Hofstra Law Review

Volume 4 | Issue 3 Article 10

1976

# Smith v. Westland Life Insurance Co.

Barry C. Weiss

# SMITH v. WESTLAND LIFE INSURANCE CO.

INSURANCE—*Termination of Interim Insurance Coverage—Notice in the absence of a refund of the initial premium is not sufficient to terminate a contract for temporary insurance.* 15 Cal. 3d 111, 539 P.2d 433, 123 Cal. Rptr. 649 (1975).

In *Smith v. Westland Life Insurance Co.*,[1] the Supreme Court of California resolved a question raised but left unanswered more than 20 years ago in the landmark case of *Ransom v. Penn Mutual Life Insurance Co.*:[2] where an applicant for life insurance pays an amount equal to the first premium in return for a conditional receipt[3] which results in interim coverage, by what method can the insurance company terminate such coverage?

In *Smith*, after meeting with the carrier's agent, the plaintiff's decedent decided to apply for life insurance protection in the amount of $3,000. The plan provided for the distribution of an additional $3,000 in the event of accidental death and included a clause which waived payment of the premium in the event of total disability. Smith signed an application form and paid an amount equal to the first premium. In exchange, he was given a conditional receipt of the insurability type.[4]

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1. 15 Cal. 3d 111, 539 P.2d 433, 123 Cal. Rptr. 649 (1975) (in bank).

2. 43 Cal. 2d 420, 274 P.2d 633 (1954). The *Ransom* court noted:

> We need not decide . . . whether, as suggested by some courts, [a contract for temporary insurance] can be terminated only by actual rejection of the application and return of the premium payment.

*Id.*, 274 P.2d at 636.

3. Generally, conditional receipts may be classified as of either the "insurability" or the "approval" type. Where the approval form is employed, immediate coverage is conditioned upon the company's approval of the terms specified in the application. On the other hand, the typical insurability receipt provides that immediate coverage is conditioned upon a finding that the applicant is insurable under industry standards as of the date of the application or the medical examination, whichever is later. O'Neill, *Interim Coverage: Conditional Receipts*, 1964 U. ILL. L.F. 571, 574-75.

The purchaser of life insurance may choose not to pay an amount equal to the first premium upon completion of the application in which case no conditional receipt is issued and no interim coverage is provided. The application is viewed as soliciting an offer by the company. This is commonly referred to as C.O.D. issuance. The offer is made by the company when it delivers the policy and is accepted when the first premium is paid. Thus, no liability is undertaken by the company until the formal policy has been accepted by the applicant. Fortunato, *Conditional Receipts: Should the Uninsurable Have Insurance?*, 1 FORUM, April 1966, at 5, 6.

4. The conditional receipt provided in pertinent part:

> I. That if the Company at its Home Office after investigation shall be satisfied that on the date hereof, or on the date of the medical examination for such insurance, whichever is later, each person proposed for insurance was insurable

At the routine medical examination, Smith was found to be in excellent health, but a subsequent investigation revealed that he was engaged in a hazardous occupation. The company therefore offered to issue a modified policy which did not provide for accidental death benefits or for the waiver of premium payments in case of total disability. A number of attempts by company salesmen to persuade Smith to accept the changes and pay a higher premium proved futile. At the close of the final meeting between the parties, Smith was told that his premium would be refunded. The next day, before the premium had been returned, Smith was killed in an automobile accident. Upon the failure of the company to pay the benefits for which Smith had applied, the plaintiff brought suit in her capacity as administratrix of her husband's estate.[5]

*Ransom v. Penn Mutual Life Insurance Co.*[6] established the rule that the conditional receipt creates coverage as of the date of the application. Such interim coverage incorporates all the terms of the policy sought by the prospective purchaser. The issue in *Smith* was whether oral notice of rejection to the applicant is sufficient to terminate the existing temporary coverage.[7] Finding notice alone to be insufficient, the *Smith* court announced that the carrier would be required to satisfy a dual requirement before temporary coverage could be terminated. The court declared:[8]

> [W]here, as here, the insurer has received an application for insurance together with payment of the premium and thereafter

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> and entitled under the Company's rules and standards to insurance on the plan and for the amount applied for . . . , the insurance protection applied for shall by reason for such payment . . . take effect from the date hereof or from the date of such medical examination, whichever is later.

Smith v. Westland Life Ins. Co., 15 Cal. 3d 111, 113-14 n.3, 539 P.2d 433, 435 n.3, 123 Cal. Rptr. 649, 651 n.3 (1975).

