1893

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Recommended Citation

INSURANCE LAW AS A SPECIALTY, 2 Yale L.J. (1893).
Available at: https://digitalcommons.law.yale.edu/ylj/vol2/iss4/3

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INSURANCE LAW

INSURANCE LAW AS A SPECIALTY.

BY A MEMBER
OF THE NEW YORK BAR.

Insurance law is not an intentional specialty, but rather accidental. It is not as profound as that of real estate, but more so than patent law. It is not worth while for a student to set out with this branch of business in view, for no matter how well equipped he may be, insurance litigation will hardly come to him for that particular reason. The average lawyer knows just enough about insurance law to get along without calling in special counsel, and the courts will ultimately set the plaintiff right if he persists in his litigation; certainly upon the face of the record according as he makes it.

To be sure, insurance law covers a vast amount of business. Life insurance alone, in this country, exceeds in amount the national debt; there being in round numbers within the United States three hundred million dollars of what is termed “old line” insurance, and six hundred million dollars of assessment insurance.

One of the most obvious characteristics of this kind of litigation is that it usually has a corporation for the defendant, which fact exposes it to the jury prejudice, in its full force. This is so strong at present, that it is hardly worth while for an insurance company to contest any case depending on a jury issue. No matter how gross the fraud, no matter how insufficient the evidence, no matter how poorly tried the plaintiff’s case, the jury are sure to find against the company. It seems impossible for a jury to divest itself of its predetermined bias against insurance societies and its determination to “beat” them whenever an opportunity offers. Nor, in my opinion, is this feeling to be attributed entirely to the “rich man,” or socialistic tendencies of the age. It may very well be assigned in great part to quite another impulse. Society at large has come to realize that half a dozen leading life insurance companies have amassed enormous sums of money, never to be returned to the persons from whom they have been robbed, and by a sort of blind impulse, which irre- mediable injustice always arouses, has determined in its heart of hearts to reciprocate this robbery under the forms of law, whenever it can get a chance.
The general public has not the least suspicion that this colossal accumulation has been a matter of necessity, to comply with the requirements of an unwise statute, which "old line" insurance companies had no hand in making, and are not particularly anxious to have kept in force. The insurance laws of each State were framed in the early period of the business, by those who assumed that each policy would persist till the death of the insured, and hence, required the companies to collect, along with the mortuary requirement, as much more for what is called "reserve," while the companies themselves with a generosity, which is characteristic of irresponsible trustees, charged the insured a third sum, also as large as the mortuary requirement, for expense; thus making the insured pay three full prices for his insurance. Now the fact, that only one policy in ten persists, has enabled the successful companies to accumulate immense sums, which are more likely to be doubled than depleted. It is said that half a dozen leading companies have six hundred million dollars of funds in their possession; that they afford salaries which exceed that of the President of the United States, with stealages only rivalled by Panama. The general public has arrived at a realizing sense of this, possibly exaggerated it, and takes its revenge when some unfortunate company is obliged to submit its rights to a jury.

But the fact, that this class of litigation always involves the jury prejudice, is by no means its most novel and interesting feature. The legal maxims which control insurance litigation are not those which govern ordinary suits between man and man. Generally in the practice of law the question is: What was the intent of the parties as expressed, or to be implied from their words and acts, and how can this intention, when ascertained, be carried into effect in conformity with the rules of law? Nothing of the kind occurs in insurance litigation. The maxim of contra proferentem controls; which means, freely interpreted, that any possible construction is to be given to the contract or transaction necessary to avoid a forfeiture. Hence, it is no longer litigation between man and man, upon principles with which the lawyer is most familiar, but rather between "the devil and the deep sea," under the audacity, ignorance, or irresponsibility of whatever court may chance to have the matter in charge.

