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COMMENTS

RETURN OF UNEARNED PREMIUMS AND CANCELLATION OF INSURANCE POLICIES

Insurance companies often deem it prudent to cancel a policy, and a great deal of litigation arises when, after a loss, the insured or a claimant attempts to prove that this cancellation was not effective. In such cases, an argument often advanced by the insured is that as a condition precedent to a valid cancellation, the insurer was to return any unearned premiums and that this condition was not met.¹ It is the purpose of this comment to discuss whether the return of any unearned premium or premiums due is a condition of cancellation, and what constitutes a valid payment or tender of such premium.

Quite often whether or not the insurer must return any unearned premium is determined by statute;² however, where it is not, the general rule is that the parties may contract as they see fit.³

It is not the function of courts to make new contracts for parties by construction, and where the parties are competent to contract and the provisions of the contract are not against the public policy of the state, the parties are bound thereby. . . . The relationship existing between the insurer and the assured is a contractual relationship and there is no element of a trust relationship involved. If the parties are competent to contract they have the legal right to put into their contract such provisions as they deem fit, and the reasonableness or wisdom of the provisions used are not matters of moment to the court construing them.⁴

Generally, when the insurer cancels the policy it must tender the unearned premium unless the policy provides otherwise.⁵ The reason for this rule is to prevent the insurance company from having the use of the in-

¹ "An unearned premium is that portion of a premium which has not been earned by reason of the fact that the policy has been cancelled and is the premium for the unexpired term of the policy." *Downey v. Humphreys*, 102 Cal. App. 323, 325, 227 P. 2d 484, 485 (1951).

² Ill. Rev. Stat. (1951) c. 73, § 970.

³ *Summers v. Traveter's Ins. Co.*, 109 F. 2d 845 (C.A. 8th, 1940); *Leslie v. Standard Acc. Ins. Co.*, 327 Ill. App. 343, 64 N.E. 2d 391 (1945).

⁴ *Leslie v. Standard Acc. Inc. Co.*, 327 Ill. App. 343, 346, 64 N.E. 2d 391, 393 (1945).

⁵ *Standard Acc. Ins. Co. v. Leslie*, 55 F. Supp. 134 (E.D. Ill., 1944); *Genone v. Citizens Ins. Co. of N.J.*, 207 Ga. 83, 60 S.E. 2d 125 (1950); *Annes v. Carolan, Graham, Hoffman Inc.*, 336 Ill. 542, 168 N.E. 637 (1929); *Parks v. Lumbermens Mut. Cas. Co.*, 327 Ill. App. 356, 64 N.E. 2d 210 (1945); *Leslie v. Standard Acc. Ins. Co.*, 327 Ill. App. 343, 64 N.E. 2d 391 (1945); *Dent v. Monarch Life Ins. Co.*, 231 Mo. App. 283, 98 S.W. 2d 123 (1936).

sured's money, and perhaps thus prevent him from obtaining other insurance. Furthermore, the insured should not have to wait upon the insurer's pleasure, since the latter knows when it determines to cancel and should forward any unearned premium with that cancellation.⁶

In the vast majority of the earlier cases, the policies were construed as having no provision contrary to this general rule requiring repayment as a condition precedent to effective cancellation.⁷ But as the insurers drafted the contracts, they soon inserted clauses in their favor, and many of the later cases hold that a return of the unearned premium is not a condition of cancellation by the insurer.

The cases may be divided into groups, according to the language contained in the policies relative to cancellation by the insurer.

If the clause giving the insurer the right to cancel provides that that right may be exercised by notice to the insured, and, if it provides for a return of a ratable proportion of the premiums for the unexpired term, or contains language substantially to that effect, the cases are in accord in holding that a return or tender of the ratable premium is a condition precedent to a cancellation of the policy by the insurer.⁸

Another common type of cancellation clause provides that the insurer may cancel by giving notice with or without the return of the unearned premium. These clauses further provide that if such notice be given without a tender of the ratable premium, then such refund shall be paid on demand, and the notice of cancellation shall say that it will be paid on demand. Under this type of clause, it has been held that the insurer must either tender the refund or give notice that it will be paid on demand. If neither of these conditions are met, the policy is not cancelled.⁹

Other policies provide for cancellation by the insurer by the giving of notice and a return of the unearned premium on demand, but do not require the insurer to give notice that the premium will be paid on demand. This type has been held to impose no obligation upon the insurer to refund any unearned premium, or to give notice that the refund will be made on demand, as a condition of cancellation.¹⁰

⁶ *Aetna Ins. Co. v. Maguire*, 51 Ill. 342 (1869); *Peoria M. & F. Ins. Co. v. Botto*, 47 Ill. 516 (1868).