5. *Id.* at 114-15, 539 P.2d at 435-36, 123 Cal. Rptr. at 651-52.

6. 43 Cal. 2d 420, 274 P.2d 633 (1954).

*Ransom* has been influential in a number of jurisdictions. *See, e.g.*, Farmers New World Life Ins. Co. v. Crites, 29 Colo. App. 394, 487 P.2d 608 (1971); Toevs v. Western Farm Bureau Life Ins. Co., 94 Idaho 151, 483 P.2d 682 (1971); Prudential Ins. Co. of America v. Lamme, 83 Nev. 146, 425 P.2d 346 (1967); Allen v. Metropolitan Life Ins. Co., 44 N.J. 294, 208 A.2d 638 (1965); Long v. United Benefit Life Ins. Co., 29 Utah 2d 204, 507 P.2d 375 (1973). It may be assumed that the *Smith* decision will have a similar impact.

7. The trial court ruled in favor of the insurance company and held that a contract for temporary insurance is terminated by rejection of the application and notice to the applicant. Smith v. Westland Life Ins. Co., 15 Cal. 3d 111, 116, 539 P.2d 433, 436, 123 Cal. Rptr. 649, 652 (1975).

8. *Id.* at 121, 539 P.2d at 440, 123 Cal. Rptr. at 656.

> decides to reject it, the contract of insurance immediately created upon the receipt of the application and payment of the premium is not terminated until (a) the insurer has actually rejected the application and by appropriate notice communicated such rejection to the insured and (b) refunded the premium payment to the insured.

In reaching its conclusion, the *Smith* court utilized a mode of analysis similar to that employed previously in the *Ransom* decision. In *Ransom*, upon payment of an amount equal to the first premium, the applicant was given a conditional receipt of the insurability type.[9] Before the company could issue a formal policy, the applicant was killed in an automobile accident. The company returned the premium to the decedent's wife but refused to make any further payment.

Writing for the *Ransom* court, Chief Justice Gibson determined that "a contract of insurance arose upon [the carrier's] receipt of the completed application and the first premium payment."[10] The court premised this conclusion upon the fact that the language of the conditional receipt[11] was ambiguous.[12] The court declared that such ambiguities must be resolved by reference to the "understanding of an ordinary person,"[13] and con-

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9. 43 Cal. 2d 420, 274 P.2d 633, 634 (1954). *See also* note 3 *supra*.

10. *Id.*, 274 P.2d at 635.

11. The receipt in *Ransom* provided:

> If the first premium is paid in full in exchange for the attached receipt . . . when this application is signed the insurance shall be in force, subject to the terms and conditions of the policy applied for, from the date of Part I or Part II of this application, whichever is the later, provided the Company shall be satisfied that the Proposed Insured was at that date acceptable under the Company's rules for insurance upon the plan at the rate of premium and for the amount applied for, but that if such first premium is not so paid or if the Company is not satisfied as to such acceptability, no insurance shall be in force until both the first premium is paid in full and the policy is delivered . . . .

*Id.*, 274 P.2d at 634.

12. The court observed:

> The clause . . . is subject to the interpretation that the applicant is offered a choice of either paying his first premium when he signs the application, in which event "the insurance shall be in force . . . from the date . . . of the application," or of paying upon receipt of the policy, in which event "no insurance shall be in force until . . . the policy is delivered."

*Id.*, 274 P.2d at 635-36.

13. *Id.*, 274 P.2d at 636.

The judicial inclination to protect the weaker party to an adhesion contract by construing the contract in accordance with that party's reasonable expectations has been discussed by a number of commentators. *See, e.g.*, Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 854 (1964); Tobriner & Grodin, *The*

cluded that the ordinary individual "would believe that he would secure the benefit of immediate coverage by paying the premium . . . ."[14] After noting the "obvious advantage to the company"[15] in securing immediate payment of the premium, the court announced:[16]

> [I]t would be unconscionable to permit the company, after using language to induce payment of the premium at that time, to escape the obligation which an ordinary applicant would reasonably believe had been undertaken by the insurer.

Since the company had unilaterally drafted the terms of the receipt,[17] it could have explained the terms clearly if if had desired to do so. The court therefore resolved the ambiguity created by the insurance company in favor of the beneficiary.[18]

That the applicant in *Ransom* may have been uninsurable by industry standards was not decisive of the question of interim

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*Individual and the Public Service Enterprise in the New Industrial State*, 55 CAL. L. REV. 1247, 1273-76 (1967); Note, *Insurance: The Meaning of the Contract in Light of the Insured's Reasonable Expectations*, 2 LINCOLN L. REV. 157 (1967).