I do not wish to be understood as impugning this doctrine of law, for I believe it to be good and wholesome. There are many and sufficient reasons for applying this maxim to this class of cases which I need not go into here, but the license which it
affords to a court to develop, not only the "personal equation" of its own judicial mind, but its ingenuity, sympathy, and boldness in construing complex writings against the obvious intention of the parties, makes it very embarrassing for the lawyer who has to defend the company. He must be prepared (if such preparation be possible) for the bull-dog tenacity of one judge, the refined subtlety of another, the want of familiarity with insurance doctrine of a third, together with the we-do-as-we-please character of the Appellate Court. All or any of these possible elements, which may enter into the trial of his cause, renders the result very precarious and uncertain, no matter how well he has prepared his case or how familiar he may be with the evidence and the law.

It is hardly necessary to say that this latitudinarianism leads to such departures from the ordinary run of legal decisions, that no lawyer, who realizes his situation enough to know the "fix" that he is in, can tell whether he is "a-foot or horse-back." Only recently one of our most eminent courts of appeal made a decision (120 N. Y. 496), which the first text writer who had occasion to overhaul that branch of the subject said was to be regarded as "clearly unsound." (Cooke, p. 188, n.) In this kind of litigation it is not the legal "personal equation" of the judge, which is important, but rather his moral "equation," coupled, perhaps, with his appellate irresponsibility. However, the doctrines of insurance law do not comprise the only things peculiar to this branch of litigation. The contracts to be construed are as exceptional as are the rules for their construction. I do not refer particularly to those of "old line" insurance, because these have been manipulated by "eminent" counsel, until they merit, perhaps, the invidious distinction, which the maxim already mentioned confers upon them; but the great mass of life insurance litigation arises on assessment certificates or policies, and it is safe to say, that as regards their defensive capacity, one (if duly qualified) can drive a "cart and oxen" through the best of them. The reasons for this looseness are of various kinds. In the first place, the contract itself is elaborate and complex from the nature of the case. Secondly, it is constantly being changed according to the notion of its lay obligors to meet new and constantly changing forms of fraud, while to interject a new idea into such a composite mass of contractual elements, even if perfect beforehand, is like wading in "where angels fear to tread." Thirdly, most of the benefit societies were originated by laymen who had little or no insurance experience, and who began in a small, quiet way, without capital or great expectations and further without the remotest idea of
what the enterprise involved, if successful, as to the obstacles to be met and overcome. And it is but just to say that the great mass of these pioneers in this new kind of insurance were thoroughly honest and fair minded men, who out of their own lay knowledge of the familiar principles of law, as between man and man, framed their contracts, from which the intent of the parties could be readily seen, comprising large goody-goody elements put in promiscuously, on the supposition that the world was dying to embark in fair and cheap insurance, on an equitable basis, without anyone seeking advantage at the expense of another; whereas, the fact was, that every "fraud" in christendom jumped at the opportunity to take advantage of these insurance green-horns, who had embarked in a business, "which they did not understand." Of course these contracts, after being written by laymen, were submitted so some common-law lawyer, who, very likely was quite unfamiliar with the doctrines of contra proferentes, and who, even if he had had the responsibility, hardly approximated the realization of what it was to draw a long-winded, complex contract with a multitude of conditions and provisos, providing for an infinite number of contingencies, which could hardly be foreseen, so that in no possible way could a construction other than that intended be extorted from the language considered in reference to the facts. This of all things is the most difficult of attainment. Probably not half a dozen specialists in the country are competent for such a task, while very likely, absolute safety could only be assured by absolute brevity.

There is always one thing in the company's favor, and it is no small increment of advantage at that. The plaintiff's lawyer is generally less acquainted with the law and decisions governing his case than he who appears for the company. Few lawyers have insurance suits enough to feel perfectly au fait in them; while insurance companies are generally willing to settle any case on a fair basis, without regard to their strict legal rights, and, therefore, there are more such cases settled pending litigation than perhaps in any other department of the law.

