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Apparent Authority: Basis of Liability - Gulf Gularanty Life Inc. Co. v. Mrs, Erin Lewis Middleton, Invididually and as Ex'x of the Estate of Victor L. Middleton, et al.

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APPARENT AUTHORITY: BASIS OF LIABILITY

Gulf Guaranty Life Ins. Co. v. Mrs. Erin Lewis Middleton, individually and as Ex'x of the Estate of Victor L. Middleton, et al., 361 So. 2d 1377 (Miss. 1978).

The doctrine of apparent authority is certainly not a new and recently evolving scheme for finding liability. As early as 1885[1] the courts emerged with this basic principle, but it has now grown into one of the most inescapable liability traps. It is well-established in the general laws of agency in Mississippi. *Clow Corporation v. J. D. Mullican, Inc.*,[2] *McPherson v. McLendon*,[3] *Steen v. Andrews*,[4] and the present case[5] are but a few of the cases adhering to the doctrine of apparent authority.

Pursuant to a master insurance policy effective July 24, 1970, Citizens Bank, as agent of Gulf Guaranty Life Insurance Company, issued Victor L. Middleton a credit insurance policy. This policy was issued by one Broome, an employee of Citizens and the authorized agent for Gulf Guaranty. October 23, 1978, Middleton sought a loan and credit life insurance in the amount of ten thousand dollars ($10,000.00),[6] thus increasing the total credit insurance with Gulf through Citizens to nineteen thousand and fifty dollars ($19,050.00). A provision in the master policy, as well as in the certificate, limited Gulf's liability to any borrower to ten thousand dollars ($10,000.00), regardless of the number of certificates issued.[7] Middleton was fifty-six at the time of issuance. He died the day following the issuance of certificate. Mrs. Middleton, executrix of her deceased husband's estate, sought recovery of the face value of the certificate. Gulf presented Mrs. Middleton with a check for nine thousand and fifty dollars ($9,050.00) and tendered another check in the amount of nine hundred fifty ($950.00). She refused the latter and brought suit for the remaining ten thousand ($10,000.00) plus interest on the nine thousand and fifty dollars ($9,050.00).[8]

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[1]Rivari v. Queen's Ins. Co., 62 Miss. 720 (1885).

[2]356 So. 2d 579 (Miss. 1978).

[3]221 So. 2d 75 (Miss. 1969).

[4]223 Miss. 694, 78 So. 2d 881 (1955).

[5]Gulf Guaranty Life Ins. Co. v. Mrs. Erin Lewis Middleton, individually and as ex'x. of the Estate of Victor L. Middleton, et al., 361 So. 2d 1377 (Miss. 1978).

[6]For a comparable fact situation, *see* Flaherty v. Gulfco Life Ins. Co., 327 So. 2d 436 (La. App. 1976).

[7]The following was not the schedule in effect at the time of issuance of the master policy. This schedule became effective April 14, 1971 and was the schedule in effect on October 23, 1975.

Age of Insured Debtor	Maximum Amount	Maximum Term of Insurance
15-55 inclusive	$20,000	60 months
56-60 inclusive	10,000	36 months
61-65 inclusive	5,000	36 months
66-69 inclusive	1,000	12 months

[8]The suit was instituted against Gulf Guaranty Life Insurance Company, Citizens Bank of Columbia, Mississippi, and Broome. *Id.* at 1380.

The trial court found that the limitation in the policy was waived since Gulf had written policies six times in the past in excess of the limitation. The court held that the waiver of the limitations in the past was a ratification of each excess transaction and Gulf was, therefore, estopped to deny that the policy in question was in full force and effect. The court further held that liability arose at his death. A contrary decision, the trial court concluded, would be unconscionable and inequitable.

The supreme court affirmed Gulf's liability[9] by holding that Gulf's approval of the previous six instances of excess insurance, along with its acceptance of the benefits, provided the basis for ratification of the certificate in question.[10] Thus, Gulf's argument that its lack of knowledge prevented ratification was inapplicable under the present circumstances.

The court cited *McPherson v. McClendon*[11] as controlling on the law of agency and further stated its applicability to insurance agency relationships in this state.[12] *McPherson* holds that a principal is estopped from denying the authority of his agent, especially where the agent with the knowledge and consent of the principal holds himself out to the world as having certain powers.[13] Under this principle, the court held, Broome was an agent of Gulf. *Steen v. Andrews*,[14] which was also cited in *McPherson*, controlled on the issuance of apparent authority. The court ruled that Broome created such authority.