14. 43 Cal. 2d 420, 274 P.2d 633, 636 (1954).

15. *Id.*

16. *Id.*

17. *Id.* It has been frequently observed that insurance contracts are contracts of adhesion. *See, e.g.*, Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 966 (1970); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 633 (1943); Lenhoff, *Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law*, 36 TUL. L. REV. 481, 483 (1962); Patterson, *The Delivery of a Life-Insurance* Policy, 33 HARV. L. REV. 198, 222 (1919).

Professor Kessler has noted:

> Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection . . . to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.

Kessler, *supra*, at 632.

18. Ransom v. Penn Mutual Life Ins. Co., 43 Cal. 2d 420, 425, 274 P.2d 633, 636 (1954).

> [T]he canon contra proferentem is more rigorously applied in insurance than in other contracts [footnote omitted], in recognition of the difference between the parties in their acquaintance with the subject matter.

Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 602 (2d Cir.), *cert. denied*, 331 U.S. 849 (1947).

coverage.[19] The court cited a number of cases[20] to support the view that:[21]

> [T]he proviso that the company shall be satisfied that the insured was acceptable at the date of the application creates only a right to terminate the contract if the company becomes dissatisfied with the risk before a policy is issued.

Thus, where an applicant for life insurance dies before the company reaches a decision regarding insurability, the beneficiaries' claim must be satisfied unless the conditional receipt clearly specifies that insurability is a condition precedent to coverage.[22] If the conditional receipt fails to adequately disclaim interim liability, *Ransom* requires that the applicant who pays an amount equal to the first premium receive interim coverage.[23] This is the price California courts require insurance companies to bear for failing to clearly delineate the conditions under which coverage will be made available to the applicant.

In reaching its decision, the *Smith* court purported to apply

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19. 43 Cal. 2d 420, 425, 274 P.2d 633, 636 (1954); *see* Comment, *"Binding Receipts" in California*, 7 STAN. L. REV. 292, 298 (1955).

20. Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599 (2d Cir.), *cert. denied*, 331 U.S. 849 (1947); Occidental Life Ins. Co. of California v. Lame Elk White Horse, 74 A.2d 435 (D.C. Mun. Ct. App. 1950); Reck v. Prudential Ins. Co. of America, 116 N.J.L. 444, 184 A. 777 (Ct. Err. & App. 1936); Duncan v. John Hancock Mut. Life Ins. Co., 137 Ohio St. 441, 31 N.E.2d 88 (1940); Albers v. Security Mut. Life Ins. Co., 41 S.D. 270, 170 N.W. 159 (1918).

21. 43 Cal. 2d 420, 424, 274 P.2d 633, 635 (1955). *But see* O'Neill, *Interim Coverage: Conditional Receipts*, 1964 U. ILL. L.F. 571, 578-85; Comment, *"Binding Receipts" in California*, *supra* note 19, at 299 n.28.

22. This development has not gone without criticism. *See, e.g.*, Fortunato, *supra* note 3, where it is suggested that interim coverage for the uninsurable applicant is inconsistent with established principles of insurance law:

> The insurer's right to select its risk is in accord with the entire philosophy of the law as it applies to life insurance. The courts and the legislature have long recognized the previously unqualified right of a life insurer to decide what applicants it will insure. The entire underwriting process, including application, investigation and evaluation is directed to this end.

*Id.* at 22.

23. In Wernecke v. Pacific Fidelity Life Ins. Co., 238 Cal. App. 2d 884, 48 Cal. Rptr. 251 (1965), the plaintiff's decedent exchanged an amount equal to the first premium for a conditional receipt of the insurability type. He died the following day. In discussing the legal effect of the receipt, the court observed:

> In any event, the language used does not foreclose the implication by the ordinary layman that upon payment of the premium requested he is insured until the company advises him it is not satisfied he is insurable under the plan selected.

Id. at 887-88, 48 Cal. Rptr. at 253.

the same principles that were instrumental in *Ransom*. It postulated that an applicant's expectation of coverage is premised on two acts—the signing of the application and the payment of an amount equal to the first premium.[24] The court concluded:[25]

> This reasonable expectation on the part of the applicant would . . . extend to a continuance of such coverage until the insurer had nullified the two factors responsible for its existence— the application for the policy by rejection and notice of rejection, and the payment of premium by a refund of it.

