1971

State Automobile and Casualty Underwriters v. Richard J. Salisbury and Diversified Insurance Agency : Brief of Appellant

THE SUPREME CO
OF THE STATE OF UT

STATE AUTOMOBILE AND
CASUALTY UNDERWRITERS,
a Utah corporation,
Plaintiff-Respondent,

v.

RICHARD
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Defendant-Appell

BRIEF OF AP

Appeal from the District Co
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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE AUTOMOBILE AND CASUALTY UNDERWRITERS, a Utah corporation,
Plaintiff-Respondent,

v.

RICHARD J. SALISBURY and DIVERSIFIED INSURANCE AGENCY, a Utah corporation,
Defendant-Appellant.

Case No. 12511

BRIEF OF APPELLANT

NATURE OF THE CASE

This is an action by an insurer against its agent for an alleged violation of authority in binding a risk which resulted in a loss to the insurer.

DISPOSITION IN LOWER COURT

This case was submitted to the jury by way of three special interrogatories. On two of the interrogatories the jury found that there was no preponderance of the evi-

dence that the defendant had received the most recent edition of the Prohibited List prior to binding the coverage or that "underwriting guides" is defendant's possession had been violated when the coverage was bound. On a third proposition the jury found the defendant had a duty of inquiry concerning persons having two moving violations within the past three years.

The trial court then entered findings of fact and conclusions of law that because Diversified *would have been instructed* to not bind any coverage on this particular risk had it made inquiry of State Auto, its failure to make such an inquiry was the proximate cause of State Auto's loss and therefore judgment was entered for plaintiff in the amount of $19,758.74 plus interest.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment below and judgment in its favor as a matter of law, no cause of action.

STATEMENT OF FACTS

The parties will be referred to as they appeared in the court below. All italics in this brief have been added.

In the early part of 1964 the plaintiff insurer ("State Auto") contacted the defendant insurance agency ("Diversified") in an effort to secure an agency agreement with the latter (R. 186). Subsequently, on July 10, 1964 an agency agreement was signed. See Exhibit 1-P. The manuals to be used in writing insurance for State Auto were received by Diversified in August of 1964 (R. 190).

The defendant Richard J. Salisbury and his father were the principal stockholders in Diversified at the time it became an agent for State Auto. Diversified, at that time, was already an agent for approximately ten other companies of which five or six were motor vehicle insurers (R. 186).

One of Diversified's customers was a Mr. Farrell Crawforth (R. 202). On October 1, 1965 Mr. Salisbury took a binding automobile insurance application from Mr. Crawforth. The application was sent to State Auto's regional office in Denver. Immediately prior to that time Mr. Crawforth had insured his automobiles with the Fireman's Fund Insurance Company. Mr. Salisbury placed the October 1, 1965 insurance application with State Auto because of more favorable insurance rates.

The front page of Mr. Crawforth's application listed the following traffic citations: July 13, 1963, improper turn; August 7, 1963, speeding; August 20, 1964, speeding. On the reverse side of the application Mr. Salisbury entered the appropriate information and signatures to make the insurance immediately effective.

The application was received by State Auto's Denver branch office on Monday, October 4, 1965. When received, no diary date was established with respect to the application (R. 15 - answer to interrogatory No. 17). The application was held by State Auto at its Denver office for an additional two weeks, until Friday, October 15, 1965, before any action was taken upon it (R. 15 - answer to in-

terrogatory No. 15). State Auto then returned the application, stating, because of the prior violations, it did not desire to underwrite the coverage.

During the early morning hours of October 16, 1965, and prior to the receipt by Diversified of State Auto's letter rejecting Mr. Crawforth's application, Mr. Crawforth was involved in a serious automobile accident. In settling subsequent claims against Mr. Crawforth resulting from this accident, State Auto incurred loss and expenses of $19,758.74.

This action was then filed by State Auto alleging Diversified had exceeded its authority by taking a binding application in contravention of the company's prohibited list.

In the trial court State Auto argued that the coverage should never have been written for Mr. Crawforth because anyone with more than two moving violations within the past three years would have been on the company's 1964 Prohibited List. Diversified denied ever having received a Prohibited List which would have precluded binding Mr. Crawforth's application. Diversified pointed out that the Prohibited List contained in its manual when Mr. Crawforth's application was bound was a 1957 edition list containing no prohibition for persons with two or more moving violations within the past three years. See Exhibit 22-D pages 153 and 154.

