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The Role Of The Employer In Employer-Administered Group Insurance Plans - Elfstrom v. New York Life Insurance Company

The Role Of The Employer In Employer-Administered Group Insurance Plans

Elfstrom v. New York Life Insurance Company[1]

Plaintiff Elfstrom was president and majority stockholder of a corporation which held a group insurance policy issued by the defendant. He directed an employee, Mrs. Still, who handled the administration of the corporation's group insurance program, to enroll his daughter, Brenda. Mrs. Still filled out Brenda's application and policy certificate and, in doing so, made a number of misstatements regarding the eligibility of the applicant. Although she was a part-time employee, Brenda failed to meet the technical requirements for eligibility under the policy.[2] After Brenda's death Elfstrom brought suit for benefits under the policy, claiming that because Mrs. Still was the insurer's agent and enrolled Brenda with knowledge of her ineligibility, the insurer could not assert that ineligibility as a defense. The insurer, contending that Mrs. Still was not its agent, raised the defense of ineligibility and filed a cross-complaint asking for rescission of the policy. The trial court held that Mrs. Still was not the insurer's agent and permitted the insurer to rescind the insurance certificate issued to Brenda. The Supreme Court of California, concluding that the corporation, through Mrs. Still, was acting as an agent of the insurer in administering the policy and that errors in administration were, thus, attributable to the insurer, reversed the decision of the trial court and held that the insurer could not raise the defense of ineligibility.[3] The court went on to hold that the insurer would be entitled to rescission of the certificate of life insurance issued to Brenda if it were proved that the plaintiff-beneficiary, Elfstrom, had fraudulently misrepresented material facts in Brenda's application for insurance and remanded the case for a finding on this issue.[4]

The issues before the court in *Elfstrom* are peculiar to employer-administered group insurance administration, for it is the employer's role in the effective functioning of this kind of insurance which sets it apart from all other insurance programs.[5] The typical insurance policy is a contract between the insurer and the insured. As contracting parties, their acts and omissions are covered by a relatively well defined body of law. Group insurance, on the other hand, substitutes the employer as the second contracting party in place of the insured. The policy is issued directly to the employer. Usually the insured employee never sees the master policy; his knowledge of its terms is

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1. 67 Cal. 2d 560, 432 P.2d 731, 63 Cal. Rptr. 35 (1967).
2. Brenda was enrolled under Class C coverage. To be eligible for this coverage the applicant must have worked at least thirty-two hours per week for a period of six months prior to applying, and must have earned at least two hundred dollars per month. Brenda attended school and met the eligibility requirements for a period of less than four months instead of the required six. 432 P.2d at 733, 63 Cal. Rptr. at 37.
3. "We are convinced that the employer is the agent of the insurer in performing the duties of administering group insurance policies." 432 P.2d at 737, 63 Cal. Rptr. at 41.
4. 432 P.2d at 739–40, 63 Cal. Rptr. at 43–44.
5. For an explanation of the normal operation of group insurance plans, see D. GREGG, AN ANALYSIS OF GROUP LIFE INSURANCE 24–44 (1950).

limited to that acquired through informal channels or from publications put out by the insurer or the employer during subscription drives.[6] It is this lack of knowledge and the resulting dependence upon the employer to handle "the details" of the insurance program which create most of the legal difficulties in group insurance litigation.

In employer-administered group insurance plans, the employer performs the functions connected with the administration of the policy, functions which, under normal insurance contracts, are handled by the insurer. As a result, the legal capacity of the employer in such insurance plans is highly uncertain. The employer is the real insured under the policy and, as such, appears to be acting in behalf of the employees. The employees depend on the employer to handle the "details" necessary to procure and maintain insurance coverage. At the same time, the employer performs the administrative functions normally assumed by the insurer, and, in that respect, seems to be acting for the insurer. Controversy over the role of the employer has been generally concerned with his actions in three areas: 1) enrollment of employees and general administration; 2) payment of premiums; and 3) notice of claims. In resolving the litigation in these areas the courts have almost universally adopted the law of agency. However, the application of agency principles to determine the legal status of the employer has not been uniform. The cases are almost equally split between those which hold the employer to be an agent of the insurer[7] and those which hold him to be an agent of the employees.[8]

The decision which undoubtedly has had the greatest effect on judicial thought in this area was handed down by the Supreme Court in the case of *Boseman v. Connecticut General Life Insurance Co.*[9] The issue facing the Court in that case was not one of employer administration but was, rather, a conflict of laws problem. The appellant, an employee enrolled in a group insurance plan, argued that since he had been enrolled under the policy in Texas, the law of that state should be controlling. He buttressed that position with the theory that the policyholder, his employer, acted as an agent of the insurer in administering the policy in Texas. The Court decided against the

6. Occasionally the certificate of insurance issued to the employee as notice that coverage has begun will contain some information about the specific terms of the policy.