The court's application of a reasonable expectations analysis demonstrates the extremely malleable nature of the concept. The court observed that an applicant could reasonably expect that notice would be insufficient to terminate temporary coverage unless accompanied by the return of the initial premium. Since the conditional receipt failed to disclose the method of termination, the expectations of the applicant would be controlling.

However justifiable the reasonable expectations analysis might have been in *Ransom*, its application in *Smith* is not only unnecessary but detracts from the strength of the court's opinion. At the heart of the majority opinion is the proposition that a reasonable consumer would expect coverage to continue despite being unequivocally informed to the contrary. As Justice Clark noted in his dissent in *Smith*, a consumer who has been rejected has "no basis . . . for believing that insurance will continue."[26]

In light of the court's strained analysis, it is appropriate to reconsider the issues to determine whether an alternative approach would accomplish the same result. It is submitted that the unconscionable character of the transaction, independent of ambiguities real or contrived,[27] requires that interim coverage continue until the premium is returned to the applicant.

The *Ransom* court noted that interim coverage could be avoided if the carrier were willing to make its intentions clear.

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24. Smith v. Westland Life Ins. Co., 15 Cal. 3d 111, 123, 539 P.2d 433, 442, 123 Cal. Rptr. 649, 658 (1975).

25. *Id.* at 123, 539 P.2d at 442, 123 Cal. Rptr. at 658.

26. *Id.* at 128-29, 539 P.2d at 446, 123 Cal. Rptr. at 662 (Clark, J., dissenting).

27. "[I]n their protective function courts have been known to create ambiguities in order to be able to bring their interpretative power into play." Kessler, *Forces Shaping the Insurance Contract*, 1954 INS. L.J. 151, 163. Professor Kessler has also stated: "[M]any courts have shown a remarkable skill in reaching 'just' decisions by construing ambiguous clauses against their author even in cases where there was no ambiguity." Kessler, *supra* note 17, at 633.

The court stated: "[D]efendant drafted the clause, and had it wished to make clear that its satisfaction was a condition precedent to a contract, it could easily have done so by using unequivocal terms."[28] This language has been extensively relied upon;[29] courts have been reluctant to adopt the view that acceptance of a premium in the absence of temporary coverage is unconscionable per se. In *Thompson v. Occidental Life Insurance Co.*,[30] decided in 1973, the Supreme Court of California reaffirmed the view expressed in *Ransom*:[31]

> [A]n insurance company is not precluded from imposing conditions precedent to the effectiveness of insurance coverage despite the advance payment of the first premium. However, as *Ransom* explains, any such condition must be stated in conspicuous, unambiguous and unequivocal language . . . .

It appears, however, that even the most unequivocal disclaimer, standing alone, will not be sufficient to defeat temporary coverage. Recent cases lend support to the view that if liability is to be limited, not only must the disclaimer be unequivocal, but it must also be affirmatively brought to the attention of the applicant.[32] Since this further step is required by California courts to limit the extent of temporary coverage, logically it must be required in order to avoid temporary coverage completely.

Although the drafting problem in this area does not appear insurmountable,[33] companies "have . . . failed to clarify the lan-

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28. 43 Cal. 2d 420, 425, 274 P.2d 633, 636 (1954).

One commentator has expressed doubt whether the problem is simply a matter of draftsmanship:

> That the company could achieve "retroactive immediate coverage" simply by redrafting its application and receipt seems doubtful. It is the concept of "retroactive immediate coverage" that is deceptive, not the language of the . . . receipt.

Comment, *"Binding Receipts" in California*, *supra* note 19, at 299-300. *See* Fortunato, *supra* note 3, at 21.

29. *See, e.g.*, Metropolitan Life Ins. Co. v. Grant, 268 F.2d 307, 309 (9th Cir. 1959); Thompson v. Occidental Life Ins. Co., 9 Cal. 3d 904, 912, 513 P.2d 353, 357, 109 Cal. Rptr. 473, 477 (1973); Wernecke v. Pacific Fidelity Life Ins. Co., 238 Cal. App. 2d 884, 891, 48 Cal. Rptr. 251, 254 (1965); Brunt v. Occidental Life Ins. Co., 223 Cal. App. 2d 179, 185, 35 Cal. Rptr. 492, 496 (1963).

