1960), may be taken as representative. The agent of an automobile liability insurer accepted an application and premium from plaintiff on April 23. On May 7 or 8, the agent assured plaintiff's brother the policy would be issued. Nothing else was heard from defendant until plaintiff tried to report an accident on May 25, at which time defendant denied it had ever insured her. The court held defendant estopped. Commissioner Doerner's perceptive opinion merits reading for two other points also: the apparent authority of a liability agent, and the waiver doctrines applicable to the situation where truthful answers are given by the applicant but false answers are recorded by the solicitor.

126. More than one of these situations may be involved in one case. *Voss v. American Mut. Liab. Ins. Co.*, *supra* note 125, illustrates this. For reasons indicated in note 115, *supra*, waiver of misrepresentations was eliminated from the discussion of *Winger*.

127. 345 S.W.2d at 185.

had there been an "estoppel," which sometimes has masqueraded under the name of "waiver."¹²⁸ Estoppel requires a detrimental reliance upon the conduct of the one sought to be estopped.¹²⁹ Finding a detriment would be difficult because Rose became uninsurable—*i.e.*, dead—just three days after the conduct complained of.¹³⁰ But the court had hinted in its main opinion that estoppel was the basis for its conclusion:

Both Midwest [Rose's corporation] and plaintiff [a trustee to whom the policies had been assigned] were induced to and did change their positions by reason of the delivery of the policies and the collection of premiums. While the check was returned on December 23rd uncashed, Midwest had kept sufficient funds in the bank for its payment from the time it was delivered. The waiver relied upon clearly involved an element of estoppel.¹³¹

On rehearing the company protested against the holding "that retention of a premium check for less than a month . . . creates an estoppel to deny liability." The court denied so holding.¹³² What it had meant, it went on to say, was that the company had created a "waiver in the nature of estoppel."¹³³

What is "waiver in the nature of estoppel" if it's neither waiver nor estoppel?¹³⁴ Conceptually, waiver has three elements: (a) breach of some policy term (b) known to the insurer (c) who intentionally surrenders his remedy for the breach. Estoppel has four: (a) breach of a policy term (b)

128. See *Voss v. American Mut. Liab. Ins. Co.*, 341 S.W.2d 270, 277 (St. L. Ct. App. 1960).

129. *E.g.*, PATTERSON, *ESSENTIALS* 495-96.

130. The law in Missouri, as elsewhere (see Annot., 32 A.L.R.2d 487 (1953)), is that:

The delay in returning the premium on a proposed contract of insurance . . . can only operate as an estoppel to deny an acceptance of an application when it has had the effect of misleading the applicant, and the applicant, by reason of being misled, has refrained from taking out other insurance.

Summers v. Prudential Ins. Co., 337 S.W.2d 562, 565 (St. L. Ct. App. 1960).

131. 345 S.W.2d at 183. See also *id.* at 180:

The evidence was sufficient to show waiver, by estoppel, since defendant was bound by the knowledge of its agent and estopped thereby to assert its right under the sound health provisions The estoppel existed despite any provisions in the policies Both plaintiff and plaintiff's assignor would be prejudiced if defendant were permitted to now change its position

132. *Id.* at 190.

133. *Id.* at 189. The words came from *Zielinski v. General Am. Life Ins. Co.*, 96 S.W.2d 1059, 1063 (St. L. Ct. App. 1936).

134. VANCE § 82 lists and attempts to distinguish eleven different waiver situations.

with misleading conduct by the insurer (c) upon which the insured relies (d) to his detriment.¹³⁵ "Waiver in the nature of estoppel" apparently combines some, but not all, elements of both. According to *Winger*, the insurer need not intentionally relinquish his defense, as he must to create a waiver.¹³⁶ Nor, apparently, need the insured show that his reliance has been detrimental, as would be required in estoppel.¹³⁷ The court evidently thought that paying the premium check and keeping sufficient funds on hand to cover it showed reliance by the corporation.¹³⁸ The misleading conduct of the insurer consisted of delivering the policies, accepting the premium check, and retaining it for less than a month.¹³⁹ Thus far, then, waiver in the nature of estoppel seems to require misleading conduct by the insurer relied upon—but not necessarily detrimentally—by the insured.

