

# Insurance: Liability of an Agent for Fraud

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in light of present day conditions, but may go even further, where injustice would otherwise clearly result, and create a new right and a corresponding duty in the absence of Legislative action. Justification for such judicial lawmaking might be argued, for example, with respect to a right of privacy in Wisconsin.<sup>43</sup> Currently, Wisconsin is one of the few states which do not in any way recognize such a right.<sup>44</sup> The modern trend towards recognizing such a right began in 1890 with the publication of a famous article urging the necessity of its recognition.<sup>45</sup> Through the years prominent writers in the tort field have generally advocated the enforcement of such a right.<sup>46</sup> An eminent American lawyer has declared that the invasion of the privacy of an individual ". . . may produce suffering much more acute than that produced by a mere bodily injury."<sup>47</sup> An indication of its general acceptance has been the demand for a uniform law in this area.<sup>48</sup> In light of the almost universal recognition of the need of the right of privacy, and in view of the tendency of the Wisconsin Court to depart from its traditional reluctance to exercise the "legislative" prerogative in policy matters,<sup>49</sup> it seems at least possible that, if it receives a case involving a serious invasion of the privacy of an individual causing the individual great harm, the Court may act affirmatively to protect the "right of privacy" even without prior legislative action.

Historically, especially since the development of courts of equity, the common law has found the means, where justice seemed to demand it, to "make" the law as well as interpret it. Recent Wisconsin Supreme Court decisions, with respect to immunities which have outlived the reasons for their existence, give every indication that judicial lawmaking is still a vital ingredient of our legal system.

FREDERICK MUTH

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**Insurance: Liability of an Agent or Fraud**—In *Anderson v. Knox*,<sup>1</sup> the plaintiff brought an action for fraud and misrepresentation against an agent of the New York Life Insurance Company. The plaintiff alleged that the insurance agent, Anderson, had falsely and fraudulently induced his wife and him to purchase \$150,000 worth of bank financed life insurance, representing this as a suitable policy, in line

<sup>43</sup> Yoeckel v. Samonig, 272 Wis. 430, 75 N.W. 2d 925 (1956); State ex rel Distenfeld v. Neelen, 255 Wis. 214, 38 N.W. 2d 703 (1949); Judevine v. Benzies Mortgage Fuel and Warehouse Co., 222 Wis. 512, 269 N.W. 295 (1936).

<sup>44</sup> Note, *The Right of Privacy in Wisconsin*, 1961 WIS. L. REV. 332.

<sup>45</sup> Brandeis and Warren, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>46</sup> PROSSER, TORTS 635 (2d Ed. 1955); HARPER AND JAMES, TORTS 677 (1956); RESTATEMENT OF TORTS, §867 (1939).

<sup>47</sup> Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 363 (1915).

<sup>48</sup> Ludwig, *Peace of Mind in 48 Pieces v. Uniform Right of Privacy*, 32 MINN. L. REV. 734 (1948).

<sup>49</sup> Hoyltz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962); Kojis v. Doctor's Hospital, 12 Wis. 2d 367, 107 N.W. 2d 131 (1961).

<sup>1</sup> 297 F. 2d 702 (1961).

with the plaintiffs needs and means. On the other hand, the agent contended that he had merely presented to the plaintiff and his wife, a program for purchasing life insurance, and it was their responsibility to decide what they could and should buy.

In reaching its decision, the court found that Anderson had presented himself to the insured as an expert in the field of bank financed life insurance. It also found, that due to the complexities of this program, the plaintiff had rightfully placed his reliance upon the defendant, who had then fraudulently or with reckless disregard as to their truth or falsity, made representations to the plaintiff that the insurance he offered was suitable for him. The plaintiff was awarded \$13,309.98 compensatory damages, \$10,000 punitive damages, and \$2,500 in damages for mental suffering.

At first glance, this decision may cause quite a bit of concern among the vast ranks of insurance agents in this nation, for an insurance agent has been held liable, in a large amount, to an insured. However, a careful examination of this case is of utmost importance in order to determine the actual effect it will have upon present day methods of selling insurance.

Perhaps the first area of this case that should be explored is that of the position of the agent. He claimed that it was the responsibility of the plaintiff to decide just how much insurance he would need and could afford. The court ruled that in the sale of such a complex plan by an expert to a trusting buyer this was no defense. In other words, the court has indicated that in such sales by modern day insurance agents the strict rule of *caveat emptor* exists no longer.