30. 9 Cal. 3d 904, 513 P.2d 353, 109 Cal. Rptr. 473 (1973).

31. *Id.* at 912, 513 P.2d at 357, 109 Cal. Rptr. at 477.

32. Logan v. John Hancock Mut. Life Ins. Co., 41 Cal. App. 3d 988, 116 Cal. Rptr. 528 (1974); Young v. Metropolitan Life Ins. Co., 272 Cal. App. 2d 453, 77 Cal. Rptr. 382 (1969); *see* Steven v. Fidelity & Cas. Co., 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

33. *See, e.g.*, Palmer v. Mutual Life Ins. Co., 324 F. Supp. 254 (D. Me. 1971).

guage used in such receipts so as to eliminate their patent ambiguities . . . ."[34] The failure of carriers to employ available tools to protect themselves has led one court to speculate:[35]

> [C]ompanies would rather assume a calculated risk in an isolated case . . . than lose the benefits flowing from the general acceptance of premiums in advance, thus binding and committing the insured immediately to the contract as written.

If *Smith* were decided solely on the strength of *Ransom*, it could be argued that the return of the premium is not required if the conditional receipt clearly states that written notice is sufficient to terminate coverage, and this was called to the attention of the applicant. Clearly, such a procedure would not place the applicant in the confusing and uncertain position which the *Smith* court deplored.

The result in *Smith* rested, however, on an additional consideration. The court declared:[36]

> Our decision to adopt this rule is fortified by the consideration recognized in *Ransom* that it is unconscionable for an insurance company to hold premiums without providing coverage.

Although this statement is not an altogether accurate appraisal of the *Ransom* decision,[37] the factors which may justify the company's retention of an amount equal to the first premium upon the signing of the application clearly cease to exist once the company has determined not to issue the policy requested. At that point the company should be required to disgorge the initial payment.

Further, it must be remembered that the conditional receipt is a contract of adhesion.[38] Therefore, the insurance company, as

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34. Smith v. Westland Life Ins. Co., 15 Cal. 3d 111, 121, 539 P.2d 433, 440, 123 Cal. Rptr. 649, 656 (1975).

35. Wood v. Metropolitan Life Ins. Co., 193 F. Supp. 371, 374 (N.D. Cal. 1961), *aff'd*, 302 F.2d 802 (9th Cir. 1962).

36. 15 Cal. 3d 111, 124, 539 P.2d 433, 443, 123 Cal. Rptr. 649, 659 (1975). Applying *Ransom*, the Court of Appeals for the Ninth Circuit has suggested that the rationale of the decision was the unconscionability of taking premiums in advance where no immediate coverage would be forthcoming. Metropolitan Life Ins. Co. v. Grant, 268 F.2d 307, 310 (9th Cir. 1959).

37. The *Ransom* court's finding of unconscionability did not rest exclusively upon the fact that the applicant had made an advance payment of the premium. What the court declared to be unconscionable was the company's use of ambiguous language which would lead the ordinary applicant to surrender the initial payment in the belief that he would secure immediate coverage. *See* text accompanying note 16 *supra*.

38. *See* Smith v. Westland Life Ins. Co., 15 Cal. 3d 111, 122 n.12, 539 P.2d 433, 441

drafter, could unilaterally decide that notice would be sufficient to terminate temporary coverage. In dealing with contracts of adhesion, the Supreme Court of California has stated:[39]

> In standardized contracts . . . which are made by parties of unequal bargaining strength, the California courts have long been disinclined to effectuate clauses of limitation of liability which are unclear . . . inconspicuous or *unconscionable.*

Thus, a clear and conspicuous clause to this effect could be stricken if found unconscionable.[40] Although the court was not faced with this issue in *Smith*, if pressed to decide it, it appears that unambiguous written notice would not be considered sufficient.

In discussing the concept of unconscionability, the court in *Williams v. Walker-Thomas Furniture Co.* noted:[41]

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.

Unconscionability thus includes both procedural and substantive aspects. On a procedural level, the insurance company is in a position to dictate the terms of the conditional receipt. The applicant is not given the opportunity to bargain over the method of termination. He is confronted with the choice of either accepting the term which is offered or foregoing life insurance. The substantive element is also present as the term is unreasonably favorable to the stronger party. The company which receives payment at the time of application is in a decidedly advantageous position. It is free to utilize the deposit; at the same time, the applicant is dependent upon the good faith of the carrier for the prompt return of his payment if he is rejected.[42] It is therefore

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n.12, 123 Cal. Rptr. 649, 657 n.12 (1975). *See also* note 17 *supra*.