Mr. Salisbury never even saw the 1964 Prohibited List upon which State Auto relied until after suit was filed (R. 195, 240).

The mail clerk for State Auto, Mrs. Elsie Waggoner, admitted the manuals sent to Diversified on August 7, 1964 contained only the 1957 prohibited list (R. 247-48, 277-80). She further admitted there was no record of having sent the 1964 Prohibited List to Diversified (R. 264). The jury logically found that State Auto had failed to show Diversified received the later 1964 Prohibited List (R. 149) .

The Sales Agency Contract between the parties prohibited binding risks, as is here relevant, only if the risk was noted on the company's Prohibited List on "specific underwriting guides." See Exhibit 1-P. Nowhere in the Sales Agency Contract is the latter term defined.

In addition to granting Diversified binding authority, the Sales Agency Contract defines the relationship between the parties:

"RELATIONSHIP"

> "Nothing herein contained shall be construed to create the relationship of employer and employee between the Parties hereto. *It is distinctly understood and agreed that the Second Party shall, under the provisions of this contract, independently act in accordance with his own ideas and exercise his own judgment.* It is understood and agreed that the Second Party shall not bind or obligate the State Automobile Casualty Underwriters in any manner whatsoever except as herein specifically provided or, as defined in the manuals and underwriting guide(s)." Exhibit 1-P page 2.

At trial State Auto offered into evidence several letters sent to Diversified for the apparent purpose of showing Mr. Salisbury was aware he could not write binding coverage for persons in Mr. Crawforth's situation. The letters all concern the rejection of applications sent to State Auto by Diversified. Mr. Salisbury testified that State Auto rejected about 10 percent of all automobile insurance applications Diversified submitted. (R. 242).

None of the letters purported to be underwriting guides respecting the binding of future applications. Indeed each of the letters gives several reasons why the application was rejected:

Exhibit 6-P concerns two violations and two accidents within the past three years. The reply simply states: "Although the applicant was not at fault, we do not feel that we would want to provide coverage on the basis of the frequency of these occurrences."

Exhibit 9-P is in conjunction with the return of an application on seven vehicles operated by a sand and gravel corporation. The application states State Auto is no longer writing sand and gravel equipment unless it is strictly owner operated and additionally mentions that since one operator is under 21 years of age it did not care to insure drivers on such risks under 25 years of age.

Exhibit 10-P notes that the applicant was involved in three accidents in three years and, though only one was an "at fault" accident the company returned the application because the "applicant's wife is somewhat accident prone."

Exhibit 11-P returns the application because it concerns a vehicle over 15 years of age, lists one accident and two violations in the past three years, and having had insurance declined.

Exhibit 12-P refers only to a motor vehicle violation by the applicant. The company states "We do not feel that the violation in this instance is far enough in the past to warrant consideration."

Exhibit 13-P is Diversified's memo to which the previous exhibit responds.

Exhibit 14-P declines the application because of underage operators, a sports car, and two violations in the last two years. This is the only letter making reference to the Prohibited List. It states: "This would also put the risk on our Prohibited List." It is not clear from this comment whether the combination of the three facts or any single one puts the risk on the Prohibited List.

Exhibit 15-P rejects an application because the principal operator of the two automobiles is under 25 years of age and has had two speeding violations in the last three years.

Exhibit 16-P concerns the rejection of the Farrell Crawforth application: It simply states:

> "It is noted that the applicant has had three violations in the last three years. We do not care to write any risk who has had two or more occurrences in the last three years. Consequently, we feel it would be best in this instance to decline coverage and return the application to you."

The matter was submitted to the jury by way of three interrogatories. Proposition No. 1 stated:

> "Prior to October 1, 1965, the defendant received the 1964 edition of the Prohibitive List." (R. 149).

The jury found no preponderance of the evidence either way.

Proposition No. 3 stated:

> "When the defendant gave Farrell Crawforth insurance coverage, the defendant violated underwriting guides received by the defendant before October 1, 1965, which were not in the manual." (R. 150).

The jury again found no preponderance of the evidence either way.

Proposition No. 2 stated:

> "Prior to October 1, 1965, in the exercise of reasonable care, the defendant had enough notice to require the defendant to inquire about the prohibition of insuring applicants with two moving violations within three years." (R. 150)

The jury found this proposition to be "true."