Finally, the court rejected Gulf's contention that waiver and estoppel could not be used to enlarge the risks covered by a policy or create a new and different contract.[15] This argument, the court noted, did not overcome the fundamental fairness demanded by similar circumstances in *Thurmond v. Carter*.[16] In *Thurmond*, the court held that a principal could not silently acquiesce in acts by his agent and obtain the resulting benefits as long as the situation proved advantageous, and repudiate the acts when an unfortunate occurrence made it in his best interest to do so.[17]

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[9]361 So. 2d at 1382. The supreme court reversed the trial court's decision on Citizen's liability. They found both Citizens and Broome were held secondarily liable to Gulf. *Id.* at 1384. *See, e.g.*, Aven v. Singleton, 132 Miss. 256, 266-67, 96 So. 165, 167-68 (1923).

[10]*Id.*

[11]221 So. 2d 75.

[12]361 So. 2d at 1382.

[13]221 So. 2d at 78.

[14]223 Miss. 694, 78 So. 2d 881 (1955).

[15]361 So. 2d at 1383.

[16]*Id.*

[17]*Id.*

GENERALITIES IN THE LAW

I. *Agency Relationships*

It is well-established that the general laws of agency apply to agency relationships in the insurance industry.[18] In determining agency problems, the courts have looked at two areas: first, the nature of the agency — general, local or soliciting,[19] second, whether the agency is one of express authority[20] or apparent authority.[21] Each case must stand on its own. A determination of whether a principal will be liable for the acts of his agent will necessarily depend "on the rank and status of the agent and on the subject matter on which he assumes to act."[22]

The agent is often acting for the principal. To third persons, the agent appears to actually be the principal or at least to have the same powers.[23] However, in looking to the principal for liability, it is necessary to assert on what basis the third person has standing against the principal. Apparent authority may provide that basis. This authority arises from conduct or representations by the principal that allows third persons to reasonably believe that the agent has the power to act.[24] This belief in the agent's power will generally operate to hold the principal liable to those who have changed their position in reliance.[25] Under apparent authority, however, detrimental change in position is not essential.[26]

Apparent authority is a privileged power possessed by the agent. This power, which is based on the principal's manifestations of con-

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[18]*See, e.g.*, The Globe Mutual Life Ins. Co. of N.Y. v. Wolff, 95 U.S. 326 (1877); McPherson v. McClendon, 221 So. 2d 75 (Miss. 1969); American Bankers' Ins. Co. v. Lee, 161 Miss. 85, 134 So. 836 (1931); Germania Life Ins. Co. v. Bouldin, 100 Miss. 660, 56 So. 609 (1911).

[19]*See, e.g.*, Saucier v. Life & Casualty Ins. Co., 189 Miss. 693, 198 So. 625 (1940); Travelers Fire Ins. Co. v. Price, 169 Miss. 531, 152 So. 889 (1934); Yorkshire Ins. Co., Ltd. of London v. Gazis, 215 Ala. 564, 112 So. 154 (1927); Home Ins. Co. v. Soreby, 60 Miss. 302 (1882).

[20]*See, e.g.*, Bunge Corp. v. Biglane, 418 F. Supp. 1159 (D.C. Miss., 1976); Butler v. Bunge Corp., 329 F. Supp. 47 (D.C. Miss., 1971).

[21]*See, e.g.*, NMS Industries, Inc. v. Premium Corp. of America, Inc., 487 F.2d 292 (C.A. Miss. 1973), McPherson v. McLendon, 221 So. 2d 75 (Miss. 1969); Steen v. Andrews, 223 Miss. 694, 78 So. 2d 881 (1955); Wellford and Withers v. Arnold, 162 Miss. 786, 140 So. 220 (1932); Tarver v. J. W. Sanders Cotton Mill, 187 Miss. 111, 192 So. 17 (1939).

[22]16A APPLEMAN, INSURANCE LAW AND PRACTICE § 9121 at 391 (1968) [hereinafter cited as APPLEMAN].

[23]*See, e.g.*, Canal Ins. Co. v. Bush, 247 Miss. 87, 154 So. 2d 111 (1963); Rivara v. Queen's Ins. Co., 62 Miss. 720 (1885).

[24]W. SEAVEY, LAW OF AGENCY § 8 at 13 (1964) [hereinafter cited as W. SEAVEY].