7. *See, e.g.,* Dorman v. John Hancock Mut. Life Ins. Co., 25 F. Supp. 889 (S.D. Cal. 1939), *aff'd,* 108 F.2d 220 (9th Cir. 1940); Piedmont S. Life Ins. Co. v. Gunter, 108 Ga. App. 236, 132 S.E.2d 527 (1963); Cason v. Aetna Life Ins. Co., 91 Ga. App. 323, 85 S.E.2d 568 (1954); Equitable Life Assur. Soc. v. Florence, 47 Ga. App. 711, 171 S.E. 317 (1933); Baum v. Massachusetts Mut. Life Ins. Co., 357 P.2d 960 (Okla. 1960); Coker v. Aetna Life Ins. Co., 188 S.C. 472, 199 S.E. 694 (1938). *Cf.* Washington Nat'l Ins. Co. v. Burch, 293 F.2d 365 (5th Cir. 1961); Metropolitan Life Ins. Co. v. Pope, 193 Ark. 139, 97 S.W.2d 915 (1936).

8. *See, e.g.,* Metropolitan Life Ins. Co. v. Quilty, 92 F.2d 829 (7th Cir. 1937); Aetna Life Ins. Co. v. Messier, 173 F. Supp. 90 (M.D. Pa. 1959); Thigpen v. Metropolitan Life Ins. Co., 57 Ga. App. 405, 195 S.E. 591 (1938); Kloidt v. Metropolitan Life Ins. Co., 18 N.J. Misc. 661, 16 A.2d 274 (Sup. Ct. 1939); Layman v. Continental Assur. Co., 416 Pa. 155, 205 A.2d 93 (1964); McFadden v. Equitable Life Assur. Soc., 351 Pa. 570, 41 A.2d 624 (1945); Best v. Equitable Life Assur. Soc., 165 Pa. Super. 452, 68 A.2d 400 (1949); Bahas v. Equitable Life Assur. Soc., 128 Pa. Super. 167, 193 A. 344 (1937). *See also* Wing v. John Hancock Mut. Life. Ins. Co., 314 Mass. 269, 49 N.E.2d 905 (1943) (dictum); Hroblak v. Metropolitan Life Ins. Co., 50 Ohio L. Abs. 395, 79 N.E.2d 360 (Ct. App. 1947) (dictum).

9. 301 U.S. 196 (1937).

employee on the ground that the real contract of insurance was not the enrollment of the employee in Texas but the master policy issued to the employer in Pennsylvania.[10] However, the Court felt compelled to refute the agency argument:

> Employers regard group insurance not only as protection at low cost for their employees but also as advantageous to themselves in that it makes for loyalty, lessens turn-over and the like. When procuring the policy, obtaining applications of employees, taking payroll deduction orders, reporting changes in the insured group, paying premiums and generally in doing whatever may serve to obtain and keep the insurance in force, *employers act not as agents of the insurer but for their employees or for themselves.*[11]

This portion of the *Boseman* opinion is open to criticism on three grounds. First, although group insurance may be desirable from the point of view of both the employer and his employees, the employer's administration of the program also greatly benefits the insurer:

> Much of the work of soliciting individuals for insurance and practically all of the duties of collecting insurance premiums have been taken over by the group client's organization. The obvious result is that there are fewer functions to be performed by the insurance agent or broker and by the insurance company's salaried personnel than in the case of individual insurance.[12]

Second, in concentrating solely on the benefit flowing from the employer's actions, the Court ignored other widely accepted criteria of agency relationships, such as control over the agent, consent to the agency relationship, and public policy.[13] Third, the broad, all-encompassing language of the *Boseman* decision glosses over the fact that widely differing considerations may be applicable to the various facets of the employer's administration. Regrettably, in later decisions, courts failed to appreciate the narrow issue actually involved in *Boseman* and cited the case for the sweeping proposition that the employer is always the agent of his employees in administering group insurance. The result has been a line of authority which lacks both careful analysis and flexibility.[14]