C. *Imputing An Agent's Knowledge to His Principal.*

The court held it also required knowledge of the breach by the insurer. Defendant argued its agent had not known of Rose's bad health because he had been misled by the doctor. It contended the agent had no knowledge to impute, and, consequently, no waiver was created. The agent knew enough facts to put a reasonable person on guard, the court replied, and facts he could have discovered by investigation would be imputed.¹⁴⁰ On

135. These requirements are stated inside the frame of reference set by the *Winger* case. They are not intended to apply to the other waiver situations distinguished in the text at notes 124-26, *supra*.

136. "[T]he instruction is not erroneous . . . because waiver based upon ["in the nature of"] an estoppel does not require an intention to waive, or a voluntary and intentional abandonment of a known right, so long as the acts upon which the estoppel is based are intentionally performed." 345 S.W.2d at 183.

"As stated, the waiver here submitted was in law based upon estoppel. There was no submission here of an intention to voluntarily waive a known right, but only waiver on the facts submitted, waiver by estoppel." *Id.* at 189.

137. The court didn't say this in so many words. The inference seems plain enough, however. The objections to finding a detriment are stated *supra*, note 130. In addition, it seems doubtful the court would have taken such pains to refute the company's estoppel argument had it considered the detriment either present or necessary. See notes 132, 136, *supra*.

138. See 345 S.W.2d at 183, 190.

139. The last may be the least important aspect of the company's behavior. As indicated by the quotation at note 131, *supra*, the court laid considerable stress upon the company's retention of the check in its main opinion. On rehearing, the company pointed out that the case which had originated "waiver in the nature of estoppel," *Zielinski v. General Am. Life Ins. Co.*, 96 S.W.2d 1059 (St. L. Ct. App. 1936), had held specifically that retaining a check a reasonable length of time does *not* create such a waiver. 96 S.W.2d at 1063-64. The court distinguished that case on the ground that no policy had been issued. 345 S.W.2d at 191. The court does not say whether the distinction was to minimize the importance of retaining the check or was to categorize *Zielinski* as a different type of waiver situation.

140. 345 S.W.2d at 180, 185-86.

this point the court overruled a series of cases which had held that "knowledge . . . must be actual knowledge and not what might have been discovered . . ." ¹⁴¹ The overruling brought Missouri into line with most other states.¹⁴²

Both applications contained non-waiver provisions:

No information acquired by any representative of the Company shall bind it unless stated in this application. No printed provision hereof shall be modified or waived except by an endorsement signed by an Officer at its Home Office.¹⁴³

The court stated, "the estoppel existed despite any provisions in the policies that the agents had no such power."¹⁴⁴ But then it assumed these provisions would defeat recovery had they been known to the corporation. The court doesn't explain the apparent inconsistency between the statement and the assumption. With respect to non-waiver provisions, the court seems in fact to have held that waiver and waiver in the nature of estoppel will be treated alike. It apparently looked upon a waiver in the nature of estoppel as essentially a waiver, but with misleading conduct and reliance substituted for intentional relinquishment of a known right.

The holding that the non-waiver provisions potentially barred recovery compelled an unfortunate ruling. Defendant first argued that Sheffrey knew of these provisions, and hence its agent had no apparent authority to waive them. There was evidence, replied the court in its main opinion, that Sheffrey did not know of them until after the policies had been delivered.¹⁴⁵ On rehearing the company argued that if Sheffrey didn't know of them Rose certainly did because he had signed the applications. His knowledge should be imputed to his corporation and bar recovery.

Here was a real poser. Having committed itself to the theory of waiver in the main opinion, the court had no room to maneuver. It first noted the exact date Rose became president was not in the record—it might have been after he signed the applications. The court continued:

While Rose *in his personal capacity* had acquired constructive notice of the limitations . . . as set forth in the application[s]

141. See *Guenther v. Metropolitan Life Ins. Co.*, 189 S.W.2d 126, 128 (St. L. Ct. App. 1945).

142. See RESTATEMENT (SECOND), AGENCY §§ 9, 272 (1959).

143. 345 S.W.2d at 174.