[25]*See, e.g.*, McPherson v. McLendon, 221 So. 2d 75, 78 (Miss. 1969).

[26]*See, e.g.*, Tarver v. J. W. Sanders Cotton Mill, 187 Miss. 111, 192 So. 17 (1939). *See generally*, Cummings, *Binding the Insurer-Apparent Authority and Estoppel in Virginia*, 27 WASH. AND LEE L. REV. 102 (1970).

sent, allows the agent to bind his principal.[27] The consent may be founded upon an inherent authority to bind or may be created by ratification of the prior acts.

Whether it be by accepting premiums,[28] accepting risks,[29] or filling out and countersigning policies,[30] the agent by his acts, agreements, or representations can bind the insurer. However, as a general rule, the insured has an obligation to ascertain the agent's powers and limitations when he *knows* the agent is acting under special or restricted authority.[31]

The test of the agent's powers is what the public believed he possessed, rather than what his principal had actually conferred upon him.[32] If the agent, under the guise of apparent authority, seeks to modify, waive or alter express provisions in the contract, it appears to the public that he has this authority. The principal may therefore find himself liable when his agent acts beyond power or authority actually conferred.[33] Where the insured has no knowledge, actual or constructive, of restrictions to the contrary, the power of the agent to alter or waive provisions is equal to that of the principal.[34] It is vital to note that knowledge by the insured of the agent's limited ability to act for his principal will discharge liability of the principal.[35]

Sutherland v. Federal Insurance Company[36] was one of Mississippi's first decisions on apparent authority. Earlier in *Rivara v.*

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[27]W. SEAVEY, *supra.* § 8, at 14.

[28]*See, e.g.*, Consolidated Underwriters Ins. Co. v. Landers, 235 So. 2d 818 (Miss. 1970); Progressive Fire Ins. Co. v. Brinson, 76 S.E.2d 807 (1953). *See generally*, COUCH ON INSURANCE 2d § 26:228 (1960) [hereinafter cited as COUCH].

[29]*See, e.g.*, Insurance Co. of N. Am. v. Ours, 266 So. 2d 168 (D.C. Fla. 1972); St. Paul Fire and Marine Ins. Co. v. Loving, 162 Miss. 114, 140 So. 727 (1932). *See generally*, Couch, *supra* at 26:196.

[30]*See, e.g.*, Sunx Ins. Office Ltd. v. Gonce, 224 F.2d 250 (9th Cir. 1955); Canal Ins. Co. v. Bush, 247 Miss. 87, 154 So. 2d 111, (1963). *See generally*, Couch, *supra* at § 16:181.

[31]Cavins v. Planters Bank & Trust Co., 187 F.2d 906, 908 (5th Cir. 1951); Bunge Corp. v. Biglane, 418 F. Supp. 1159, 1165 (D.C. Miss. 1976); Consumers Credit Corp. of Miss. v. Swilley, 243 Miss. 838, 849, 138 So. 2d 885, 889 (1962); Aetna Insurance Co. v. Singleton, 174 Miss. 556, 566, 567, 164 So. 13, 16 (1935); *See generally*, COUCH, *supra* § 26:70.

[32]Tarver V. J. W. Sanders Cotton Mill, Inc., 187 Miss. 111, 118, 192 So. 17, 19 (1939).

[33]*Id.*

[34]*See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Loving, 163 Miss. 114, 119, 140 So. 727, 728 (1932); Interstate Life & Accident Co. v. Ruble, 160 Miss. 206, 133 So. 223 (1931); Hartford Fire Ins. Co. v. Clark, 154 Miss. 418, 122 So. 551 (1929); *See generally*, COUCH, *supra* § 16:222.

[35]Richard v. Springfield Fire & Marine Ins. Co., 114 La. 794, 38 So. 563, 565 (1905).

[36]97 Miss. 345, 52 So. 689 (1910); In Sutherland, the agent bound the company in a renewal agreement. However, the company had earlier revoked the agent's authority without knowledge of revocation to the insured.

Queens Insurance Company,[37] the court had implied this principle by holding that an insurance agent clothed with authority to make contracts of insurance or to issue policies stood in the place of the company to the insured. In *Germania Life Insurance Company v. Bouldin*,[38] the court reemphasized that insurance companies were governed by the general laws of agency.[39] The court also held that an agent with powers conferred by the principal or powers that third persons had a right to assume the agent possessed would bind the insurer. The principal would be estopped from denying the authority of an agent.