This decision is but the application of modern day tort law to a new fact situation. It is in line with what Dean Prosser refers to as the "marked change" in the attitude of the courts toward justifiable reliance.<sup>2</sup> Prior case law based upon the doctrine of *caveat emptor* required a buyer to protect himself by investigation and independent judgment and to distrust those with whom he was dealing at arms length.<sup>3</sup> This position is now fast giving way to a new standard of business ethics,<sup>4</sup> which does not only protect the gullible buyer, but also requires the expert to render an honest opinion, as such statement may be held to be an assertion of fact. This trend is exemplified in the courts finding liability based upon affirmations as to quantity,<sup>5</sup> or quality,<sup>6</sup> of land or goods sold,<sup>7</sup> even in instances where the falsity of the representation could have been found with little or no investigation.<sup>8</sup>

<sup>2</sup> PROSSER, THE LAW OF TORTS 552-53 (2d ed. 1955).

<sup>3</sup> *Mabardy v. McHugh*, 202 Mass. 148, 88 N.E. 894 (1909).

<sup>4</sup> *Supra* note 2, at 553.

<sup>5</sup> *Lunning v. Sprague*, 71 Idaho 138, 227 P. 2d 347 (1951).

<sup>6</sup> *Erickson v. Midgarden*, 226 Minn. 55, 31 N.W. 2d 918 (1948).

<sup>7</sup> *Lunnie v. Gadapee*, 116 Vt. 261, 73 A. 2d 312 (1950).

<sup>8</sup> *Buckley v. Buckley*, 230 Mich. 504, 202 N.W. 955 (1925).

Thus, the court in the *Anderson* case, by precluding the defense of *caveat emptor*, has merely followed the trend in the law. It would suffice to say, that the honest insurance salesman has little to fear in this area, while he who has fraud in his heart at the prospect of an unwary buyer, would do well to remember that: "No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool."<sup>9</sup>

The court, having rejected Anderson's aforementioned position, and having found that he had rendered a dishonest opinion to the plaintiff, predicated his liability upon a principle of which many agents may not be fully aware. The court citing *Edward Barron Estate Co. v. Woodruff Co.*,<sup>10</sup> noted that although, generally, an action for deceit cannot be founded upon a mere expression of opinion, yet, as soon as an expert expresses a dishonest opinion he has made himself liable in an action for deceit.

The exact significance of this decision cannot be appreciated unless one remembers that Anderson was an "expert agent" selling a "complex" plan of insurance. Had he been but a layman or an ordinary salesman the consequences would have been different, for "justifiable reliance" is one of the five elements necessary for a deceit action,<sup>11</sup> and generally there can be no reliance upon a representation purporting to be one of opinion only.<sup>12</sup> Because Anderson was an expert, however, his opinion could be relied on as a statement of fact by the insured.<sup>13</sup> Similar relationships which allow the same right of reliance include the right of a client to rely on the opinion of an attorney upon a point of law,<sup>14</sup> or a patient on a doctor's opinion upon a matter of health,<sup>15</sup> or a buyer upon a stockbroker's opinion regarding bonds.<sup>16</sup>

<sup>9</sup> *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832, 836 (1887). Nor is contributory negligence generally held to be a defense to intentional fraud. 37 C.J.S., *Fraud* §30(c) (1943).

<sup>10</sup> 163 Cal. 561, 126 Pac. 351, 356 (1912). There is other authority in accord with this view. See RESTATEMENT, TORTS, §542(a) (1938); HARPER AND JAMES, THE LAW OF TORTS, §7.8 (1956). See also for a discussion of the area, Keeton, *Fraud—Misrepresentation of Opinion*, 21 MINN. L. REV. 643 (1937) and *Stegman v. Professional and Business Men's Life Ins. Co.*, 173 Kan. 744, 253 P. 2d 1074 (1953), where the court held that the plaintiff could recover a premium paid from the defendant insurer if he could prove the soliciting agent's fraud in inducing the purchase.

<sup>11</sup> *Supra* note 2, at 523. It should be noted also, that even if *caveat emptor* is not a defense and the plaintiff can prove justifiable reliance, "scienter" is another of the elements that must be proven to recover for fraud. And, proving this element may be somewhat more difficult, as, it is one thing to prove that an expert opinion was rendered, while quite another to prove that it was dishonest.

<sup>12</sup> *Supra* note 2, at 556.

<sup>13</sup> In *Jeleiewski v. Eck*, 175 Wis. 497, 185 N.W. 540, 541 (1921), the court points out that liability for a dishonest opinion is generally rationalized upon the theory that the condition of a man's mind is as much a fact as the condition of his body, although more difficult to prove, and that therefore, a misstatement of a man's mind is a misstatement of fact.

<sup>14</sup> *Rosenberg v. Cyrowski*, 227 Mich. 508, 198 N.W. 905 (1924).

<sup>15</sup> *Hedin v. Minneapolis Medical and Surgical Inst.*, 62 Minn. 146, 64 N.W. 158 (1895).