144. *Id.* at 180. The court offered no reason why this was true. The words "the policies" apparently should have been "the applications," since the court had been speaking about applications just before the quoted remark. Furthermore, the provisions were contained in the applications. *Id.* at 174.

145. *Id.* at 179.

which he signed on October 29, the policies were never delivered to Rose, nor did he pay the premiums. . . . We must, therefore, reject appellant's conclusion that, under the law of agency Midwest [Rose's corporation], through Mr. Rose, had knowledge of the limitations. . . . Midwest was not concluded . . . by Rose's application[s] made *in his personal capacity* on October 29.¹⁴⁶

And further, "the original application[s] were] . . . not signed by any *then* stockholder, officer or agent of Midwest."¹⁴⁷ These statements not only are contrary to agency law, they overlook a fundamental principle of insurance law, viz., that the owner of life insurance must have an insurable interest in the life at the time the policy takes effect. If Rose was not president when the policies became effective they were void.¹⁴⁸ If he was, his knowledge should have been imputed to his corporation.

The quoted language has many possible meanings. One is that knowledge acquired by a person before he becomes an agent will not be imputed to his principal when he does. This is contrary to agency law.¹⁴⁹ The other possible meanings pivot around the word "capacity."¹⁵⁰ The court may have been trying to say that a person can be identified by several different nouns, such as "man," "husband," "lawyer," "professor," "agent," all of which it groups under the heading "capacity." If so, it jumbled together four different issues. First, the rule is that "a principal is not affected by the knowledge of an agent who is privileged not to disclose or act upon it."¹⁵¹ Thus knowledge acquired by a lawyer while acting for *A* will not be imputed to a subsequent client *B*. The result is sometimes stated in terms of "ca-

146. *Id.* at 188.

147. *Id.* at 190. (Emphasis added and deleted.)

148. VANCE § 31. Rose of course signed the applications before the policies became effective, so the argument is not that the insurable interest rule made him an agent automatically; but it seemingly could have raised such a presumption. Furthermore, that Rose was not *president* of the corporation when he signed the applications doesn't mean he could not have been an *agent* then. The agreement under which he became president required him to get this insurance (345 S.W.2d at 173), which would seem a sufficient basis for such a finding.

149. RESTATEMENT (SECOND), AGENCY § 276 (1959). See *Dace v. John Hancock Mut. Life Ins. Co.*, 148 S.W.2d 93, 95-96 (St. L. Ct. App. 1941).

150. "How many readers . . . would consider . . . the drinking habits of a landlord or tenant before preparing a lease? Yet Mr. Friedman . . . advises that 'The first thing that should appear in a lease . . . is the correct names and addresses of the landlord, their capacity and . . . the nature of their entities.' (My landlord's capacity is three quarts)." Isaacs, Jr., "*Don't Tell Me How It Ends*"—*A Review*, 15 RECORD OF N.Y.C.B.A. 412 (1960).

151. RESTATEMENT (SECOND), AGENCY § 281 (1959).

capacity."¹⁵² This situation has no bearing on the *Winger* case. Second, the rule is that, in order to be imputed, knowledge must be pertinent to some transaction the agent was authorized to conduct.¹⁵³ Or, in the court's phrase, must be pertinent to him "in his capacity" as agent. Rose clearly was authorized to conduct this transaction because the agreement under which he became president required him to get the insurance. Third, the court might have meant the information must be pertinent to a transaction which the agent was authorized, *at the time he learned it*, to conduct. Fourth, the court might have meant the information must have been learned while the agent was acting within the scope of employment. Both the third and fourth possibilities are contrary to the rule that it makes no difference when or how the agent acquired the knowledge.¹⁵⁴ Every conceivable meaning of the court's holding is either untenable under the law of agency or inapplicable to the facts of *Winger*.¹⁵⁵