The courts have retained these general principles. In Mississippi it is well-settled that an insurance agent acting with apparent authority may through his actions, conduct, or misrepresentations waive or modify provisions and consequently bind the insurer to an applicant.[41]

II. *Estoppel*

If the insurance company permits the agent to act with the semblance of full authority, it will be estopped to deny his authority.[42] If the agent knowingly changes the material facts or the risks involved, the insurer is estopped from asserting the invalidity of the policy.[43] The insurer may also be estopped to deny a waiver of the contract provision especially inserted for the insurer's benefit if the agent acts in such a manner to cause third persons using ordinary and prudent business habits to reasonably rely on him.[44]

Likewise, a principal may be estopped to deny the existence of a policy or an act of an agent where he accepts and retains the benefits

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[37]62 Miss. 720 (1885).

[38]100 Miss. 660, 56 So. 609 (1911).

[39]*Id. See, e.g.*, The Globe Mut. Life Ins. Co. of N.Y. v. Wolff, 95 U.S. 326 (1877); McPherson v. McLendon, 221 So. 2d 75 (Miss 1969); American Bankers Ins. Co. v. Lee, 161 Miss. 85, 134 So. 836 (1931); Germania Life Ins. Co. v. Bouldin, 100 Miss. 660, 56 So. 609 (1911).

[40]100 Miss. at 678, 56 So. at 613; *see also* Liverpool & London & Globe Ins. Co. v. Delaney, 190 Miss. 404, 200 So. 440 (1941) where the general agent supplied with forms to be countersigned, could waive any provisions contained within the policy.

[41]There are many recent cases adhering to this principle. *See, e.g.*, Hohenberg Bros. Co. v. Killebrew, 505 F.2d 643 (5th Cir. 1974); NMS Industries, Inc. v. Premium Corp. of America, Inc., 487 F.2d 292 (5th Cir. 1973).

[42]*See, e.g.*, Steen v. Andrews, 223 Miss. 694, 78 So. 2d 881 (1955). Union Mutual Life Ins. Co. v. Wilkinson, 80 U.S. (13 Wall.) 222, 20 L. Ed. 617 (1871). *See generally*, 43 AM. JUR. 2d *Insurance* § 156 (1969).

[43]*See, e.g.*, Big Creek Drug Co. v. Stuyvesant Ins. Co., 115 Miss. 333, 75 So. 768 (1917); Scottish Union & National Ins. Co. v. Wylie, 120 Miss. 681, 70 So. 835 (1916). *See generally*, COUCH, *supra* § 26:132.

[44]*See, e.g.*, Union Compress & Warehouse Co. v. Mobus, 217 So. 2d 23 (Miss. 1968); Steen v. Andrews, 223 Miss. 694, 78 So. 2d 881 (1955).

of a transaction.[45] The basis of liability is that the agent at the time had full knowledge of all the material facts of the retention of the benefits. Thus, such knowledge is imputed to the principal.[46] Knowledge imposes a liability upon the principal and prevents him from profiting by his own wrong.[47] Again, it is important to note that knowledge by the principal is essential, and lack of full knowledge by the agent cannot be imputed to the principal.[48] "There can be no estoppel by acceptance of benefits in ignorance of the facts by the party allegedly estopped."[49]

Estoppel generally is based upon five elements:

1. There must have been a false representation or a concealment of a material fact.
2. The representation must have been made with knowledge, actual or virtual, of the fact.
3. The party to whom the representation was made must have been ignorant of the truth of the matter.
4. The representation must have been made with the intention, actual or virtual, that the party should act on it.
5. The other party must have been induced to act on it.[50]

Estoppel is premised upon a prejudicial change of position by the insured.[51] The change must have resulted from the agent's apparent authority to act, transact, contract, waive or modify. Usually it is an overt action, but inaction or silence may also amount to a misrepresentation or concealment.[52] In *Deposit Guaranty National Bank v. Prudential Insurance Company*,[53] the court stated, "In order for estoppel by conduct to arise there must be intentional false representation or concealment of facts, and the party affected thereby must be ignorant of the truth and must have been induced to act or fail to act because of the conduct of the other."[54]

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[45]*See, e.g.*, Consolidated Underwriters Ins. Co. v. Landers, 235 So. 2d 818 (Ala. 1970). *See generally*, COUCH *supra* § 26:228.

