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Insurance: Agent's Commission; State Regulation; Police Power

Ronald A. Padway

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sustain the finding. Negligence and bad faith were contended to be distinct since in the Wisconsin Zinc Company case the court held that fraud was evidence of bad faith but that there could be no recovery for negligence. However, the court in the Hilker case, took the view as has already been stated in the first paragraph of this comment, that bad faith and negligence are synonymous and that negligence points directly to bad faith.

To put the Hilker case succinctly, an assured may recover from his insurance company in excess of his policy limits if a judgment is rendered against him over the amount of the policy limit as the result of bad faith on the part of the insurance company which may be shown by fraud (Wisconsin Zinc Company case), or by negligence in investigating and adjusting and in failing to notify the assured of the danger of the case against him (the Hilker case).

In the decision of the court on rehearing it said, “Each case presenting the issue of liability of an insurance carrier under such circumstances as here presented must be determined upon its own peculiar state of facts.” A little farther down in the decision, the court defines the antonym of bad faith, namely, good faith, in this way. “But the good faith performance of the obligation which the insurance company assumed when it took to itself the complete and exclusive control of all matters that determine the liability of the insured, require that it be held to that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business were he investigating and adjusting such claims.” In these words lies the gist of the decision, making the proof of the negligence sufficient of itself to sustain a finding of bad faith. As the law exists, then, an insurance company may be liable for bad faith by proof of fraud or negligence on its part.

Clyde Sheets.

Applied to existing insurance agency conditions the New Jersey act reveals serious flaws. Providing equal compensation to all agents representing a particular company, it leaves the way open for other companies to have a different standard of compensation, and perchance an agent may find himself with the several companies in his office each paying on a different commission basis, leaving no doubt as to which company will receive the cream and bulk of the agent's business. More valuable agents, or those with preferred risks, will be held to the lower rate paid to others for average or less desirable risks. On the other hand, payment of high commissions to agents may impair the financial stability of insurers. The percentage of the premium paid to an agent bears a direct relation to the rate charged. More important is the extent to which the state can now directly control agents' commissions. Controlling the agent, cannot the state, by dictating the general and special agents' commissions, contingency bonuses paid to agents for low loss ratios, adjusting expenses, lobbying expenses, and tax payments, practically tell the companies what to do and how much to charge? The trend seems in that direction, and the police power, following the permit of *O'Gorman & Young*, can menace the insurance companies alarmingly. The state can strike at the overhead and profits. In all lines of insurance the overhead is terrific. In *State ex rel Time Ins. Co. v. Smith*, 184 Wis. 455, Justice Crownhart, dissenting, said: "Health and accident insurance costs more than 50% of the premiums for overhead in this state. It is a poor investment. Such excessive costs can hardly be justified in the public interest." A recent MARQUETTE LAW REVIEW article states that of the automobile insurance premiums paid in, two-thirds is diverted to overhead, commissions, and profits. 15 Marq. L. Rev. 19. It is therefore clear that the *O'Gorman & Young* decision, decided by a 5 to 4 division of the court, is important because it adds to the right of the state to control the rate charged the policyholder the additional right to adroitly limit the components of the rate.

The insurance business holds such a peculiar relation to the public interests that there is superimposed upon it the right of public regulation. *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389. This case gives the state the right to regulate unearned premium funds or reserves, dividend limits, investments and assets, discrimination in rates, limitations of risk, and other vital factors. Cf. 233 U.S. 412. Wisconsin reserves the right to control corporations under its constitution. *Stone
v. Wisconsin, 94 U.S. 181. And the state legislature may "impose any conditions, reasonable or unreasonable * * *" State ex rel Drake v. Doyle, 40 Wis. 175. Cf. 99 Wis. 371. The state may discriminate between classes of companies. Northwestern Mut. Ins. Co.v. Wisconsin, 247 U.S. 132; State v. U. S. Mut. Acc. Assn., 67 Wis. 624. In Wisconsin, the police power was applied to agency commissions as early as 1862, in Fire Dept v. Helfenstein, 16 Wis. 137, wherein fire department dues were held collectible from a local agent as a proper exercise of the police power. Generally, an insurance company may be charged a percentage of premiums to maintain a fire department, Trustees v. Roome, 93 N.Y. 313; and even to maintain a fireman's benevolent association, Firemen's Benev. Assn. v. Lounsbury, 21 Ill. 511; Van Inwagen v. Chicago, 61 Ill. 31. Imposing upon the agent of a foreign insurance company a license tax of a percentage of the premiums collected at his agency is not unconstitutional, People v. Thurber, 13 Ill. 554; Fire Dept. v. Helfenstein, 16 Wis. 137. A license fee may be based on a percentage of the premiums received. New York Life Ins. Co. v. State, 192 Wis. 404. But to levy on interest received from bonds and securities of the United States is unconstitutional. Northwestern Mutual L. Ins. Co. v. Wisconsin, (U.S.) 48 Sup. Ct. 55. A state may impose a personal penalty on an agent, as where business is written in unlicensed companies and a loss is but partially paid. Cordy v. Northern Sec. Co., 177 Wis. 68. Machines installed to vend policies on railroads may be prohibited under the police power pursuant to statutes requiring policies to be issued through local agents resident in the state. State v. Smith, 184 Wis. 309. The legislature may set up general standards for the insurance commissioner to follow. State ex rel Wis. Ins. Bureau v. Whitman, 196 Wis. 472. The insurance commissioner may control salaries of insurance company officials, so as to require that salaries be reasonable. State ex rel National Mutual Ins. Co. v. Conn. 115 Ohio St. 607. He may also compel a distribution of dividends to policyholders. Equitable Life Assur. Co. v. Host, 124 Wis. 657.