⁷ *Ibid.*

⁸ *Standard Acc. Ins. Co. v. Leslie*, 55 F. Supp. 134 (E.D. Ill., 1944); *Gill v. Fidelity Phoenix Fire Ins. Co.*, 5 F. Supp. 1 (E.D. Ky., 1933); *Aetna Ins. Co. v. Maguire*, 51 Ill. 342 (1869).

⁹ *Naify v. Pacific Indem. Co.*, 11 Cal. 2d 5, 76 P. 2d 663 (1938); *Molyneux v. Royal Exch. Assurance*, 235 Mich. 678, 209 N.W. 803 (1926); *Hamilton Ridge Lumber Co. v. Boston Ins. Co.*, 133 S.C. 472, 131 S.E. 22 (1925).

¹⁰ *General Accident Fire & L. Assur. Corp. v. Scheron*, 151 F. 2d 825 (C.A. 5th, 1945); *Summers v. Traveters' Ins. Co.*, 109 F. 2d 845 (C.A. 8th, 1940); *Boyle v. Inter. Insurance Exchange*, 335 Ill. App. 386, 82 N.E. 2d 179 (1948); *Smith v. Traveter's Ins. Co.*, 163 Misc. 579, 296 N.Y.S. 365 (S. Ct., 1937).

Under all "demand" policies, if a demand is made before the notice period ends, the cancellation becomes effective as of the date given in the notice. However, if the insured makes a demand for the unearned premium before the effective date of the cancellation as given in the notice, and that demand is refused, the cancellation does not become effective until the unearned premium is paid or tendered to the insured.¹¹

There is a decided conflict in the cases interpreting the so-called "standard" cancellation clause, or "New York standard form," which provides for a return of the unearned premium on surrender of the policy and for retention of the pro rata premium only. The majority of the cases in which such a clause has been construed have held that a tender of the unearned premium is a necessary condition precedent to a valid cancellation by the insurer.¹² The majority apparently puts emphasis on the phrase referring to a retention of the pro rata premium only. They interpret this to mean that the company, on cancellation, will retain the pro rata premium only, and return the unearned premium as a condition of cancellation. Since it is the company that seeks to cancel, it is reasoned that it should seek the insured, and not vice versa.¹³ This argument is further strengthened by the universally held rule that as the insurer writes the contract, any ambiguous clause will be interpreted against the insurance company.¹⁴

A considerable number of cases have held contra to the majority. They state that a return of the unearned premium is not a condition precedent to cancellation by the insurer of a policy containing the so-called "standard" cancellation clause. Based on a seemingly more logical and less strained interpretation of the clause in question, the minority view dissociates the phrase giving the insurer the right to cancel on written notice from the phrase giving the insured a right to any unearned premium on surrender of the policy. It is reasoned that as the policy states that the refund will be made on surrender of the policy by the insured, this surrender is a condition of the insured's right to the unearned premium,

¹¹ *General Exch. Ins. Corp. v. Coffelt*, 192 Ark. 468, 92 S.W. 2d 213 (1936); *Molyneaux v. Royal Exch. Assurance*, 235 Mich. 638, 209 N.W. 803 (1926).

¹² 45 C.J.S., *Insurance* § 451 (1946); 32 C.J., *Insurance* § 440 (1942).

¹³ *Hamilton Ridge Lumber Corp. v. Boston Ins. Co.*, 133 S.C. 472, 131 S.E. 22 (1925); *Barr v. County Mut. Cas. Co.*, 345 Ill. App. 199, 102 N.E. 2d 656 (1951); *Hartford Fire Ins. Co. v. Tewes*, 132 Ill. App. 321 (1907); *Hartford Fire Ins. Co. v. McKenzie*, 70 Ill. App. 615 (1896).

¹⁴ *Pitchford v. Electrical Workers' Ben. Ass'n.*, 189 Okla. 82, 113 P. 2d 591 (1941); *Lehr v. Professional Underwriters*, 296 Mich. 693, 296 N.W. 843 (1941); *Walker v. Commercial Cas. Ins. Co.*, 191 S.C. 187, 4 S.E. 2d 248 (1939); *Stateman v. Travelers Cas. Ins. Co.*, 296 Ill. App. 5, 15 N.E. 2d 607 (1938).

and, thus, payment or tender cannot be a condition to the insurer's right to cancel.¹⁵

The cancellation clause which seems to be the most recent development, and is apparently in common use today, provides that the insurer may cancel by written notice stating when, not less than five days thereafter, such cancellation shall be effective. Such a clause further states that if the policy is so cancelled, premium adjustment may be made at the effective cancellation date and that if the unearned premium is not returned at the time the cancellation is effected, it shall be returned as soon as practicable after cancellation becomes effective. With but three exceptions, all courts interpreting this type of clause have said that a return of the unearned premium is not a condition precedent to cancellation by the insurer.¹⁶ The three cases which are contrary to the majority¹⁷ have been classified as erroneous in both logic and authority.¹⁸ This presents the interesting question of whether it is necessary that the refund be made within a reasonable time, i.e., is the return within a reasonable time a condition subsequent to a valid cancellation? The question has been directly raised in only one case, *Gibbons v. Kelly*.¹⁹ It was there held that a return of an unearned premium was neither a condition precedent nor subsequent under a "reasonable time" clause.