[46]*See, e.g.*, World Ins. Co. v. Bethea, 230 Miss. 765, 93 So. 2d 624 (1957); Hartford Fire Ins. v. Williams, 165 Miss. 233, 145 So. 94 (1933); Home Fire Ins. v. Williams, 165 Miss. 233, 145 So. 94 (1933).

[47]*See generally*, 28 AM. JUR. 2d, *Estoppel and Waiver*, § 59 (1966).

[48]*See, e.g.*, Vaughan v. Lewis, 236 Miss. 792, 112 So. 2d 247 (1959); Hall & Brown Wood Working Machine Co. v. Haley Furniture & Mfg. Co., 174 Ala. 190, 56 So. 726 (1911).

[49]Simpson v. M-P Enterprises, Inc., 252 So. 2d 202, 207 (Miss. 1971).

[50]MYERS, LIFE AND HEALTH INSURANCE LAW § 6:14, at 178 (1972).

[51]*See generally*, 16A APPLEMAN, *supra*. at § 9081 (1968); McPherson v. McLendon, 221 So. 2d 75 (Miss. 1969); Steen v. Andrews, 223 Miss. 694, 78 So. 2d 881 (1955).

[52]*See, e.g.*, Strauss Bros v. Denton, 140 Miss. 745, 106 So. 257 (1925); McIntosh v. Hill, 212 Ala. 136, 102 So. 101 (1924).

[53]Deposit Guaranty National Bank v. Prudential Ins. Co., 195 So. 2d 506, 511 (Miss. 1967). *See also*: United Timber and Lumber Co. v. Hill, 226 Miss. 540, 84 So. 2d 921 (1956).

[54]*Id.* at 511.

III. *Waiver*

A waiver is a voluntary and intentional relinquishment of a known and existing right.[55] Knowledge of material facts is essential in order for waiver to rest upon intention, although conduct by the agent may also amount to a waiver. The courts, especially in insurance cases, have used the words waiver and estoppel interchangeably. Cases have generally interpreted the implied waiver by the agent's conduct essentially as an estoppel.[56] Waiver may be shown by an express agreement or by implications from the acts and conduct of the agent acting within his real or apparent authority.[57] However, a waiver will not be implied where neither the insurer nor his agent had full knowledge of all pertinent and material facts.[58]

Courts recognize that general agents may waive provisions in contracts, provided of course, that they are acting pursuant to either actual or apparent authority.[59] The proof of the waiver must be clear and convincing.[60] It also appears that there is a very distinct difference between waiving forfeiture clauses and waiving provisions that operate to extend coverage when the subject matter is within the terms of the policy.[61] *St. Paul Fire and Marine Insurance Company v. Air Comfort Engineers, Inc.* held that estoppel may apply to a forfeiture of contracted benefits but cannot create a liability or coverage not previously contracted.[62] One case has even held that under *no* conditions can the coverage be extended by waiver and estoppel.[63] This rationale is premised upon the basis that the insured should not be able to take advantage of the insurer for something he has not contracted or paid for, whereas in a forfeiture case, one is waiving something he had a right to previously.[64]

IV. *Ratification*

The principle of ratification differs from the principles of waiver and estoppel. Ratification does not depend upon a change in position

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[55]43 AM. JUR. 2d, *Insurance* § 1053 (1969).

[56]Ins. Co. of St. Louis v. Yates, 200 So. 2d 622 (Fla. 1967); Newriter v. Life & Casualty Ins. Co. of Tenn., 229 Ala. 359, 157 So. 73 (1934).

[57]Couch, *supra.* at § 26:232 (1960).

[58]Standard Life Inc. Co. v. Baldwin, 199 Miss. 271, 24 So. 2d 360, 361 (1946).

[59]Richard v. Springfield Tire and Marine Ins. Co., 114 La. 794, 38 So. 563 (1905); Liverpool & London & Globe Ins. Co. v. Delaney, 190 Miss. 404, 200 So. 440 (1941); Canal Ins. Co. v. Bush, 247 Miss. 87, 154 So. 2d 111 (1963).

[60]Michigan Millers Mutual Ins. Co. v. Lindsey, 285 So. 2d 908, 911 (Miss. 1973).

[61]Morris v. Am. Fidelity Fire Ins. Co., 253 Miss. 297, 173, So. 2d 618 (1965); *see generally*: Stonewall Life Ins. Co. v. Cooke, 165 Miss. 619, 144 So. 217 (1932); United States Fidelity & Guaranty Co. v. Yost, 183 Miss. 65, 183 So. 260 (1938).