The court then entered findings of fact and conclusions of law to the effect that the defendant's failure to make an inquiry as referred to in the special verdict, proposition No. 2, was the proximate cause of the plaintiff's loss in settling the claims against Crawforth (R. 153, 154).

Judgment for State Auto was then entered for $19,758.74.

ARGUMENT

POINT I. IT WAS WITHIN THE SCOPE OF DEFENDANT'S AUTHORITY TO WRITE A BINDING INSURANCE APPLICATION FOR FARRELL CRAWFORTH.

State Auto solicited Diversified to become its agent. Having thus created the agency relationship, and having initiated this suit, it had the burden of showing Diversified exceed its authority in binding Mr. Crawforth's application. See Instruction 9-C (R. 138).

Diversified had clear authority under the "Sales Agency Contract" to bind applications for at least twenty days. See Exhibit 1-P, pages 2 and 3. That contract placed only one limitation upon Diversified's authority to bind coverage which is relevant to this action:

> "*Any changes* or additions to the binding authority as herein provided *shall be governed by the specific underwriting guides and/or manuals* furnished by the First Party [State Auto]". *Id.*

Any limits upon Diversified's binding authority therefore had to come from either, (1) the manual State Auto furnished Diversified or, (2) "specific underwriting guides."

The jury resolved the issue whether the Crawforth application had been bound contrary to the 1964 Prohibited List with their "no preponderance" finding in response to the following proposition:

"Prior to October 1, 1965, the defendant received the 1964 edition of the Prohibitive List." (R. 149).

"Underwriting guides" were the second limitation upon Diversified's authority to bind applications.

The Sales Agency Contract does not define "underwriting guides." State Auto presented no evidence which would have clarified the term.

The jury was asked in proposition No. 3 whether "underwriting guides" not in State Auto's manual had been exceeded when Diversified bound Farrell Crawforth's application:

"When the defendant gave Farrell Crawforth insurance coverage, the defendant violated underwriting guides received by the defendant before October 1, 1965, which were not in the manual." (R. 150).

The jury again found favorable to Diversified:

"No preponderance of the evidence either way." (R. 150)

Even though the Sales Agency Contract limited Diversified's binding authority only as to prohibitions in the underwriting guides or the manual, the trial court over defendant's objection, injected a third issue sounding in negligence which was presented to the jury as Proposition 2 of the special verdict.

It stated:

> "Prior to October 1, 1965, in the exercise of reasonable care, the defendant had enough notice to require the defendant to inquire about the prohibition of insuring applicants with two moving violations within three years." (R. 150)

The jury found this proposition to be "true." (R. 150)

Proposition 2 was drafted by the trial court. Even assuming, for the sake of argument, that this issue was properly before the jury, it was prejudicial error to have submitted this interrogatory to the jurors without giving them any instructions for resolving the issue. The proposition contains such terms as "reasonable care" and "enough notice". Nowhere in the instructions are these terms explained or referred to in any way. Indeed no instruction touches upon proposition 2 in any regard.

It is clear from the language of proposition 2 that the jury did not find Diversified exceeded its authority to bind applications. The proposition simply states Diversified had a duty to inquire concerning persons with two moving violations within the past three years. It is an obvious fact of modern life that persons seeking insurance also need coverage pending any inquiry concerning their insurability. The finding in proposition 2 is not one which declares Diversified was without authority to bind applications pending any inquiry into the applicant's insurability.

The finding in proposition 2 was that Diversified had a duty to inquire of State Auto concerning this particular

risk. How the jury arrived at the finding that such a duty existed is purely speculative, however, because the trial court gave the jurors no instruction whatsoever by which they could determine such a duty existed.

Assuming, for the sake of argument, such a duty existed, however, this duty was fulfilled when Diversified sent Mr. Crawforth's application to State Auto. Nothing in the agency agreement prohibited an inquiry in this matter. Indeed it should be obvious that the ideal way for an agent to submit relevant information to an insurer on an insurance applicant would be by using the insurer's own forms!

Proposition 2 injected an issue of negligence into this lawsuit. Negligence is the breach of a duty. The duties an agent has to his principal are determined by the agency agreement. As such unless there is a breach of a duty under the agency agreement the agent incurs no liability to the principal.

This principle is well stated in Restatement of Agency 2d § 376:

> "The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made, except to the extent that fraud, duress, illegality, or the incapacity of one or both of the parties to the agreement modifies it or deprives it of legal effect."