Where a return or tender is necessary for cancellation, the company must return or tender the full pro rata premium due.²⁰ This must be made in legal tender unless the insured accepts other consideration.²¹ Thus, a draft drawn by the insurer upon itself was held insufficient in the absence of any proof of acceptance by the insured.²² Also, an express money order was held inadequate where the insured had stated that he would not accept a check but that he wanted the money.²³

¹⁵ *Damen v. Jarvis Bldg. Corp. v. Mechanics' Ins. Co.*, 83 F. 2d 793 (C.A. 7th, 1936), cert. denied 299 U.S. 556 (1936); *Schwarzschild & S. Co. v. Phoenix Ins. Co.*, 124 Fed. 52 (C.A. 2d, 1903); *Medford v. Pacific Nat. Fire Ins. Co.*, 189 Ore. 617, 219 P. 2d 142 (1950).

¹⁶ *Gibbons v. Kelly*, 156 Ohio St. 163, 101 N.E. 2d 497 (1951); *Turney v. Allstate Ins. Co.*, 167 Pa. Super. 175, 74 A. 2d 730 (1950); *Leslie v. Standard Acc. Ins. Co.*, 327 Ill. App. 343, 64 N.E. 2d 391 (1945).

¹⁷ *Crotts v. Fletcher Motor Co.*, 219 S.C. 204, 64 S.E. 2d 540 (1951); *Elmore v. Middlesex Mutual Fire Ins. Co.*, 219 S.C. 456, 65 S.E. 2d 871 (1951); *Ellzey v. Hardware Mut. Ins. Co.*, 40 So. 2d 24 (La. App., 1949).

¹⁸ *Gibbons v. Kelly*, 153 Ohio St. 163, 101 N.E. 2d 497 (1951).

¹⁹ *Ibid.*

²⁰ *Van Valkenburgh v. Lenox F. Ins. Co.*, 51 N.Y. 465 (Comm'n of Appeals, 1873).

²¹ *Gill v. Fidelity Phoenix Fire Ins. Co.*, 5 F. Supp. 1, (E.D. Ky., 1933).

²² *First Nat. F. Ins. Co. v. Burnett*, 79 Fla. 424, 84 So. 382 (1920).

²³ *Niagra F. Ins. Co. v. Mitchell*, 164 S.W. 919 (Tex. Civ. App., 1914).

The insurer must seek out the insured and tender the unearned premium to him.²⁴ A promise to pay in the future,²⁵ or a request that the insured come to the insurer's office for payment is not sufficient.²⁶ Nor is a statement that payment will be made by the insurer's agent sufficient to meet a cancellation repayment requirement.²⁷

A mere bookkeeping entry is not a tender or repayment, such as when a broker charges the insurer's agent and credits the insured's account with the amount of the unearned premium.²⁸ Nor is the crediting by the insurer's agent of the account of the broker, who procured the insurance for the insured, sufficient.²⁹ Where the insurer notified the broker who procured the insurance to apply the amount due to the debt owed by the broker to the insurer, it has been held that this would not constitute a payment sufficient to cancel the policy.³⁰ Even when the insured owed the insurer money, a crediting of that account is not sufficient payment.³¹ A similar result was reached when the account the insured owed the insurer's agent was credited with the amount of the unearned premium due the insurer.³²

The insured may waive his right to a return or tender of the unearned premium as a condition precedent to cancellation.³³ That is, he may agree with the insurer to cancel the contract even though the insurer has not yet returned any unearned premium, since the clause compelling the insurer to repay is for the benefit of the insured and may be waived at any time.³⁴

Whether such a waiver occurred depends upon the facts and is a question for the jury.³⁵ No set rules can be formulated. However, it can be said, generally, that if the insured, upon notice that the insurer intends to cancel, surrenders the policy to the insurer, the insured waives his

²⁴ *Aetna Ins. Co. v. Maguire*, 51 Ill. 342 (1869).

²⁵ *Griffey v. New York Cent. Ins. Co.*, 100 N.Y. 417, 3 N.E. 309 (1885).

²⁶ *Hathorn v. Germania Ins. Co.*, 55 Barb. (N.Y.) 28 (1869).