[62]St. Paul Fire & Marine Ins. Co. v. Air Conform Engineers, 253 So. 2d 525 (Miss. 1971).

[63]Reserve Life Ins. Co. v. Ramsey, 98 Ga. App. 732, 106 S.E.2d 820 (1958).

[64]*See* 1 A.L.R.3d 1139 (1956).

nor a detrimental reliance.[65] The principal's liability may be based upon expressed authority conferred on the agent,[66] apparent authority,[67] acceptance and retention of benefits,[68] prejudicial change in position,[69] silence or inaction inducing another to suffer prejudice,[70] and acts and conduct amounting to waiver.[71] None of these equate with ratification, nor are they prerequisites. Ratification is a unilateral act of confirmation by the principal after the agent has acted outside the scope of his authority.[72] To constitute ratification it is only necessary that the insurer manifest assent to the unauthorized acts.[73]

The conditions necessary to establish ratification are as follows:

1. A contract which is suceptible of ratification must be established.
2. The contract must be one the principal himself could authorize.
3. The person making the contract must have purported to act as the agent of the insurer.
4. Ratification must rest upon knowledge of the facts by the principal; the principal must be cognizant of what has been done or must have intentionally acted.[74] (There can be no implied ratification of an act when at the time of claimed ratification, the principal was ignorant of the facts.)

In Mississippi cases the knowledge requirement seems essential to the principal's liability. Other states have held that the knowledge necessary to ratify need not be actual but may be shown by customs and course of dealing.[75]

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[65]W. SEAVEY, *supra.* § 32, at 58 (1964).

[66]Butler v. Bunge Corp., 329 F. Supp. 47 (D.C. Miss. 1971); Bunge Corp. v. Biglane, 418 F. Supp. 1159 (D.C. Miss. 1976).

[67]Clow Corp. v. J. D. Mullican, Inc., 356 So. 2d 579 (Miss. 1978); McPherson v. McLendon, 221 So. 2d 75 (Miss. 1969); Steen v. Andrews, 223 Miss. 694, 78 So. 2d 881 (1955).

[68]Consol. Underwriters Ins. Co. v. Landers, 235 So. 2d 818 (Ala. 1970); Progressive Fire Ins. Co. v. Brinson, 88 Ga. App. 498, 76 S.E.2d 807 (1953); *see also*: COUCH, *supra.* at § 26:228 (1960).

[69]McPherson v. McLendon, 221 So. 2d 75 (Miss. 1969). *See generally*: 16A APPLEMAN, *supra.* at § 9081 (1968).

[70]McIntosh v. Hill, 212 Ala. 136, 102 So. 101 (1924); Strauss Bros. v. Denton, 140 Miss. 745, 106 So. 257 (1925).

[71]NMS Industries, Inc. v. Premium Corp. of Am., Inc., 487 F.2d 191 (5th Cir. 1973); Hohenberg Bros. Co. v. Killebrew, 505 F.2d 643 (5th Cir. 1974).

[72]W. SEAVEY, *supra.* § 32, at 58 (1964).

[73]*Id.* § 37 at 67.

[74]COUCH, *supra.* at § 26:33 (1960). Gulf Refining Co. v. Travis, 201 Miss. 336, 29 So. 2d 100; sugg. of error overr. 30 So. 2d 398 (1974); Ledoux v. Old Republic Life Ins. Co., 253 So. 2d 731 (La. App. 1970); Flaherty v. Gulfco Life Ins. Co., 327 So. 2d 436 (La. App. 1976).

[75]Shaw v. Bailey, 36 Ala. 250, 55 So. 2d 132 (1951); Alabama Mills, Inc. v. Smith, 237 Ala. 296, 186 So. 699 (1939).

Analysis

Gulf Guaranty is the first time that the Mississippi Supreme Court has addressed a fact situation of this nature.[76] The court found the principles of apparent authority and estoppel in *McPherson v. McClendon*[77] controlling and held "No authority other than this decision is really essential upon which to base the conclusion reached as to Gulf."[78] Thus, it is clear that this decision was rendered in accordance with agency law.

