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Astrid E. Ellis

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Telephone Rates

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jected directory assistance usage data or its corresponding revenue and expense projections. Because these omissions precluded independent verification of the reliability of United's figures, the district court found that OCA's concerns regarding inflated numbers and duplicate recovery were validated. Finally, because the Utilities Board had failed to furnish OCA with the calculations that led it to conclude that the increases were just and reasonable, its conclusion was open to dispute.

On appeal to the supreme court, United argued that the district court's findings were merely a reiteration of OCA's contentions. United claimed that unless OCA presented its own contrary data refuting United's calculations, OCA had not disputed material facts making an evidentiary hearing worthwhile. Although the supreme court agreed that purely legal disputes did not warrant an evidentiary hearing, the court dismissed United's argument.

The supreme court agreed with the lower court's findings that OCA has raised sufficient factual issues warranting an evidentiary hearing. The court found that the Utilities Board had mistakenly decided that no genuine dispute regarding material facts existed when it relied solely on United's version of the facts and prevented OCA's challenge. Because OCA represented United's consumers in this case, the court held that constitutional considerations necessitated that OCA be given the opportunity to examine and to test the credibility of the data upon which the Utilities Board based its decision. The supreme court therefore affirmed the district court's remand to the agency for further proceedings.

Aida M. Alaka

Insurance Agent May Have Bound Company To Temporary Insurance Policy Despite Misrepresentation By Insured

In *Ellingwood v. N.N. Investors Life Insurance Co., Inc.*, 805 P.2d 70 (N.M. 1991), the Supreme Court of New Mexico held that genuine issues of material fact existed with respect to the authority of an insurance agent to bind the company to an oral contract for temporary insurance coverage and with respect to alleged misrepresentations made on an application for insurance coverage.

Background

On October 30, 1985, James Streeter ("Streeter") applied for health and life insurance from N.N. Investors Life Insurance Co. ("N.N. Investors"). Streeter suffered from scoliosis, a spinal deformity, which was plainly visible. The agent for N.N. Investors asked Streeter questions and completed the application forms based on Streeter's verbal responses. The agent asked whether Streeter ever had any indication, diagnosis or treatment of various respiratory diseases or muscle and bone disorders, to which Streeter replied, "No." The agent indicated on the form that Streeter's lower spine had been surgically fused and recorded the name, address, and phone number of Streeter's treating physician. Streeter did not have a physical examination or interview with a physician prior to completing the insurance application of N.N. Investors.

The language of the application provided that coverage would not be effective until the insurance company approved the application and the applicant paid the first premium. Streeter signed the application and asked the agent when coverage would be effective. According to the affidavit of Streeter's grandmother, the agent responded, in her presence, that coverage would begin upon receipt of payment of the first premium;

when Streeter paid the agent, the agent replied that coverage was in effect at that time. Relying solely on the application, the company subsequently approved major medical and term life insurance coverage for Streeter. The insurance certificate stated that coverage would begin at 12:00 noon on November 12, 1985.

On November 10, 1985, Streeter entered a hospital emergency room for treatment of severe bronchial pneumonia. Streeter died 3:40 a.m. on November 12, just over eight hours prior to the time of effectiveness of coverage, as stated on the insurance certificate.

Claims and Defenses

Upon receipt of claims under the insurance policies, N.N. Investors investigated Streeter's medical history and discovered that he suffered from scoliosis and had suffered pulmonary problems in the past. N.N. Investors claimed that Streeter's failure to disclose these medical conditions amounted to material misrepresentations. As a result, N.N. Investors refused to pay benefits under the policies and refunded the premiums paid by Streeter to date. In addition to the claim of misrepresentation, N.N. Investors argued that under the terms of the application, insurance coverage was not effective until approved by the company. N.N. Investors argued that the terms of the agreement excluded coverage for pre-existing conditions; since the pneumonia occurred prior to the effective date of coverage, it constituted such a pre-existing condition.

In response, Patricia Ellingwood ("Ellingwood"), as representative of Streeter's estate, sued N.N. Investors for breach of contract and negligence. Ellingwood claimed that N.N. Investors's agent had apparent authority to bind the insurance company by oral agreement to temporary insurance coverage effective upon receipt of payment. Ellingwood further claimed that N.N. Investors violated a statute regulating temporary insurance coverage which she claimed constituted negligence per se on the part of N.N. Investors

and its agent. N.M. Stat. Ann. 1978 § 59A-18-22 (1988).