²⁷ *Tisdell v. New Hampshire F. Ins. Co.*, 155 N.Y. 163, 49 N.E. 664 (1897); *Aetna Ins. Co. v. Maguire*, 51 Ill. 342 (1869); *Peoria M. & F. Ins. Co. v. Botto*, 47 Ill. 516 (1868).

²⁸ *Bradshaw Bros. & Co. v. Fire Ins. Co.*, 89 Minn. 334, 94 N.W. 866 (1903).

²⁹ *Kinney v. Caledonian Ins. Co.*, 148 Ill. App. 256 (1909); *Kinney v. Rochester German Ins. Co.*, 141 Ill. App. 543 (1908).

³⁰ *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566 (1885).

³¹ *Lattan v. Royal Ins. Co.*, 45 N.J.L. 453 (S.Ct., 1883).

³² *Elmore v. Middlesex Mut. Fire Ins. Co.*, 65 S.E. 2d 871 (S.C., 1951).

³³ *Pagliero v. Merchants Fire Assur. Corp. of N.Y.*, 169 F. 2d 373 (C.A. 9th, 1948); *Kincaid v. New York Life Ins. Co.*, 66 F. 2d 268 (C.A. 5th, 1933).

³⁴ *National Union Indem. Co. v. Standard Accident Co.*, 179 Ark. 1097, 20 S.W. 2d 125 (1929).

³⁵ *Liverpool, L. & G. Ins. Co. v. Tharel*, 68 Okla. 307, 174 Pac. 773 (1918).

right to a return of any unearned premium prior to cancellation.³⁶ Several cases point out exceptions to this generalization. In *Bard v. Fireman's Insurance Co.*,³⁷ the insured did not know of her right to payment prior to cancellation and surrendered her policy on the strength of the erroneous statement of her agent that the policy was already cancelled. It was there held that no waiver of the insured's rights resulted. A similar result was obtained where the policy was surrendered by a broker without authority,³⁸ and in another case where the policy was surrendered merely to allow the agent to obtain a description for the purpose of obtaining insurance in another company, which was never done.³⁹

Payment in legal tender may be waived by the insured by accepting a check,⁴⁰ but tender of the full amount is not waived by a retention of a smaller sum.⁴¹ Actual payment is waived where the insured retains a check until after a loss,⁴² unless the insured has stated that he would only accept money.⁴³

ILLINOIS INHERITANCE LAWS AND ADOPTED CHILDREN

Laws relating to the adoption of children have an interesting history in the legal systems of ancient and modern nations. Such laws were apparently well known to the Egyptians, Babylonians, Assyrians, Greeks, and Germans of antiquity.¹ In the Roman law, adoption allowed the complete substitution of the rights of the adoptive family for the rights of the natural family, at least until the time of Justinian, when the adopted child was allowed to inherit from his natural family also.² In spite of the extent of this ancient legal development, the common law

³⁶ *Addia v. Globe & R.F. Ins. Co.*, 97 W.Va. 443, 125 S.E. 161 (1924); *Liverpool, L. & G. Ins. Co. v. Tharel*, 68 Okla. 307, 174 Pac. 773 (1918); *Buckley v. Citizens Ins. Co.*, 188 N.Y. 339, 81 N.E. 165 (1907); *Hancock v. Hartford F. Ins. Co.*, 81 Misc. 159, 142 N.Y.S. 352 (S.Ct., 1913); *Bingham v. Ins. Co. of N.A.*, 4 Wis. 498, 43 N.W. 494 (1889).

³⁷ 108 Me. 506, 81 Atl. 870 (1911).

³⁸ *Kinney v. Rochester German Ins. Co.*, 141 Ill. App. 543 (1908).

³⁹ *Caldwell v. Stadcona F. & L. Ins. Co.*, [1803] 11 Can. S.C. 212.

⁴⁰ *Gill v. Fidelity Phoenix Fire Ins. Co.*, 5 F. Supp. 1 (D.C. Ky., 1933); *Lampasas Hotel & Park Co. v. Home Ins. Co.*, 17 Tex. Civ. App. 615, 43 S.W. 1081 (1897).

⁴¹ *Quong Tue Sing v. Angelo Nevada Assur. Corp.*, 86 Cal. 566, 25 Pac. 58 (1890).

⁴² *Phoenix Ins. Co. of Brooklyn v. Hunter*, 95 Miss. 754, 49 So. 740 (1909); *Lampasas Hotel & Park Co. v. Home Ins. Co.*, 17 Tex. Civ. App. 615, 43 S.W. 1081 (1897).

⁴³ *Niagara F. Ins. Co. v. Mitchell*, 164 S.W. 919 (Tex. Civ. App., 1914).

¹ 2 C.J.S., *Adoption of Children* § 2 (1936).

² *Legislation and Decisions on Inheritance Rights of Adopted Children*, 22 Iowa L. Rev. 145, 146 (1936).