The real impact of *Boseman,* however, resulted not from its analysis or arguments, but from its presentation of the issues. Because the *Boseman* Court dealt only with the question of agency, most courts, whether they accept the *Boseman* conclusion or not, have reduced the range of issues connected with employer administration of

10. 301 U.S. at 203–04. The Court held that the master policy and not the certificate issued to the employee constituted the contract of insurance. *See* D. GREGG, AN ANALYSIS OF GROUP LIFE INSURANCE 59–60 (1950). For an example of a case deciding this question solely on the agency issue, see Continental Assur. Co. v. Henson, 297 Ky. 764, 181 S.W.2d 431 (1944).

11. 301 U.S. at 204–05 (emphasis added).

12. D. GREGG, AN ANALYSIS OF GROUP LIFE INSURANCE 104 (1950).

13. W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 3 (1964); RESTATEMENT (SECOND) OF AGENCY §§ 1, 14 (1958).

14. *See* cases cited note 8 *supra.*

group insurance to the single question of agency. Thus, it was to this question that the *Elfstrom* court turned thirty years after the decision in *Boseman*. While the *Elfstrom* court realized that the issue of the employer's agency could not be determined simply from an analysis of the benefit flowing from his activities,[15] it seized upon equally narrow and precarious arguments in finding the employer to be the agent of the insurer:

> The most persuasive rationale for adopting the view that the employer acts as the agent of the insurer, however, is that the employee has no knowledge of or control over the employer's actions in handling the policy or its administration. An agency relationship is based upon consent by one person that another shall act in his behalf and be subject to his control. . . . It is clear . . . that the insurer-employer relationship meets this agency test with regard to the administration of the policy, whereas that between the employer and its employees fails to reflect true agency.[16]

While it is true that the employee has, normally, little or no control over his employer, the insurer probably has no more effective control over the employer than does the employee. This is especially true in the case of group programs which are completely administered by the employer.[17] If the insurer's "consent" to the employer's agency can be found from the simple act of entering into a group insurance contract, then the employee's consent may equally be implied from his applying for insurance which he knows will be administered by his employer.[18]

It would appear that the use of abstract, generalized criteria in attempting to resolve the agency issue is inconclusive at best, for, in the final analysis, the employer simply doesn't fit the normal agency mold. His position and actions are defined by economic expediency, not by legal theories. The real question, therefore, is one of allocating a risk which none of the parties anticipated; the answer can be found not in the application of inappropriate legal formulas but through a practical analysis of the facts of each case.

One general area of litigation, as noted earlier, involves the role of the employer in the enrollment of employees under a group program

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15. The employer, the employee, and the insurer enjoy distinct advantages from this form of insurance. The employer, at a comparatively small cost, is enabled to reduce labor turnover and to enhance the loyalty of its employees and their families. The employee benefits by obtaining insurance at modest cost, without the necessity of a physical examination. Group insurance is profitable to the insurer because it sells policies on a mass basis at negligible per capita sales cost. 432 P.2d at 735, 63 Cal. Rptr. at 35.

16. *Id.* at 738, 63 Cal. Rptr. at 42.

17. Essentially there are two forms of group insurance administration. The employer may simply serve as a forwarding agent for the insurance company which handles most of the clerical work, or, as in *Elfstrom*, the employer may completely administer the program, merely sending the insurer a list of the insured employees and remitting premiums. D. GREGG, AN ANALYSIS OF GROUP LIFE INSURANCE 71 n.17, 115–22 (1950).