Insurance cases are exceptional in another respect. They are generally treated by the claimant in one of two ways. Either in the booby style or as a "gamble." From this remark I should except our Hebrew friends with whom it is strict business. As soon as the breath has left the body of the insured, the beneficiary assumes that the company is waiting with infinite longing to rush across the country, without regard to its obligation, and dump the amount of the policy into his lap. Instead of looking over the
terms of his contract as he would a bond and mortgage or other obligation, to see where, and when, and how, as well as under what circumstances the obligation matures, his attitude towards the company is usually to the effect, that the insured is dead, and the company cannot be too quick in paying over a fortune, towards which the decedent has usually contributed hardly a hundredth part; while if the company intimates the least doubt about the validity of the transaction, owing to fraud or otherwise, this is followed by a torrent of abuse, which would disgrace the alleged, classical, fish-woman. Of course this is not always the case, but it is more frequent in this business than in any other.

Why this should be thus has occasioned the writer no little thought. A general tendency to exceptional conduct should be based on exceptional circumstances, and what these are, in this case, it is not easy to determine. It may be that it results from the amount of "taffy" everlastingly given by the agents in effecting the insurance. It may be that the over solicitation, by which nearly all insurance is effected, serves to destroy the business character of the transaction and give it a booby atmosphere. One thing, however, is certain, that the truculent timidity with which this great, lawful, and most beneficent business has been inaugurated has had not a little to do with the insolent tone assumed by those who come into collision with these societies.

Is it any wonder that such societies lack self respect, since they are outside of the pale of the law? Nine-tenths of their business is done outside of their own states and where they are called "foreign corporations." Now the law of New York, which State is a fair example of the others, provides that these societies can only do business within that State, when, in the judgment of the Superintendent of Insurance, "it will best promote the public interests." From this fiat there is no appeal. Hence, they have no legal status, for that right can hardly be called legal, which cannot be appealed to any judiciary, and which exists by the arbitrary volition of a ministerial officer. There is no innuendo here to the effect that the practical working of this law does rank injustice, or does not; my purpose being only to account for the timidity of these societies and the frequent insolence of those who have to do with them.

Again when this booby manner is exhausted, the claim is then treated as a "gamble;" get what you can without a contest and let it slide. There is a substantial reason for this last result. The claimant feels that he is getting a great deal for a little; that it really is a gamble. He has staked his little sum against
life and won. As a general thing this class of claims are never fought out persistently to the end as would be a claim on a promissory note, or a disputed title. The companies are willing to make a fair settlement and pay cash down, which, coupled with the unfamiliarity of claimant’s lawyer with this branch of litigation, together with the gamble nature of the transaction, and the feeling that the plaintiff always has that he is in the wrong, leads to settlements more frequently than in other cases.

These claims are peculiar in another respect. They are contested frauds, which fact goes a great way towards accounting for the idiosyncrasies mentioned above.

It is estimated that a quarter of all assessment insurance has fraudulent elements in it. Certainly not one-fifth of this quarter of fraud is ever discovered and contested. Only those cases where the fraud is so patent, that it can be made to appear without going to a jury is it worth while to litigate; while these cases even are generally bruited abroad in the most blatant and insulting manner. Perhaps, because such claimants, conscious of the ready payment of the great mass of similar frauds, feel aggrieved that they should be singled out as wicked examples of so common an occurrence. The Dwight Case, the Carrosses Case and the Tyler Case, with a host of other similar ones, only lesser in amount, have brought no little odium upon the companies involved; whereas, it was finally determined by the courts of last resort, or conceded by those interested, that they were all three infamous frauds, whereby the owner of some worthless life, in throwing it away, attempted to rob honest people of a fortune for the benefit of those he left behind, who did not care enough for him to aid in perpetuating his miserable existence.

As I said before it is only an accidental specialty. It is only when one happens to be counsel for an insurance company for a considerable period that it even assumes this aspect. It would be very desirable to have all insurance claims submitted, in the first instance, to some one thoroughly familiar with the subject, but that is not feasible. This remark applies to all classes of actions, but to none with so much force as to those the subject of this article.