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TOPIC: Scope of Authority of Insurer's Agents

CITATION: *Clara Gilbert v. Liberty Bankers Life Insurance Company*, 2016 WL 1573166, No. 15-21425-Civ-Cooke-Torres, (U.S.D.C. SD FL, 04/19/2016).

SUMMARY: Clara Gilbert sued Liberty Bankers Life Insurance Company. She claimed the insurer broke its contract with her by failing to pay death benefits under a life insurance policy. The insurer countered by filing a motion for summary judgment, arguing that Gilbert could not prevail, as a matter of law, on her contract claim under the policy. But the court denied the insurer's motion.

RELEVANCE: This is a case involving agents who allegedly changed the applicant's verbal response to questions on the life insurance application. It's highly unlikely AALU agents will be faced with similar facts – but the ethical challenges and warnings of this case and the best practices procedures it informs are good reminders and great lessons. And this case provides an excellent review of some of the basic principles of agency and what factors will be examined in determining if and when a person will be considered the insured's agent or the agent of the insurer—or both.

FACTS: Clara Gilbert was diagnosed with HIV sometime after May 21, 1987 but before December 12, 1988. She gave birth to her son, John Geter III, on December 12, 1988. John was born HIV positive, and shortly after his birth, doctors informed Clara that he had been born with AIDS.

In 2011, three insurance salesmen discussed with Clara the idea of policies on the life of her son. Clara signed an application as owner for a policy on John's life – who was present at the time and he signed the application.

Question 28 of the life insurance application form asked:

> Has the Proposed Insured been tested positive for exposure to the HIV infection or been diagnosed as having ARC or AIDS caused by the HIV infection or other sickness or condition derived from such infection?

Question 28 was initially answered "yes," but one of the agents changed that response to "no" and initialed the change.

Clara and Liberty disputed the circumstances surrounding her answer to Question 28 and the subsequent change in answer. Liberty contended that the agent completed Question 28 in the presence of Clara and John, and that Clara initially stated that John *did* have HIV, prompting the agent to check the "yes" box, but that Clara then advised the agent that John was born with the HIV virus but had tested negative for the past several years, so the answer should be changed to "no." The agent concurred, changed the answer to "no," and initialed the change.

Clara maintains that she completed Question 28 and answered it "yes." However Christopher, Liberty's agent, told another agent to change the answer to Question 28 to "no" and initial the change, which the agent did. Clara testified she does not know why Christopher advised the agent to change the "yes" to a "no."

On September 26, 2011, Liberty advised Clara that the policy she owned on John's life had not been issued as originally applied for and required the execution of an "Amendment to Application" confirming that the answer to Question 28 was in fact "no." This amendment bears the signature of both Clara and John but Clara did not remember signing the amendment and could not confirm that the signatures are hers and her son's. However, two of the agents claimed that the policy amendment was delivered to John and Clara on September 26, 2011 and signed by both of them in the presence of at least one of the agents.

Clara also executed an application for life insurance from Monumental Life Insurance Company on September 26, 2011. That application bears both her signature as well as one of the agent's signature. The policy on John's life was eventually approved by Liberty's underwriters.

John died on November 28, 2012. His Certification of Death, issued on December 5, 2012, listed "Metastatic CNS Lymphoma" and "AIDS" as the cause of death.

On December 31, 2012, Liberty mailed Clara a letter confirming that John Geter III had life coverage and requested additional information in order to process her claim on the policy.

Liberty subsequently sent Clara another letter dated May 8, 2013 denying her claim:

> After reviewing the medical records, we regret that we must deny benefits due to material misrepresentation on the application on the following questions: Question #28 ... Had Liberty Bankers Life known of this medical history prior to the application date, we would have declined to issue this contract.

During Clara's suit to obtain the policy proceeds, the insurer made these arguments for summary judgment:

- Plaintiff's contention that the amendment received by Liberty is a forgery constitutes a failure of condition such that the insurance contract was never formed;

- Plaintiff's recovery is precluded by Fla. Stat. § 627.409;

- Any knowledge possessed by insurance agents is not imputable to Liberty; and

- No insurance agent had any actual authority to modify or change the insurance application or to make any representations to plaintiff upon which she could rely regarding answering question 28.

The court took each of these arguments and addressed them in turn:

- Since neither party contested that John executed an application for life insurance with Liberty and subsequently executed an amendment confirming that the answer to question 28 is "no," the charge that the signature was forged is moot.