The trial court found that Gulf had waived the limitations in the master policy and was estopped from denying the certificate was in full force and effect. Because Gulf had failed to repudiate the past excess policies and had retained the benefits, the court also found that Gulf had ratified the issuance of this certificate. The Mississippi Supreme Court did not discuss the principles of waiver and estoppel in reference to current law which states that coverage can not be extended nor created by waiver and estoppel. Rather, the court sought to base its decision solely on the agency law in *McPherson v. McLendon*.[79] Furthermore, the court did not explain why waiver and estoppel was not a viable argument. The case revolved around an express provision limiting the insurer's liability and yet the court failed to examine or explain their lack of examination of this argument.[80] Mississippi law clearly reveals that waiver and estoppel cannot extend coverage.[81] In essence, Middleton was extended coverage that was expressly limited in the policy.[82]

It appears that the court has now for the first time affirmatively established that past conduct can be interpreted as a present ratification of a particular act even without full knowledge of all the material facts at the alleged time of ratification.[83] Gulf alleged that knowledge

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[76]Liverpool & London & Globe Ins. Co. v. Delancey, 190 Miss. 404, 200 So. 440 (1941). This case was similar to the instant case in that the agent was furnished with blank policies to be filled in, countersigned and issued by him without having to request or secure approval from the principal. The court held that the agent had all the powers of a general agent and could waive any of the provisions.

[77]McPherson v. McLendon, 221 So. 2d 75 (Miss. 1969).

[78]361 So. 2d at 1382.

[79]*Id.*

[80]Grain Dealers Mutual Ins. Co. v. Ellis, 234 So. 2d 925 (Miss. 1970); Frank Gardner Hardware and Supply Co. v. St. Paul Fire and Marine Ins. Co., 245 Miss. 320, 148 So. 2d 190 (1963); Employers Fire Ins. Co. v. Speed, 242 Miss. 341, 133 So. 2d 627 (1961).

[81]Grain Dealers Mutual Ins. Co. v. Ellis, 234 So. 2d 925 (Miss. 1970); Frank Gardner Hardware and Supply Co. v. St. Paul Fire and Marine Ins. Co., 245 Miss. 320, 148 So. 2d 190 (1963); Employers Fire Ins. Co. v. Speed, 242, Miss. 341, 133 So. 2d 627 (1961).

[82]361 So. 2d at 1379.

[83]Research of all Mississippi case law reveals no cases that affirmatively state that past conduct can be interpreted as a present ratification without full knowledge of all material facts.

was an essential ingredient for ratification. In response, the court's opinion reads, "This, of course, is the law, but can offer no comfort to Gulf."[84] The supreme court explained that this particular situation was based upon the events in the past.

In *Shaw v. Bailey*[85] the Alabama Court of Appeals was addressed with this similar problem and found that past acts constituted a ratification of the current act. Here the court held that authority from the owner to sell and dispose of property with full knowledge of past sale may be implied by his acquiescence and ratification:

> For instance, if the plaintiff here, prior to the time of the sale by his son to the defendants of the bale of cotton here in controversy, had knowledge that his son had shortly before, during that cotton season, sold other bales of his cotton to defendants, and received the pay therefrom, and that, upon being fully informed thereof by the defendants, he made no objection, but ratified without protest the act of his son in making such sales, then he is estopped from saying that the son had no authority to make the particular sale here, unless the plaintiff shows that before this sale he notified defendants that the authority of his son had been terminated.[86]

In a more recent Louisiana case,[87] the court established ratification of the unauthorized acts because the insurer with actual knowledge had issued excess certificates twice in the past and the insurer had made no effort to repudiate the acts of the agent nor return the benefits. Many cases have been cited supporting this proposition.

Before the decision in the instant case, it appears that Mississippi had not affirmatively decided that past conduct, custom, or acquiescence, can at a later time act as a ratification of the present act without full knowledge at the time of the alleged ratification. Apparently, however, the Mississippi Supreme Court has implied "ratification" through waiver and estoppel principles. The end result therefore is a matter of terminology and interpretation. The court may simply have found that Gulf, the insurer, was estopped from denying "ratification" because Middleton, the insured, had been misled in the past. For this reason, the decision manages to lay an unclear precedent.

The court's refusal to rule that waiver and estoppel could not be used to extend coverage merits further scrutiny. The decision clearly holds that the doctrine of apparent authority is controlling. This doctrine however is based upon the principles of waiver and estoppel. It is clear that Mississippi,[88] as well as the Fifth Circuit and other cir-

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[84]361 So. 2d at 1382.

[85]Shaw v. Bailey, 36 Ala. 250, 55 So. 2d 132 (1951).

[86]*Id.* at 134.

[87]Ledoux v. Old Republic Life Ins. Co., 233 So. 2d 731. (La. App. 1970).