18. *Elfstrom* is representative of a great many cases which have arrived at the conclusion that the employer is always the agent of the insurer, but which have failed to support their conclusions with compelling arguments. *See* cases cited note 7 *supra*.

and in the general clerical administration of that program. The *Elfstrom* case dealt with a typical problem in this area. The court there held that since the employer was the agent of the insurer, the employer's failure to recognize the ineligibility of the employee was attributable to the insurer and could not be used to bar plaintiff's recovery on the policy. A similar result was reached in *John Hancock Mutual Life Insurance Company v. Dorman*[19] on the theory that the insurer was estopped from asserting the ineligibilty of the employee because the employer was the agent of the insurer and, in that capacity, had accepted premiums from the ineligible employee over a considerable period of time. However, the approaches taken in *Elfstrom* and *Hancock* apparently overlook the complexities which are involved when agency principles are applied. The bare assertion that the employer is the agent of the insurer is insufficient to charge the insurer with full responsibility for his acts. Even if the employer is declared the agent of the insurer, another question remains: the determination of the scope of the employer's authority as agent of the insurer. Since it is highly unlikely that an insurer would give an employer the express authority to alter the terms of the master policy by enrolling ineligible employees, the real issue appears to be the extent of the employer's apparent authority. In cases where the employee is completely ignorant of the eligibility requirements of the policy (and this would probably include the majority of the cases) the apparent authority question is greatly simplified, since the employee's reliance on the employer is absolute. Where, as in *Elfstrom,* the employee is in a position to know the terms of the policy, the issue becomes the much more difficult one of the employer's apparent authority to modify the express terms of the policy. These complex agency problems are, of course, avoided by those courts which hold the employer to be the agent of the employee in the enrollment process.[20]

These same issues are present in cases where, instead of enrolling ineligible employees, the employer fails to notify an employee that he has become ineligible for further coverage or keeps the employee on the company rolls after employment has in fact ceased. As in the cases dealing with registration, most courts have decided these questions by merely holding the employer to be an agent of the employee or the insurer.[21]

The enrollment problem is clouded by the fact that employees are usually not adequately informed of the eligibility requirements of the master policy. Where the employee is left ignorant of the eligibility standards of the policy, the strict application of the rule that the employer is the agent of the employee would deny coverage to that employee, in the event of an enrollment mistake by the employer, without

19. 108 F.2d 220 (9th Cir. 1940).

20. *See, e.g.,* Equitable Life Assur. Soc. v. Hall, 253 Ky. 450, 69 S.W.2d 977 (1934). The *Hall* case was held not to apply to group insurance programs administered by one other than an employer. Kentucky Home Mut. Life Ins. Co. v. Marshall, 291 Ky. 120, 163 S.W.2d 45 (1942).

21. *Compare* Pilot Life Ins. Co. v. McCrary, 103 Ga. App. 549, 120 S.E.2d 134 (1961) *and* Shanks v. Travelers' Ins. Co., 25 F. Supp. 740 (N.D. Okla. 1938), *with* Duval v. Metropolitan Life Ins. Co., 82 N.H. 543, 136 A. 400 (1927) *and* Wyatt v. Security Benefit Life Ins. Co., 178 Kan. 91, 283 P.2d 243 (1955).

regard to the employee's total lack of responsibility for that mistake. By the same token, the fast adherence to the theory that the employer is the agent of the insurer in cases where the employee is made fully aware of the eligibility requirements and, thus, should be aware of any mistake made by the employer concerning his eligibility, would impose an undue hardship on the insurer and bestow an undeserved benefit on the employee.[22] Accordingly, the real issue in the enrollment cases should be not the dry legal question of whether the employer is the agent of the insurer or the employee, but the more practical consideration of whether or not the insurer has adequately familiarized the employees with the eligibility standards of the policy. To the extent that agency principles are applied on a case by case basis, with the result hinging on whether or not the insurer has fully acquainted the employees with the prerequisites for their eligibility, the agency formula can produce equitable solutions to the enrollment problem. The strict adherence to one of the two agency theories, however, will necessarily result in inequities.

The payment of premiums has been the most fertile source of litigation in group policy administration. In most cases, the issue is the effect on the status of the employee's coverage of the employer's failure to remit to the insurer premiums deducted from the employee's salary. This area of litigation differs from the enrollment cases in that, with a few exceptions,[23] the express terms of the policy do not directly deal with the method of payment. In spite of this distinction, the courts, in resolving this problem, have split along the same lines as the enrollment cases. Some have held the employer to be an agent of the insurer and, hence, have concluded that his deductions end the employee's payment responsibilities.[24] Others have decided that the employer is an agent of his employees and denied relief to the insured employee.[25]

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22. The *Elfstrom* court partially recognized this problem, holding that the father could not recover on the policy if he procured the insurance coverage for his daughter with the knowledge that she was ineligible, and remanding the case for a finding of fact on this issue. However, the fact that the father in *Elfstrom* was the employer as well as the beneficiary under the policy may have been a crucial factor in this holding.