Comment "a" to section 376 states:

> "Agency is a relation based upon the manifestations of consent of the parties and hence, except where the manifestations do not have legal effect, the duties of both parties are based upon them."

The authorities are to the effect that whether an agent is liable for negligence must be based upon an inquiry into the terms of the agency agreement. In *E. S. Harper Co. v. General Insurance Co. of America, 91* Idaho 767, 430 P.2d 658, 662 (1967), the Idaho Supreme Court restated this principle:

> "Obviously, the agent assumed only limited duties in acting as Harper's agent. The relationship created was based upon the parties mutual manifestations of consent, that the agent should act in certain respects on Harper's behalf and that *the agent's duties existed only by virtue of that understanding with Harper.* Where the principal sues the agent in tort upon the theory that the agent has negligently dealt with affairs entrusted to him by the principal, *the question whether the agent has improperly performed depends upon his agreement with the principal, since this determines the scope of the agent's undertaking."*

And in *Baumgartner v. Burt,* 148 Colo. 64, 365 P.2d 681, 683 (1961) it is stated:

> "The relationship between an agent and his principal is a contractual one and the extent of the rights and duties of each is to be found in the express or implied terms of the agency contract."

Nothing in the Sales Agency Contract forbids Diversified from binding an application pending an inquiry to State Auto whether it desires to accept the application.

It is hornbook law that an agent is free from liability when he exercises discretion in a good faith judgment:

> "If the mode or manner of executing the authority is not expressed, the principal is bound by the act of the agent if it be within the scope of his authority, although it be not done in the manner that the principal desired, or would himself have done it." 2 C.J.S., *Agency* 1345. § 121c

Neither is an agent an insurer against losses due to the good faith exercise of judgment in the exercise of discretion:

> "An agent who contracts to perform personal services does not undertake to render perfect service and mere errors in judgment not due to want of care of diligence, or to fraud or unfair dealing are not actionable. An agent is not an insurer against losses due to honest mistakes or errors of judgment, and if he acts in good faith and with reasonable skill and ordinary care and diligence, he will not be liable for losses which his principal sustains." 3 Am. Jur. 2d 585 *Agency* § 206.

See also *United States Liability Insurance Co. v. Haidinger-Hayes, Inc.,* 1 Cal.3d 586, 83 Cal. Rptr. 418, 463 P.2d 770, 774 (1970), where the California Supreme Court stated:

> "Liability is not incurred by a mere error of judgment in the exercise of discretion unless the error is based on want of care or diligence."

The second sentence in the Sales Agency Contract under the paragraph entitled "Relationship" required Diversified to exercise independent judgment and use its discretion:

> "It is distinctly understood and agreed that the Second Party [Diversified] shall, under the

> provisions of this contract, *independently act in accordance with his own ideas and exercise his own judgment.*" (Exhibit 1-P page 2).

State Auto, having created the agency relationship and having required Diversified to exercise its own judgment, and having given Diversified binding authority except where specifically prohibited by the manual or underwriting guides, it cannot now be heard to complain of the consequences of a good faith exercise by Diversified of that authority granted to it.

The contract defining Diversified's binding authority was drafted by State Auto. It cannot be found from the contract that Diversified was prohibited from binding Mr. Crawforth's application.

Any instructions Diversified received from State Auto via the letters giving several reasons for rejecting an application were ambiguous. An agent is not liable for an honest mistake as to ambiguous instructions. 3 C.J.S. 31 *Agency* § 148. Furthermore, if there is any ambiguity in the agency contract that Diversified was without authority to bind the risk then such ambiguity must be construed against State Auto and broadly in favor of Diversified. *Guinand v. Walton,* 22 Utah 2d 196, 450 P.2d 467 (1969). The trial court's judgment not only ignored the agency contract but in effect construed the contract strictly *against* Diversified!

In light of the jury's findings that Diversified had no notice that Mr. Crawforth's application was on State Auto's Prohibited List in its manual or in "specific under-

writing guides" it was clearly erroneous for the trial court to enter judgment in favor of State Auto. That judgment should be reversed.

POINT II.
STATE AUTO IS ESTOPPED FROM DENYING DIVERSIFIED'S AUTHORITY TO BIND FARRELL CRAWFORTH'S APPLICATION.

An estoppel, in the context of this case, refers to the prejudicial reliance of Diversified upon some act, conduct or nonaction of State Auto. 16A Appleman, *Insurance Law and Practice* 280 §9081 (1967).

