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TOPIC: Carrier's Post-Lapse Conduct May Have Created an Implied Life Insurance Contract

CITE: [*McKown v. Symetra Life Ins. Co.*](#), No. 4:13-CV-982 (U.S.D.C., D.S.C. Nov. 20, 2014).

SUMMARY: In a case in which a universal life insurance policy had previously lapsed, the carrier's subsequent acceptance of a reinstatement payment from the policy owner may have created an implied contract for insurance on the life of the insured. Despite the fact that all of the insurer's requirements for reinstatement were not met, the court ruled that a reasonable finder of fact could decide that the carrier's conduct under the circumstances—acceptance of the reinstatement check without any further communication for a significant period time—*could* have led the plaintiff to believe that an implied contract was created.

BACKGROUND: According to the court, “[a]n implied contract, like an express contract, rests on an actual agreement of the parties to be bound to a particular undertaking.” To create an implied contract “[t]he parties must manifest their mutual assent to all essential terms of the contract in order for an enforceable obligation to exist.” Thus, the policy owner must prove the insurance company’s “assent by conduct to all those terms essential to create a binding contract.”

FACTS: Plaintiff, William McKown, was the beneficiary and apparent owner of a \$100,000 universal life insurance policy issued by Symetra Life Insurance Company on the life of his father, Duncan McKown.

The policy included a grace period provision providing that “[a] grace period of 61 days will be granted if the cash value is not sufficient to cover the Cost of Insurance for the next following month.” However, this provision stated that “[i]f such premium is not paid

within the grace period, all coverage under the Policy will terminate without value at the end of the 61 day period.”

On September 15, 2009, William made a premium payment of \$2,787.62. On September 18, 2009, Symetra sent him an annual statement which indicated that “the cost of insurance deductions from September 18, 2009 to the next anniversary date [September 18] was \$9,233.76, and assuming no further premium payments, the policy would remain active until October 18, 2009.” The court stated that “[d]efendant later explained that the \$2,787.62 payment had been insufficient to fund the policy for the year beginning September 18, 2009.”

William did not make any additional payments and, on October 28, 2009, Symetra sent him a “Life Insurance Cash Value Insufficient Notice, which provided that all coverage under the [p]olicy would cease on December 19, 2009” (which was the end of the 61 day grace period) unless the requisite payment was received. William did not make the requisite payment and on December 21, 2009, Symetra sent him a Lapse/Reinstatement Notice informing him that the grace period had expired and that coverage had lapsed effective December 19, 2009.

The notice provided information concerning applying for reinstatement which included submission of (1) a reinstatement application; (2) a medical release; and (3) the updated past due amounts (\$3,986.57). William sent a check for \$3,986.57 which was deposited by Symetra on February 1, 2010. However, William did not send in a reinstatement application or medical release with the check.

On February 9, 2010, William’s father, the insured, passed away. The parties dispute precisely when Symetra received notice of the insured’s death; William claimed that he informed Symetra via telephone on February 19, 2010 and Symetra claimed that William informed them via telephone on February 23, 2010. On February 22, 2010, Symetra wrote to William informing him it would be returning the \$3,986.57 payment under separate cover and requesting that he resubmit the payment along with a completed reinstatement application and medical release. The letter does not mention the fact that the insured was deceased at the time it was sent. On February 24, 2010, Symetra refunded the payment.

The plaintiff refused to negotiate the check and subsequently filed suit against Symetra asserting claims for:

- (1) Breach of contract;
- (2) Breach of an implied contract; and
- (3) Bad faith.

After completing discovery, Symetra filed for summary judgment on all three of the plaintiff’s claims. In response, William conceded its breach of contract and bad faith claims, causing the court to enter summary judgment in favor of Symetra on those claims. Thus, the court was left to decide only plaintiff’s breach of an implied contract claim.

In his response, the plaintiff argued that there was a question of fact as to whether the defendant waived its medical requirements for a valid reinstatement and created an implied contract when it accepted and negotiated the reinstatement check.

RESULT: The court denied Symetra's motion, holding that there was a genuine issue of material fact as to whether the acceptance and negotiation of the reinstatement check created an implied contract.

According to the court, Symetra presented strong evidence that William had been provided notice of the lapse and the necessary steps needed to reinstate the policy. It was undisputed that the plaintiff only complied with the one of the three criteria required for reinstatement (making the \$3,986.57 payment).

However, the court stated that by retaining the reinstatement payment for approximately three weeks without any indication of any deficiencies or problems with the reinstatement, a reasonable fact finder could conclude that Symetra assented to the creation of an implied insurance contract. Indeed, William stated via affidavit that he received no indication (until after having notified Symetra of the insured's death) that the carrier was refusing to accept the reinstatement payment "or that that the reinstatement was still pending or under investigation." According to the plaintiff, he had "every reason to believe that Symetra had accepted the reinstatement check," and "that Symetra had in fact reinstated the policy."

Symetra maintained that it did not receive notice of the insured's death until after it informed the plaintiff it was rejecting the reinstatement payment. However, William claimed that Symetra only attempted to refund the reinstatement check *after* it was notified of the insured's death. This scenario was, according to the court, "a classic example of a genuine issue of material fact." Consequently, the court ruled that the fact finder would have to determine whether an implied contract was created under the circumstances.

RELEVANCE: As we have reported several times before in lapse cases, policy owners should not rely on the courts to try to save them from a policy lapse. Here, the plaintiff stated via sworn affidavit testimony that "he never intended for the [p]olicy to lapse." However, it is undisputed that the policy had lapsed.

In an effort to salvage the policy benefits, the plaintiff is left with the hope that a jury will determine an implied contract was created. The end result in this case remains to be decided.

The lesson of this case, regardless of the eventual outcome, is the importance of "prevention." While policy owners should exercise diligence in keeping up with policy values and premium payments on their policies, they should also remain in communication with their agents to ensure that premium payments are up-to-date and that policy values are sufficient to prevent a lapse.

Agents should quickly follow up with policy owners when a lapse notice is received by the agent, since agents are routinely copied on lapse notices sent to policy owners. **The agent's ethical obligations, potential legal duty under some circumstances, and good business practices (continuation of commissions) should be an incentive** for an agent to quickly contact the policy owner when a lapse notice is received.

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