The District Court

The District Court, Curry County, granted summary judgment for N.N. Investors. The court noted that N.N. Investors had a right of rescission because Streeter made material misrepresentations of fact on his application. The court also concluded that the application unambiguously stated that coverage was not effective until it was approved by the company. Ellingwood appealed the summary judgment order.

The Supreme Court of New Mexico

Upon review, the Supreme Court of New Mexico reversed the district court's grant of summary judgment. The court held that an agent could orally bind an insurer to coverage effective immediately if such an act were within the agent's apparent authority. The court held that issues of fact existed as to whether N.N. Investors's agent had apparent authority to bind the company to a contract for temporary insurance and whether Streeter made material misrepresentations on the insurance application.

Apparent Authority

The Supreme Court of New Mexico first addressed the threshold matter of when Streeter's insurance coverage became effective. Ellingwood argued that N.N. Investors insured Streeter prior to noon on November 12 through temporary insurance coverage issued by N.N. Investors's agent. Ellingwood alleged N.N. Investors's agent had apparent authority to bind the company to temporary coverage effective immediately. The court defined apparent authority as the authority that a reasonable person would believe an agent had, in light of the insurer's holding the agent out as an authorized representative of the company. The court noted that, under common law rules, an insurance agent, if authorized, could create a valid oral contract for insurance coverage during the period prior to the issuance or delivery

of the policy by the company. The court held it was a question of fact whether N.N. Investors's agent had apparent authority to bind the company with respect to temporary insurance coverage.

The court reasoned that while the terms of the agreement specifically stated that coverage was not effective until approved by the company, it was the duty of the insured to examine the documents only to the extent it was reasonable under the circumstances. The court stated that an insured could be expected to rely on the agent to explain the complex terms of an insurance application. Therefore, there existed an issue in this case as to whether it was reasonable for Streeter to rely on the agent's statement that coverage was effective upon receipt of payment.

In further support of its holding, the court referred to affidavits of former customers of the agent submitted by Ellingwood which showed that despite contrary language in the application, it was the agent's usual procedure to represent immediate coverage with payment of the first premium. The court stated that from these affidavits of former customers, a juror could infer that it was the company's practice to allow the agent to collect the initial premium at the time of completion of the application for insurance. The court reasoned that an agent authorized to receive payments would have apparent authority to bind the company immediately. The court stated that a typical customer could reasonably believe that he had purchased some immediate benefit through payment of a cash premium to an insurance company's agent. This belief would only be reinforced by an agent's oral assurance that this was the case. Therefore, the court held this evidence also created a jury question regarding the apparent authority of N.N. Investors's agent.

Misrepresentation

The Supreme Court of New Mexico next addressed the issue of whether a jury question existed with respect to the alleged misrepresentations made on Streeter's insurance application. The court

held that a jury, relying on the evidence in the case, could make inferences different from those alleged with respect to Streeter's representations of his medical condition.

First, the court stated that the answers recorded by the agent on the application were internally inconsistent. Even though the agent recorded negative responses to the questions regarding various respiratory diseases and muscle and bone disorders, he nevertheless recorded explanations regarding Streeter's lower spine surgery and information about the treating physician when such explanations were required only for affirmative responses. Additionally, Streeter's spinal condition was readily apparent from his physical appearance; he wore a back brace and had a very short torso and neck. The court held that the agent's reluctance to ask about Streeter's deformity should not work to disadvantage Streeter. Similarly, the court refused to penalize Streeter's estate for the insurer's failure to investigate information alerting it to a serious medical condition prior to the filing of a claim. The court held that it was a question for the jury to decide whether the information provided to the agent was sufficient to alert N.N. Investors to Streeter's serious spinal condition. The court also held that Ellingwood had introduced sufficient evidence regarding Streeter's pulmonary condition to preclude summary judgment.

The Supreme Court of New Mexico held that issues of fact existed as to whether N.N. Investors's agent had apparent authority to bind the company to a contract for temporary insurance and as to whether Streeter made material misrepresentations on the insurance application. The court therefore reversed the district court's grant of summary judgment in favor of N.N. Investors and remanded the case for trial. The court noted that the negligence claims relating to N.N. Investors's agent remained before the court on remand.

Astrid E. Ellis