The conduct held to create a waiver in the nature of estoppel was delivering the policies and accepting and retaining the premium check, funds to cover which were kept on deposit, after (imputed) knowledge of the breach. It is hard to conceive of a waiver situation of this type in which virtually identical facts would not be present.¹⁵⁶ It is arguable, therefore, that the court intended to impose liability whenever the plaintiff is not chargeable with knowledge of the non-waiver provisions. Such is the rule laid down in the leading case of *Bible v. John Hancock Mut. Life Ins. Co.*¹⁵⁷ Bible's wife had been confined to a mental hospital with manic depressive psychosis. Defendant's agent had called upon her there and had sold her two policies on her own life. Weekly thereafter an agent had called to collect premiums. She died twenty months later. The company defended on two clauses, one a delivery in sound health provision, the other a term voiding the policy if the insured had attended any hospital within two years. These clauses, however, were contained only in the policies, not in

152. *E.g.*, *Constant v. University of Rochester*, 111 N.Y. 604, 615, 19 N.E. 631, 635 (1889).

153. *Hunter v. Hunter*, 327 Mo. 817, 39 S.W.2d 359 (1931), which is the leading Missouri case on imputing knowledge.

154. RESTATEMENT (SECOND), AGENCY § 276 (1959). *Cf.*, *Hunter v. Hunter*, *supra* note 153, at 833-34, 39 S.W.2d at 365.

155. See especially RESTATEMENT (SECOND), AGENCY §§ 272, comment *g*, 274.

156. One variation might be that the agent, and hence the company, had no knowledge of the breach. It seems certain no waiver in the nature of estoppel would be found in that event. See text at note 140, *supra*. See also PATTERSON, *ESSENTIALS* 488, 498-99, 526. *Cf.*, *id.* at 503-05. Another might be that funds had not been kept on deposit continuously.

157. 256 N.Y. 458, 176 N.E. 838 (1931).

the applications. The court allowed recovery because the insured was not chargeable with knowledge of them. The *Bible* rule has been cogently criticized for failing to distinguish between those persons who were insurable at the time of policy delivery and those who were not. The former, it is said, are prejudiced by the company's conduct because they refrained from obtaining other insurance *when they could have done so*; the latter are not prejudiced except to the extent of their premium contributions.¹⁵⁸

D. Authority and Apparent Authority of Agents.

This criticism suggests a way of distinguishing *Bible* which, had plaintiff not chosen to stand on the one leg of waiver, would have provided a straightforward means of reaching *Winger's* result. It has been assumed thus far that the sound health provisions were breached. It is uncertain, however, they had been. Thrice the court emphasized that Rose's health at the time of delivery had been a question of fact for the jury.¹⁵⁹ It further noted that the agent had apparent, if not actual, authority to deliver the policies and collect the premiums.¹⁶⁰ If so, it would seem axiomatic he also had apparent authority to decide whether Rose's health was sound; the company sent him the policies to deliver and they were not supposed to be delivered if Rose's health was bad. The agent's decision could not have been unreasonable if this was a question of fact. The agent having made a reasonable,¹⁶¹ apparently authorized decision, the company would be bound by it.¹⁶² No question of waiver arises under this analysis. It avoids the criticism levelled at the *Bible* rule. It makes irrelevant the question whether non-waiver provisions affect "waiver in the nature of estoppel." It should be noted, incidentally, that Sheffrey and the agent both believed the agent had found Rose's health satisfactory. Their memorandum providing for the substitution of corrected policies reads:

158. Morris, *Waiver and Estoppel in Insurance Policy Litigation*, 105 U. PA. L. REV. 925, 943-47 (1957). The author says the *Bible* case "for all practical purposes seems overruled." *Id.* at 947, n. 69.

159. 345 S.W.2d at 184, 186 and 189.

160. *Id.* at 180.

161. There was some merit to the agent's justification of his conduct: Rose had been hospitalized twice previously that year for the same sickness; the company had known of these confinements but had accepted him anyway. *Id.* at 175. (But see note 115, *supra*, for a detailed statement of the information the company actually got.) Nevertheless, the practice of delivering policies on the lives of persons known to be in hospitals is hardly to be encouraged.