23. *See, e.g.*, Swift & Co. Employees Benefit Ass'n v. Lemire, 145 S.W.2d 698 (Tex. Civ. App. 1940).

24. *See, e.g.*, Aetna Life Ins. Co. v. Acker, 93 F.2d 975 (3d Cir. 1937); General Am. Life Ins. Co. v. Gant, 119 S.W.2d 693 (Tex. Civ. App. 1938). The same rule has been applied to social clubs and lodges whose officers administer group policies. *See, e.g.*, Grossman v. London Guar. & Accident Co., 124 Misc. 520, 208 N.Y.S. 582 (Sup. Ct. 1925); Waites v. Brotherhood of Maintenance of Way Employees, 181 S.C. 215, 186 S.E. 276 (1936).

25. Some courts have held that the policy lapsed simply because the employer was not an agent of the insurer for the purpose of collecting premiums. *See, e.g.*, Equitable Life Assur. Soc. v. Yates, 288 Ky. 309, 156 S.W.2d 128 (1941); Rivers v. State Capital Life Ins. Co., 245 N.C. 461, 96 S.E.2d 431 (1957); South Branch Valley Nat'l Bank v. Williams, 155 S.E.2d 845 (W. Va. 1967). Other courts have taken the further unnecessary step of holding the employer to be an agent of the employees. *See, e.g.*, McVay v. Mutual Ben. Health & Accident Ass'n, 26 F. Supp. 208 (N.D. Okla. 1939); Boger v. Prudential Ins. Co., 259 N.C. 125, 130 S.E.2d 64 (1963); Haneline v. Turner White Casket Co., 238 N.C. 127, 76 S.E.2d 372 (1953); Hanaieff v. Equitable Life Assur. Soc., 371 Pa. 560, 92 A.2d 202 (1952). When dealing with non-group policies the courts have had no difficulty in holding that the failure of an employer to remit premiums lapses the policy. *See, e.g.*, McFarland v. Businessmen's Assur. Co., 105 Ga. App. 209, 124 S.E.2d 432 (1962); Holloman v. Jefferson Standard

Usually the employee's only contact with the payment process is the signing of a card authorizing paycheck deductions in an amount necessary to defray the premiums. Under such circumstances, the employee has no control over the process of payment and no way of discovering any failure to pay on the part of his employer. A rule holding him responsible for his employer's failure to pay would put him in an extremely vulnerable position. If the insurer's failure to acquaint the employee with his payment responsibilities, together with the total circumstances of a case, has led the employee to believe that payment through his employer by means of paycheck deductions terminates his payment responsibility, then the insurer should not be permitted to raise non-payment as a defense.[26] The same result could be reached by treating the employer as the agent of the insurer; the paycheck deductions would then be direct payments to the insurer's agent and would, thus, terminate the employee's payment obligation.

Another approach to this problem, distinct from the agency theory, is the possibility of treating the insurer's acceptance of the salary deduction plan, with its attendant risks, as a substitute for direct payment. If this theory were adopted, the employee's authorization for deductions from his salary would, for the purposes of his right to recover on the policy, constitute absolute payment. An analogous approach was taken in *National Benefit Association v. Jackson*,[27] in which an order drawn by an employee on his employer as a part of his monthly salary was held to be absolute payment of an insurance premium even though the employer erroneously refused to pay the insurer. The court in that case reasoned that the insurer's acceptance of the order constituted a waiver of cash payment and the substitution in its stead of a right of action against the employer.[28] The use of similar reasoning with respect to the insurer's acceptance of a salary deduction scheme would guarantee employee coverage and, at the same time, leave the resolution of any legal difficulties concerning the actual exchange of cash to the insurer and the employer, the parties most responsible for the existence of such difficulties. This approach, however, involves an even greater degree of legal sophistry than the theory that the employer is the agent of the insurer. The results of the two theories are, for all practical purposes, identical.