More specifically, an insurer's failure to repudiate an asserted unauthorized issuance of a policy under circumstances which result in the agent being misled or assuming the position different than he would have assumed creates an estoppel. 16 Appleman, *Insurance Law and Practice* 358 §8781 (1967).

The evidence in this case clearly showed that State Auto's actions were prejudicially misleading to Diversified.

At trial, State Auto called Mr. Elwood Johnson, the resident vice president of the Denver branch office at the time Mr. Crawforth's application was sent to the Denver office (R. 282). Mr. Johnson explained that it was State Auto's policy to consider applications concerning normally prohibited risks:

"I assure you we did not invite or seek that kind of business, but we felt *it was a duty and obligation we owed to our agents.*" (R. 301).

With respect to persons in Mr. Crawforth's risk category, the following testimony took place:

"Q. But you in some instances did take a risk like that?

A. We have.

Q. And you wouldn't intend, by any correspondence or anything of that type, from precluding the agent to submit that type of risk to you?

A. No sir." (R. 302)

It is clear in this fact situation that State Auto's conduct was prejudicial to Diversified. Mr. Crawforth had written his insurance previously through Diversifed. Diversified had placed the prior coverage with Fireman's Fund. Because Diversified represented many companies, a fact of which State Auto was aware, it had a duty to act with reasonable promptness upon any application submitted to it.

Mr. Crawforth's application was taken on Friday, October 1, 1965. It was received in the Denver office of State Auto on Monday, October 4, 1965. The information concerning Mr. Crawforth's past traffic citations, which State Auto asserts as a basis for the application being on the Prohibited List, is found very conspicuously on the front page of the application. See Exhibit 23-D. No action was taken upon the application during the first week

in which it was received — not even a diary date was established with respect to it (R.15). Again, during the second work week no action was taken upon the application until Friday of that week — October 15, 1965.

State Auto therefore "sat on" the Crawforth application for almost two complete work weeks even though the violations which it now alleges were so objectionable were clear on the face of the application and the reverse side also clearly indicated that the application was binding.

In light of the obvious need one has to know whether he is insured, and an insurance agent's access to several sources which will accept a given risk, the unfairness of State Auto's taking no action upon the Crawforth application for two work weeks is readily apparent.

Pending such a determination an applicant as well as his agent is led to not seek coverage elsewhere. State Auto then, if its view is adopted, receives an open ended option on such insurance.

Though State Auto admitted it had previously accepted otherwise prohibited risks, it is not clear from the record whether such applications, if bound, would be backdated to the date of application if the risk were accepted.

It is said in State Auto's manual however:

> "If binders are not replaced by a policy effective as of effective date of the binder, same are subject to prorata earned premium charge." (Exhibit 2-P, page 2.)

The normal practice in the industry would be to backdate a policy to the date the coverage was bound.

Of the courts which have spoken to the inequity of an insurer's silence in regard to insurance applications, one opinion is especially helpful in understanding and resolving the problem. In *Lewis v. Travelers Insurance Co.,* 51 N.J. 244, 230 A.2d 4 (1968), the New Jersey Supreme Court held that a practice of backdating policies on otherwise prohibited risks to the date of application gave an agent authority to give a binder for interim coverage. The court stated:

> "As we have already said, *it would be unreasonable to expect an applicant for insurance to give anyone an option, indefinite as to time, to decide whether to sell coverage retroactively with the applicant holding the interim risk.* The practice of backdating the policy which would lead the applicant to believe the agent is authorized to bind the risk would if no more were shown, lead an agent to the same estimate of his authority. *That conclusion is so strongly required that an insurer could escape it only through the plainest instructions to the agent to tell an applicant for immediate coverage in so many words* (1) that the interim loss will fall upon the applicant if the application is rejected by the company; (2) *the period of time within which the company will act on the application;* (3) *the objective standard* upon which the company will weigh the application or the absence of such a standard; and (4) that a premium will be charged at the full rate for the period of retroactive coverage if the policy should issue." 230 A.2d at 9

State Auto's own district agent said that State Auto had a duty to its agents to consider risks such as Mr. Crawforh's (R. 301). Observance of the duty, however, where State Auto gave no time period in which it would act upon the application or the criteria upon which a determination would be made, not to mention the careless practice of not even putting a diary date upon such applications so as to assure prompt consideration, is a duty without any benefit to its agents. Not only would such a duty and obligation fail to confer any benefits, indeed the uncertain manner in which such applications were considered operated to the agents' and the applicants' detriment as each would not seek insurance elsewhere pending the determination.