162. "If the authority of an agent . . . is stated to be conditioned upon determination by the agent of specified facts, the principal is bound by such determination although the agent was negligent in making it." RESTATEMENT (SECOND), AGENCY § 165A (1959).

[P]ursuant to my [Sheffrey's] advice you [the agent] contacted Mr. Rose's physician and the physician who examined him for the company and satisfied yourself that there was no reason from a health standpoint why the policies should not be delivered¹⁶³

Its final advantage is that it makes unnecessary the holding that knowledge of a "fact" that may not be a fact (unsound health) can be imputed to an insurance company.¹⁶⁴

E. *Waiver of Future Breach.*

*Bledsoe v. Farm Bureau Mut. Ins. Co.*¹⁶⁵ was a suit on a fire policy. The described building had been vacant since February 1955, which the agent knew when he issued the policy in September. According to the insured's testimony, the agent told him "as long as there was furniture" the vacancy "would be permissible" if he "was figuring on renting the house . . . again."¹⁶⁶ The policy provided:

[T]his company shall not be liable for loss occurring . . . while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days¹⁶⁷

Still unrented, the building burned on August 20, 1956. The trial judge charged the jury that issuing the policy constituted a waiver if the agent knew at that time the building had been vacant for more than sixty consecutive days. Holding this charge prejudicially erroneous, the Kansas City Court of Appeals said:

Coupled with the knowledge of existing vacancy must be facts sufficient to put a reasonable person on notice that the vacancy will

163. 345 S.W.2d at 175.

164. Three other cases discussing the authority and apparent authority of insurance agents might be mentioned. *Voss v. American Mut. Liab. Ins. Co.*, 341 S.W.2d 270 (St. L. Ct. App. 1960), discussed in note 125, *supra*, concerns auto liability agents. Its handling of the agency problems is outstanding. *Wilson v. Supreme Liberty Life Ins. Co.*, 343 S.W.2d 649 (St. L. Ct. App. 1961), held, in a dispute between a former agent and his ex-employer, that a district manager who had actual authority to hire agents also had apparent authority to fix the terms of the employment contract. *Hutcheson & Co. v. Providence-Washington Ins. Co.*, 341 S.W.2d 142 (Spr. Ct. App. 1960), followed a long line of cases in holding that a fire agent with authority to collect premiums and withhold his commission from them nevertheless has no apparent authority to accept cancellation of a personal debt as a premium.

165. 341 S.W.2d 626 (K.C. Ct. App. 1960). Another feature of this case is noted in the text at note 68, *supra*.

166. *Id.* at 628.

167. *Id.* at 629. The provision quoted will be found at lines 29-35 of the Standard Fire Policy.

or is likely to continue beyond the prescribed period, or the agent must have such actual knowledge.¹⁶⁸

The provision meant, said the court, sixty "days all occurring after the issuance of the policy."¹⁶⁹

Most courts hold that issuing a policy on a building known to be vacant waives the vacancy provision.¹⁷⁰ The language quoted from *Bledsoe* shows that Missouri courts do not, except in the rare case of a policy forbidding any vacancy whatever.¹⁷¹ Again, most courts distinguish between a waiver of an existing breach and a waiver of a future breach; the latter, they hold, is not binding on the insurance company.¹⁷² Missouri courts do not.¹⁷³ In this way, Missouri courts are able to hold, on the one hand, that the period of vacancy does not begin to run until the policy is issued, but, on the other hand, that the clause can be waived by conduct occurring at that time.

168. *Id.* at 632.

169. *Id.* at 633.

170. 29A AM. JUR. *Insurance* § 917 (1960).

171. In which event Missouri courts find a waiver. *Hackett Bros. v. Philadelphia Underwriters*, 79 Mo. App. 16 (K.C. Ct. App. 1899); *Prendergast v. Dwelling House Ins. Co.*, 67 Mo. App. 426 (St. L. Ct. App. 1896).

172. PATTERSON, *ESSENTIALS* § 101, where the reason given is the parol evidence rule.

173. *Heindselman v. Home Ins. Co.*, 282 S.W.2d 191, 193 (St. L. Ct. App. 1955).