Cases involving the effect of an employee's notification of the employer, rather than the insurer, of claims under the policy constitute the third major area of litigation with respect to group policy administration. These cases are similar to those dealing with enroll-

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Life Ins. Co., 188 So. 500 (La. App. 1938). *But see* Leverett v. Continental Cas. Co., 246 Mich. 172, 225 N.W. 515 (1929).

26. *Cf.* All States Life Ins. Co. v. Tillman, 226 Ala. 245, 146 So. 393, 396 (1933):

> It is said that, so far as the employer is concerned, this is a paternalistic form of insurance. Even so, in its modern development group policies have come to embody quite liberal terms. Insurers have the distinct advantage of dealing, in course of operations under the policy, with one person; the employer to whom the policy is issued. The rules of law construing insurance contracts favorably to the insured, the employee, in this form of insurance, have all the basic reasons for their application here.

27. 114 Ill. App. 533, 2 N.E. 414 (1885).

28. 2 N.E. at 416.

ment and eligibility problems in that they are affected by the express terms of the policy. The basic issue in these cases is whether or not the employee has complied with the specific notification procedure outlined in the policy. The employer's role in the process is not determined by the simple application of an "agent" label, but depends upon an examination of the scope and source of his agency and his authority to change or waive portions of the policy itself.[29] However, these cases are different from those previously discussed in that the issue is not the effect of the employer's failure to perform as the policy requires or the parties expect, but the insured's failure to follow the express terms of the policy. Essentially the factual question upon which most of these cases hinge is whether the insurer has placed the employer in a position of apparent authority to receive notification of claims. Where it was shown that some overt act of the insurer led the employee to reasonably believe that the employer was the proper recipient of claims, the courts have generally held the insurer liable under the policy.[30] However, in the absence of such obvious grounds for relief, the courts have uniformly held that lack of notice to the insurer was fatal to the employee's claim.[31] This latter result seems unjustified. Lack of notification is a defense based upon provisions in the master policy issued to the employer. If the insurer has failed to inform the employee of these provisions and if the employee has otherwise fully

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29. *Cf.* Reserve Ins. Co. v. Duckett, 240 Md. 591, 214 A.2d 754 (1965).

30. In Porter v. Equitable Life Assur. Soc., 71 S.W.2d 766 (Kan. City, Mo. Ct. App. 1934), for example, an employer's refusal to entertain an employee's claim was held binding on the insurer after the insurer had directed the insured to contact the employer for a determination of his claim. These actions by the employer were held to be a waiver by the insurer of the requirement to furnish proof of disability. Similarly, in Coleman v. Metropolitan Life Ins. Co., 127 S.W.2d 764 (St. Louis, Mo. Ct. App. 1939), notice to the employer was held to be notice to the insurer where the insurer circulated "Statement of Claim" forms which contained instructions directing the employee to forward claims to the employer who would then send them to the insurer. If the policy expressly directs the employee to give notice of claims to his employer, then the employer is clearly the agent of the insurer for that purpose. Sullivan v. John Hancock Mut. Life Ins. Co., 110 S.W.2d 870 (St. Louis, Mo. Ct. App. 1937). *See generally* Weathers v. Sovereign Camp W.O.W., 169 S.C. 402, 112 S.E. 44 (1922). Special exceptions may also be made in the case of children:

> It is well settled in this Commonwealth that an employer or a union under a group policy does not act as agent for the insurer. . . .
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> We do not consider these cases to be equally applicable to this group insurance policy issued to a school district to insure young children (in this case a six-year-old). . . . When small children are led by the insurance company into dealing exclusively with school authorities, the company must accept the school authorities as its agents.

Frankel v. Reliance Mut. Life Ins. Co., 199 Pa. Super. 295, 184 A.2d 305, 308-09 (1962).