- Liberty's second argument concerns Florida law which provides that a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the insurance contract or policy only if any of the following apply (a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer(b) If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in loss.

- The Florida Supreme Court has held that where "an insurer would have altered the policy's terms had it known the true facts or the misstatement materially affects risk, a *nonintentional* misstatement in an application will prevent recovery under an insurance policy." As long as the misstatement satisfies subsections (a) or (b) of the statute, *it need not be made fraudulently or knowingly to void the policy*. All that is necessary is that the insured make an inaccurate statement in his application.

Of course, the insurer made just that argument: Answers provided by John and endorsed by his mother Clara on the insurance application contained misrepresentations and omissions with regard to question 28, and they both reaffirmed these misrepresentations by signing and submitting the amendment which confirmed that the answer to question 28 was "no."

However, the court noted that there is a dispute as to the facts regarding what John and Clara initially represented regarding the answer to question 28. Clara stated that she answered question 28 "yes," to the best of her knowledge and belief, and Liberty's agents *changed* her answer to "no." As such, the facts regarding whether "the insured made an inaccurate statement in his application" are in dispute.

This conclusion stands even when taking into account the subsequent amendment executed by John and Clara confirming that the answer to question 28 was "no."

According to the court, the same Liberty agents who allegedly changed John's and Clara's "yes" to a "no" brought them an amendment confirming that the answer to question 28 was in fact "no." Their affirmation of the "no" answer does not indisputably qualify as a "misstatement" that warrants a grant of summary judgment in Liberty's favor.

Liberty next argued that any knowledge possessed by its insurance agents is not imputable to Liberty and that Liberty is not bound by its agents' actions in waiving provisions of the insurance contract.

Clara alleged that she *had* fully disclosed John's health history and that Christopher instructed Sanphasiri, also Liberty's agent, to change the "yes" to a "no." Here, she fully disclosed material medical information when completing the application. If those facts are correct, the plaintiffs were completely honest about their medical history. Clara and John honestly disclosed pertinent medical information, and their respective insurance agents chose to disregard or purposefully ignore such information. As such, the case at hand is not so much about attempting to change information in an insurance application after the fact, but instead about the scope of authority of Liberty's agents.

An insurance agent is exclusively employed by, and has a continuous relationship with, a specific insurer. While an insurance broker may serve in a dual capacity and act as an agent for both the insured and the insurer, an insurance agent is an agent of the insurer and not of the insured. This distinction is important because acts of an agent are imputable to the insurer and acts of a broker are imputable to the insured.

Liberty argued that even if the agents in question here are considered agents of Liberty and not brokers, they were independent and not captive; that is, they were licensed to sell coverage for several carriers.

But the court retorted that under Florida law, "civil liability may be imposed upon insurers who cloak unaffiliated insurance agents with sufficient indicia of agency to induce a reasonable person to conclude that there is an actual agency relationship." Evidence of indicia of agency may be demonstrated where an insurer furnishes an agent with "any blank forms, applications, stationary, or other supplies soliciting, negotiating, or affecting insurance."

If sufficient indicia of agency exists and the insurer subsequently accepts business from that broker, then an insurance broker may become the statutory agent of the insurer. (Note the exception to this rule: Even if indicia of agency exists, and the insurer subsequently accepts business from the broker, liability will *not* attach to the insurer if the "insured knew or was put on notice of inquiry as to limitations on the agent's actual authority.")

Here, the court, after considering the factual record, found there was a genuine issue of material fact as to whether the three agents acted in a dual capacity as a broker for Clara Gilbert and her son and an agent for Liberty. Clara presented enough evidence indicating that Liberty may have cloaked the agents with enough indicia of agency to lead her to believe that they were Liberty's agents by providing them with blank insurance application forms and using them as Liberty's primary means of communicating with Clara. For example, when Liberty determined that an amendment to the original application was necessary, they sent two agents back to Clara's home to have her execute the amendment instead of mailing it to her or having another agent deliver her the amendment. It would be reasonable for her to believe, from that interaction, that the insurance agents were Liberty's agents.

All three agents entered Clara's home, established a relationship of trust with her, and sold her multiple policies of insurance for herself and her children. It would not be unreasonable for her to believe that they were Liberty's agents and that they had the authority to oversee and change any answers she provided on her application for insurance.