39. Steven v. Fidelity & Cas. Co., 58 Cal. 2d 862, 879, 377 P.2d 284, 295, 27 Cal. Rptr. 172, 183 (1962)(holding that an insurance company could not exclude coverage for a flight on an unscheduled airline because the decedent had a reasonable expectation that coverage would exist).

40. *See* Comment, *Contracts of Adhesion Under California Law*, 1 U. SAN FRAN. L. REV. 306, 312 (1967).

41. 350 F.2d 445, 449 (D.C. Cir. 1965).

42. It has been noted that a rejected applicant might never bother to institute legal action for the return of his or her deposit because of the relatively small amount involved. *See, e.g.*, Havighurst, *Life Insurance Binding Receipts*, 33 Ill. L. Rev. 180, 186 (1938); Comment, "*Binding Receipts*" *in California*, *supra* note 19, at 299; Comment, *Life Insur-*

doubtful that the court would permit coverage to be terminated while the company remains free to return the premium at its leisure.

If it is unconscionable for a company to retain premiums after the decision to terminate coverage has been made, it is equally unconscionable for a company to ever accept a premium without providing coverage. The *Ransom* decision did not foreclose the possibility that temporary coverage could be avoided.[43] Similarly, in *Thompson* the California Supreme Court indicated that payment of an amount equal to the first premium at the time of application does not absolutely require coverage in return.[44] The *Smith* court nevertheless construed *Ransom* to stand for the proposition that the acceptance of premiums without providing coverage is unconscionable[45] and thus vitiated the effect of the dicta in *Thompson* and *Ransom*.

Two possible solutions are suggested. State legislatures could require all advance premiums to be held in special interest-bearing accounts.[46] Upon a finding of noninsurability, the proceeds of the account would be returned to the unsuccessful applicant within a specified period of time. This would eliminate the twin evils of unearned advantage to the company and needless delay in returning the payment to its rightful owner.

Alternatively, the current industry practice of accepting premiums prior to the medical examination could be ended.[47] Clearly, where insurability receipts are employed, only the company benefits from receiving the premium prior to the date of the examination. After that date, the insurable applicant could exchange the initial premium for a binding receipt. In this way, the insurable applicant would still gain the advantage of protection during the period between the examination and the issuance of the formal policy. Likewise, this change in practice would not place the uninsurable applicant in a position of dependence regarding the return of the premium, nor would it permit the company a benefit it has not earned.

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*ance Receipts: The Mystery of the Non-binding Binder*, 63 Yale L.J. 523 (1954).

43. *See* text accompanying note 28 *supra*.

44. *See* text accompanying note 31 *supra*.

45. *See* text accompanying note 36 *supra*.

46. *Cf., e.g.*, N.Y. GEN. OBLIG. LAW § 7-103(2)-(a) (McKinney Supp. 1975)(requiring that deposits given for the rental of apartments be kept in separate, interest bearing accounts).

47. *But see* text accompanying notes 33-35 *supra*.

The continuous litigation regarding the legal effect of conditional receipts[48] demonstrates the reluctance of the industry to alter its practices. From the point of view of the carrier, the acceptance of advance premiums continues to be advantageous.[49]

The *Smith* decision reveals a marked sensitivity on the part of the California Supreme Court to the problems of the consumer vis-a-vis the insurance industry. The court's characterization of the retention of the premium without providing coverage as unconscionable[50] had ensured that carriers will not escape interim liability. Until state legislatures take affirmative action, the courts will be obligated to continue to supervise the industry in order to negate the effect of practices calculated to benefit the carrier to the corresponding disadvantage of the public.[51]

*Barry C. Weiss*

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48. *See* Annot., 2 A.L.R. 2d 943 (1948).

49. *See* Smith v. Westland Life Ins. Co., 15 Cal. 3d 111, 124, 539 P.2d 433, 443, 123 Cal. Rptr. 649, 659 (1975).

50. *See* text accompanying note 36 *supra*.

51. [I]n the purely judicial development of our law we have taken the law of insurance practically out of the category of contract, and we have established that the duties of public service companies are not contractual, as the nineteenth-century sought to make them, but are instead relational; they do not flow from agreements which the public servant may make as he chooses, they flow from the calling in which he has engaged and his consequent relation to the public.

R. POUND, THE SPIRIT OF THE COMMON LAW 29 (1921).