31. Brown v. Metropolitan Life Ins. Co., 166 Kan. 616, 203 P.2d 150 (1949); Wing v. John Hancock Mut. Life Ins. Co., 314 Mass. 269, 49 N.E.2d 905 (1943); Dewease v. Travelers Ins. Co., 208 N.C. 732, 182 S.E. 447 (1935); Tibbs v. Equitable Life Assur. Soc., 172 S.W.2d 539 (Tenn. Ct. App. 1943) (dictum); Ralston v. Metropolitan Life Ins. Co., 90 Utah 496, 62 P.2d 1119 (1936). A similar problem arises in connection with notice of change of beneficiaries. With some exceptions, the courts have been more liberal in this area. *Compare* Boehne v. Guardian Life Ins. Co., 224 Minn. 57, 28 N.W.2d 54 (1947) *and* Kaiser v. Prudential Ins. Co., 272 Wis. 527, 76 N.W.2d 311 (1956), *with* Johnson v. Johnson, 139 F.2d 930 (5th Cir. 1953). *But see* Eason v. Aetna Life Ins. Co., 212 Cal. App. 2d 607, 28 Cal. Rptr. 291 (1963) in which the court held that an employer was not the agent of the insurer for the purpose of forwarding an employee's notice that he wished to withdraw from the program. The *Elfstrom* court specifically expressed its disapproval of the *Eason* case. 432 P.2d at 738, 63 Cal. Rptr. at 42.

performed his duties under the policy, all considerations of fairness militate against permitting the insurer to raise this defense. To do so would be to hold the employee responsible for knowledge which he has little opportunity to acquire and would open the way for a variety of technical policy requirements that could make a mockery of employee coverage.

Agency principles were used in the three basic areas discussed herein to determine the insurer's liability under the policy. There are, additionally, two situations in which the law of agency has been used to ascertain the insurer's liability to third parties. Occasionally, state governments have attempted to prosecute insurance companies which carried group insurance within their boundaries for "doing business" in the state without proper licensing. It has been argued by the states that the employer holding the policy and administering a group insurance program is an agent of the insurer and, thus, that the insurer is subject to the state's licensing laws.[32] Without exception, the courts in such cases have found that the insurer was not subject to the state's licensing provisions for the simple reason that the employer was not an agent of the insurer.[33] Their preoccupation with the single issue of the employer's agency is an over-simplification of the problem. It is clear that the employer could be the agent of the insurer in part of the administration of a group policy without subjecting the insurer to prosecution for "doing business" without a license. Conversely, the insurer might well be found to be "doing business" in the absence of any agency relationship with the employer if, for example, its field representative took an overactive part in helping the employer administer the policy.[34] In short, the courts have apparently confused the broad question of an insurer's responsibility to others for the actions of the employer with the more technical question of its existence as a business entity within state boundaries. Obviously the two will not always be coextensive.

There have also been a few cases dealing with the question of whether service of process on an employer administering a group policy constitutes proper service on the insurer. The court in *Blaylock v. Prudential Insurance Co.*[35] relied upon the absence of an agency relationship between the insurer and the employer in holding that service on the employer was insufficient to bring the insured within the court's jurisdiction. The significance of this issue has been greatly eroded by the proliferation of "long arm" statutes, the provisions of which do not require personal service within the jurisdiction.[36]

The common thread running through almost all of the cases in this area is a failure to appreciate that the label "agent" carries with

32. For an example of these licensing laws, see MD. ANN. CODE art. 48A, §§ 42–61A (1968).

33. *See, e.g.*, Connecticut Gen. Life Ins. Co. v. Spear, 185 Ark. 615, 48 S.W.2d 553 (1932); People *ex rel.* Kirkman v. Van Amringe, 266 N.Y. 277, 194 N.E. 754 (1935).

34. *See* note 17 *supra* and accompanying text.

35. 84 Ga. App. 641, 67 S.E.2d 173 (1951).

36. *E.g.*, MD. ANN. CODE art. 75, §§ 94–100 (1965). *See* Auerbach, *The "Long Arm" Comes to Maryland*, 26 MD. L. REV. 13 (1966); Note, *Civil Procedure — Service of Process on the Foreign Corporation*, 18 U. FLA. L. REV. 145 (1965).