In the O'Gorman & Young case, the minority opinion declared that the public's concern was with rates, and that to interfere with an agency contract is a trespass on the insurers control of their private affairs. "Like any other expense item broker's commissions may ultimately affect the rate charged for policies, but this is true of the wages of office boys, printers, bookkeepers, actuaries, officers; the price paid for pens, ink, or other supplies,—indeed, whatever expense may be incurred * * *" For a state to interfere too far is to abridge freedom of contract. O'Gorman & Young v. Hartford F. Ins. Co., 51 Sup. Ct. Rep. 130; Western Union Tel. Co. v. Kansas, 216 U.S. 1; Hanover Ins. Co. v. Harding, 272 U.S. 494. The business of an in-
NOTES AND COMMENT

An insurance agent is primarily a private enterprise. Hobbins v. Hannan et al, 186 Wis. 284. To limit the number of agents in a particular locality is to deprive persons following such occupation of their property without due process of law. Northwestern Natl. Ins. Co. v. Fishback, 130 Wash. 470. As to dealing with agents, the jurisdiction of the insurance commissioner is purely statutory. Union Indemnity Co. v. Smith, 187 Wis. 528 @ 538. The commissioner cannot draw up an insurance form, as that function is legislative. Dowling v. Lanchashire Ins. Co., 92 Wis 63. A legislature cannot authorize a municipality to levy in order to raise funds for a mere private purpose. Broadhead v. Milwaukee, 19 Wis. 624. Where a state law and a city law each levy a tax of 2% on premiums, the result is double taxation. Fire Dept. v. Tuttle, 48 Wis. 91. A state cannot make past compliance with an unconstitutional tax a condition precedent to a renewal of a license, as where premiums were deemed personalty and taxed at 30% of value. Hanover Fire Ins. Co. v. Harding, 272 U.S. 494. If the revenue purpose is more important than the regulative, the imposition is a tax. San Francisco v. Liverpool & L. & G. Ins. Co., 74 Cal. 113.

O’Gorman & Young v. Hartford Fire Ins. Co. establishes the proposition that agency commissions may be controlled and limited by legislative fiat. It will be interesting to observe whether and how legislatures extend the police power to other details of the insurance business.

RONALD A. PADWAY.

JOINT ADVENTURE—Whether a joint adventurer can claim compensation for services rendered in conducting the affairs of the adventure, in the absence of an express agreement to that effect, is the ultimate problem presented in Week v. Week’s Estate, 235 N.W. 448, (Wis.).

Plaintiff and the deceased defendant entered an oral agreement in 1902, whereby they agreed to make equal contributions to the expense and to share equally the profits and losses of developing water power on the Spokane river. They worked together for seven years when in 1909 the deceased left Spokane. From 1909 to the time of actual sale, the plaintiff and defendant were on the look-out for buyers. In 1924, mostly through the efforts of deceased and an attorney hired by him, the property was sold.

The plaintiff claims that the deceased agreed to compensate him for the time and service he devoted to the adventure in excess of the time and service deceased gave to it, and that he is entitled to recover the deceased’s estate $25,000 as a reasonable value of such excess.

Plaintiff claims that since deceased was away from Spokane for about fifteen years, he (the plaintiff) should be compensated for look-