<sup>16</sup> *McDonald v. Lastinger*, Tex. Civ. App., 214 S.W. 829 (1919).

Adopting this reasoning, it would appear that the expert agent (as distinguished from the layman), proposing a complex plan of insurance to his trusting customer will find little mercy in the courts for his dishonest and fraudulent statements. This holding if nothing else, will preclude the agent from a defense of mere "sales opinion" or "puffing" in his method of selling.

*Anderson v. Knox* goes on to show that under certain fact situations, even in the absence of a dishonest opinion, the ordinary (as well as the expert) insurance agent may become a fiduciary with a broader duty of disclosure owed to the prospective insured.<sup>17</sup>

In the *Anderson* case, the court found that no fiduciary relationship existed between the plaintiff and the defendant due to the fact that Knox knew Anderson was the agent of the insurance company at the time of the sale. The insurance agent should be aware, however, that it is not an indication that just because he is an agent of the insurance company, he cannot become the fiduciary of the insured.<sup>18</sup> It would seem, rather, that for determining whether or not an insurance agent is such a fiduciary, the test is whether he is or is not an agent or broker of the insured.<sup>19</sup> If such a fiduciary relationship is established, the broker or agent is under a duty necessitating the full disclosure of all the knowledge he possesses which is important or desirable that the insured should have, and breach of this duty will make him liable in an action for fraud.<sup>20</sup>

Although it is not mentioned in *Anderson v. Knox*, it should be noted that the insurance agent, who makes fraudulent representations to the insured or prospective insured, may face not only civil, but criminal sanctions as well. The various penalties he may incur for violation of state law include: loss of license,<sup>21</sup> fine,<sup>22</sup> or even imprisonment.<sup>23</sup>

Another area of liability of which the insurance agent, and others in corresponding fields, should be aware, is that of their responsibility for negligent misrepresentations. *Derry v. Peek*,<sup>24</sup> which excluded negligent misrepresentation from the action of deceit, has not been fully adopted by all of the American courts.<sup>25</sup> And, although no case has been found in point which has as yet held an insurance agent liable for negligent

<sup>17</sup> *Anderson v. Knox*, *supra* note 1, at 708.

<sup>18</sup> HARPER AND JAMES, *op. cit. supra* note 9, §7.8.

<sup>19</sup> *Hardt v. Brink*, 192 F. Supp. 879 (1961). This case held that an insurance agent who acted as a broker for the insured, was liable to the plaintiff for non-disclosure of certain information. See also *Finnerity v. Frenchman*, 118 N.Y.S. 2d 790 (1952), and *Hood v. Cline*, 35 Wash. 2d 192, 212 P. 2d 110, 115 (1949).

<sup>20</sup> *Edward Barron Estate Co. v. Woodruff Co.*, *supra* note 4, at 357.

<sup>21</sup> SMITH-HURD'S ILL. ANN. STAT. c. 73 §§599, 601 (1936).

<sup>22</sup> MICH. STAT. ANN. REV. ED. ch. 24 §§12064, 12069 (1957).

<sup>23</sup> WIS. STAT. §§201.53(9), (10), (13) (1959).

<sup>24</sup> 14 A.C. 337, 58 L.J. Ch. 864 (1889).

<sup>25</sup> *Haentze v. Loeker*, 233 Wis. 583, 290 N.W. 163 (1940); *Cunningham v. Pease*, *House Furnishing Co.*, 74 N.H. 435, 69 Atl. 120 (1908); and *Gagne v. Bertram* 43 Cal. 2d 481, 275 P. 2d 15 (1954) (under statue).

misrepresentation to the insured, there is little reason to believe that recovery in such an action would be precluded if litigated. As Dean Prosser points out, a number of American courts have held that a deceit action will lie for negligent statements, while a number of other courts allow a straight negligence action for such misrepresentations.<sup>28</sup>

It is thus apparent that, the insurance agent (possibly along with other contemporaries such as loan consolidation experts) in today's business world is by no means free from good faith responsibilities to his prospective customer. He not only must realize that for him the defenses of *caveat emptor* and "mere sales opinion" may no longer be available; but also, that he may even become the fiduciary of the insured with a much higher duty of disclosure. Finally, he should also be conscious of the fact that many states impose criminal penalties upon fraudulent agents, while others may even go so far as to impose civil liability on him for his negligent misrepresentations.

Very simply, the *Anderson* case takes established principles of tort law and applies them to a new fact situation arising out of modern business practices. It holds insurance agents liable for their fraudulent acts of salesmanship.

JAMES B. YOUNG

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<sup>28</sup> *Supra* note 2, at 542.