it no intrinsic determination of the scope of the agency relationship. It seems clear that the *Elfstrom* holding is undesirable to the extent that it assumes the employer to be the agent of the insurer in all activities connected with the administration of a group policy. The particular circumstances of a case may well dictate the opposite conclusion. For the same reason, the *Boseman* rationale is misleading when accepted blindly. It is the assumption, implicit in both decisions, that there is no middle ground between finding that the employer is a general agent for either the insurer or the insured which is the failing of both. As noted in *Iowa Mutual Insurance Co. v. Richards*:[37] "It may be established that a person is an agent of the insured or the insurer, or of both parties. . . ." Perhaps the legal difficulties surrounding employer-administered group policies stem from the fact that agency principles are entirely inappropriate in that area. It can be persuasively argued that the employer acts for himself only and is the agent of neither the insurer nor the insured. In *Langley v. Prudential Insurance Co.*,[38] the court answered an argument that the employer was an agent of the insurer with the observation: "The Pullman Company [the employer] was a party to the insurance contract entered into between it and the defendant [the insurer]. It was a party to the contract adverse to the defendant. The contract was not a contract of agency. It was a contract of insurance."[39] While perhaps couched in oversimplified language, this statement does suggest that the application of agency concepts in this area of litigation is artificial. What is really at issue is not agency, but the illusion of agency, not a relationship based upon general theorems of the law, but one which has as its foundation the particular facts in each case. Perhaps the most equitable solution in these cases would be to ignore the role of the employer, for purposes of the litigation, and resolve the conflict by balancing the relative rights and equities of the insurer and the employee. Such an approach would avoid the agency dilemma altogether and, at the same time, would allow the courts more flexibility in dealing with group insurance problems.

While statutory guidelines would be extremely helpful,[40] much of the litigation over group insurance administration could be avoided

37. 229 F.2d 210, 212 (7th Cir. 1956). *See* Greer v. Equitable Life Assur. Soc., 180 S.C. 162, 185 S.E. 68 (1936). Although there have been no Maryland cases determining the employer's position in a group insurance program, two Maryland cases dealing with individual insurance policies suggest that the court of appeals might take a position between *Elfstrom* and *Boseman*. In Sun Insurance Office, Ltd. v. Mallick, 160 Md. 71, 153 A. 35 (1931), the court found that an insurance agent acted for the insurer in collecting premiums and remitting them, but was the agent of the insured in soliciting the insurance. And in District Agency Co. v. Suburban Delivery Service, 224 Md. 364, 370, 167 A.2d 874, 877 (1961), the court stated: "Essentially, we think that District Agency acted as broker for Suburban in obtaining the insurance . . . but that it acted as agent for the insurance company both in countersigning the policy and with regard to the collection of premiums."

38. 161 S.W.2d 27 (St. Louis, Mo. Ct. App. 1942).

39. *Id.* at 30–31.

40. Statutory provisions relating to the employers' administration of group insurance programs have been limited to measures excluding employers from the licensing regulations covering insurance agents. *E.g.*, MD. ANN. CODE art. 48A, § 166 (1968). *But cf.* Voris v. Aetna Life Ins. Co., 26 F. Supp. 722 (N.D. Okla. 1939). The court decided in *Elfstrom* that the California Insurance Code was not useful in reaching its conclusions, 432 P.2d at 738 n.9, 63 Cal. Rptr. at 42 n.9.

if insurance companies would insert provisions in their policies expressly delineating the responsibilities of each party and, at the same time, sponsor more complete programs of employee education dealing with their policies. It should be kept in mind, however, that the courts will be reluctant to allow insurance companies to shift too much of the risk of employer negligence onto the insured employees, who are least able to bear the losses resulting from poor administration of the group policy.

> Group insurance is a comparatively new form of insurance, and each problem presented . . . concerning it should be approached with the purpose of giving to it every legitimate opportunity of becoming a social agency of real consequence. . . . These results would be defeated if the employer, by poor administration could be instrumental in causing the insurance to become unavailable to the employee.[41]

Hopefully the courts will begin to abandon the rigidity in approach which has characterized too many of the cases in this area and move toward a consideration of the group insurance problem that is more responsive to contemporary social pressures.[42]

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41. Neider v. Continental Assur. Co., 213 La. App. 621, 35 So. 2d 237, 240 (1948). *See* note 26 *supra* and accompanying text.

42. According to the 1967 LIFE INSURANCE FACT BOOK, published by the Institute of Life Insurance at the end of 1966, group life insurance accounted for thirty-five per cent of all life insurance in force, or some 343.4 billion dollars' worth. Even more suggestive of the social implications of this form of insurance is the fact that group insurance programs covering small groups are rapidly increasing. In 1956 group insurance policies covering twenty-five or fewer employees accounted for 24.5% of total group life coverage; in 1963 this figure had risen to 54.1%. For a good discussion of the social consequences of expanding group insurance coverage see S. KIMBELL, INSURANCE & PUBLIC POLICY 307 (1960).