[88]Grain Dealers Mutual Life Ins. Co. v. Ellis, 234 So. 2d 925 (Miss. 1970); Frank Gardner Hardware and Supply Co. v. St. Paul Fire and Marine Ins. Co., 245 Miss. 320,

cuits[90] asserts that waiver and estoppel may *not* be used to create primary liability or extend coverage expressly excluded in the policy terms. For example, in *Employers Fire Insurance Co. v. Speed*,[91] the policy excluded liability resulting from damage of the building while in the process of construction unless entirely enclosed and under a roof. The building, without a complete roof, was destroyed by a windstorm. The court held waiver and estoppel can only have a field of operation when the subject matter is within the policy and it cannot operate radically to change the terms, notwithstanding the fact that the applicant had contacted the agent who was supposed to write construction coverage. A Louisiana Court in 1970[92] held that waiver and estoppel cannot be used to extend or enlarge coverage beyond the terms of the policy. Twice before an excess policy limitation had been issued, and although the court affirmed the insurer's liability, it did so on the basis of ratification and not on the basis of waiver and estoppel. In *Mississippi Hospital and Medical Services v. Lumpkin*,[93] the supreme court held that waiver and estoppel cannot be used to create a primary liability or to *increase the coverage of insurance contracts*. There are numerous cases clearly purporting that the majority rule is that waiver and estoppel cannot be used to create or extend liability.[94]

The opinion implies that the waiver and estoppel argument proposed by Gulf was not sufficient to overcome the law expressed in *McPherson v. McLendon*.[95] Furthermore, the court in citing *Thurmond v. Carter*,[96] specifically held that fundamental fairness dictated a favorable outcome for Middleton. In *Thurmond*[97] the court found that a contractor who frequently retained convicts for hire, could not silently acquiesce and obtain benefits so long as they were advantageous and repudiate them when an unfortunate occurrence made it to his interest to do so. In the instant case,[98] notwithstanding the express policy limitation, the supreme court ruled Gulf also should not be able to accept the premiums and deny the excess policy later.

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148 So. 2d 190 (1963); Employers Fire Ins. Co. v. Speed, 242 Miss. 341, 133 So. 2d 627 (1961).

[89]Kaminer v. Franklin Life Ins. Co., 472 F.2d 1073 (5th Cir. 1973); Hemming v. Manhattan Life Ins. Co., 427 F.2d 340 (5th Cir. 1970).

[90]State Farm Mut. Auto Ins. Co. v. Petsch, 261 F.2d 331 (10th Cir. 1958); Montgomery v. M.F.A. Mut. Ins. Co., 250 F.2d 357 (8th Cir. 1957).

[91]Employers Fire Ins. Co. v. Speed, 242 Miss. 341, 133 So. 2d 627 (1961).

[92]Ledoux v. Old Republic Life Ins. Co., 233 So. 2d 731 (La. App. 1970).

[93]Miss. Hosp. and Medical Servs. v. Lumpkin, 229 So. 2d 573 (Miss. 1969).

[94]*Supra*, notes 88-90.

[95]McPherson v. McLendon, 221 So. 2d 75 (Miss. 1969).

[96]Thurmond v. Carter, 59 Miss. 127 (1881).

[97]*Id.*

[98]Gulf Guaranty Life Ins. Co. v. Middleton, 361 So. 2d 1377 (Miss. 1978).

Conclusion

Gulf Guaranty Life Insurance Co. v. Middleton is one of the first Mississippi cases to state that past conduct and acts may serve to bind a principal under the theory of ratification, although the principal lacks present knowledge. Knowledge is essential for ratification; however, apparent authority has no element of pre-requisite knowledge. The agency laws in Mississippi are well-founded and there are numerous cases that purport apparent authority and resulting liability as is evident by the instant case. Nevertheless *Gulf* is apparently the first instance where waiver and estoppel was used to extend coverage not previously contracted.

The problems inherent in this opinion are not uncommon to most cases. The facts here were unique and the developed law had yet to be applied to them. This led to the court's willingness and actually its "need" to seek law applicable to the particular circumstances. In doing so the court intertwined law and "emotion."

The concept of fundamental fairness can be very overwhelming. The "need" for a court to bend and shape the result to conform to what fairness dictates is certainly not a new scheme. When such conformations occur, opinions are often written that lay an unclear precedent. It appears that *Gulf Guaranty v. Middleton* is such an opinion.

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