In an early Supreme Court case, *The Southern Life Insurance Co. v. McCain,* 96 U.S. 84, 85 (1878), the Supreme Court held that the silence of the insurance company when it had a duty to act was equivalent to adoption of the act of the agent:

> "Silence then was equivalent to an adoption of the act of the agent, and closed the mouth of the company ever afterwards."

State Auto, having vaguely defined the limits of Diversified's binding authority while conferring — even demanding — a broad exercise of discretionary judgment by Diversified is estopped by its own silence to deny Diversified's authority.

The lower court should have so ruled.

POINT III.

THE TRIAL COURT'S FINDINGS ARE CONTRARY TO THE INSTRUCTIONS.

Upon the court's own motion the matter was submitted to the jury by way of special interrogatories. The requested instructions submitted to the court were drafted in the expectation of the matter being submitted to the jury by way of general verdict. As a result several of these instructions were submitted to the jury without properly modifying them to conform to the special verdict the jury was required to give. See, for example R. 142, 144.

It has often been stated that instructions are "the law of the case" and as such they comprise the applicable principles of law to which the trial court itself must subscribe. It is clear in this case that the trial court's judgment is contrary to the instructions.

Instruction No. 9-I stated a principle upon which judgment should be entered for Diversified:

> "If you find from the evidence that Diversified Insurance Agency did not receive or know of the new Prohibited List issued by the plaintiff after the agency contract was executed limiting the defendant's binding authority, *your verdict must be in favor of the defendant, Diversified Insurance Agency and against the plaintiff.*" (R. 144)

The jury's answers to propositions 1 and 3 require judgment for Diversified under this instruction.

Instruction No. 9-J stated:

> "An insurance company cannot reduce an agent's binding authority without communicating to the agency *specific notice* as to change or reduction in his binding authority.

The jury found in propositions 1 and 3 that State Auto had failed to show Divisified received the 1964 edition of the Prohibited List or any other specific underwriting guides which would have precluded binding the coverage for Mr. Crawforth. The only issue resolved favorably to State Auto was one requiring defendant to make an inquiry concerning risks such as Mr. Crawforth's. A duty to inquire is not the equivalent of a lack of authority.

As stated in Instruction 9-J State Auto could not reduce Diversified's binding authority without communicating to it some "specific notice as to the change or reduction." No such "specific notice" was offered into evidence. Once again the jury's findings that there were no prohibited lists or underwriting guides received by Diversified which would have prohibited binding the Crawforth risk show that there was no "specific notice" as to the change or reduction of Diversified's binding authority.

In entering judgment for State Auto, the trial court ignored the very principles of law it had approved in submitting the matter to the jury. Proper application of those principles in light of the jury's findings requires a reversal of that judgment.

CONCLUSION

State Auto sought out Diversified to become its agent. The agency contract subsequently signed was drafted by State Auto. It limited Diversified's authority to bind coverage, as is here relevant, only to those prohibited risks in its manual or "specific underwriting guides" while at the same time demanding a broad exercise of discretion and independent judgment by Diversified.

The jury found the application Diversified bound which gave rise to this suit was not a risk prohibited by either State Auto's manual or its "underwriting guides" in light of the manual or guides then available to Diversified.

Even if there was some question whether the Crawforth risk was acceptable to State Auto, Diversified still had authority under its granted rights to exercise judgment to bind the coverage pending some action by State Auto on the application.

State Auto admitted it had a duty to its agents to consider applications on even prohibited risks. It in effect demanded an open ended option on such insurance however by not giving any time limits in which it would act upon such an application.

The application here in question was in State Auto's office for two full work weeks before any action was taken on it. Within a few hours of its rejection, and prior

to receipt of notice of the rejection by Diversified, a loss was incurred.

Diversified was an agent for several insurers and could have placed the coverage with other insurers. State Auto was well aware of this fact.

In reality State Auto is now demanding that its agent insure it against losses attributed to an ambiguous agency contract, unbusinesslike office procedures, and its own lack of diligence in fulfilling a duty to which it readily admitted.

The judgment of the lower court should be reversed.

MAILING NOTICE

I hereby certify I personally delivered two copies of the foregoing brief, to Jay E. Jensen, 1205 Continental Bank Building, Salt Lake City, Utah 84101 this ..... day of July, 1971.

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