IN SEARCH OF LOST "GOOD FAITH"

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"Most of the insurers are issuing the Insurance Policies, which are commonly not understood by the assured and no attempt is made by the insurer to make assured understand the implications of the insurance contract delivered to him which becomes "Fiat Accompli" at the time of the loss under the policy".

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CONTRACT OF UBERRIMAE FIDEI

Like every other contract, a contract of Insurance is a contract "UBERRIMAE FIDEI". In other words, all insurance contracts are contracts of "utmost good faith" Both parties, the insurer and the insured, to the contract are bound to disclose to each other all the facts relevant to the transaction. Neither party is to take advantage of the other's lack of information and/or knowledge.

The Insurer for example, is not supposed to exploit the lack of knowledge of the assured about the methods, practices and the mode, principles and the basis of the claims settlement, equally as the insured is not to keep back the information or knowledge he has about the risk factors which may lead the insurer to believe otherwise.

Insurers, who are aware of the various judgements and the court decisions regarding the admissibility of the claim and the terms and conditions of the policy, are bound to disclose that knowledge to the insured. And if "the utmost good faith be not observed by either party, the contract may be avoided by the other party".

Lord Mansfield, in Carter Vs : Boehm case pointed out the duty of the good faith lay not only upon the assured, but also upon the underwriters, who, for instance would not be allowed to retain premium in respect of a policy made on a ship or cargo which he knew at the time to have arrived safely.

In short, premium is refundable if already paid, if the risk is not attached, for; no consideration is required to be paid if the risk is not assumed by the underwriter.

It is our common experience that many underwriters have retained the premium without any attachment of the risk for non-issuance of stamped policy; and under such circumstances if any claim occurred the insurers merely deny liability on one or the other pretext, that they were not on the risk.

It is equally true that the insurance policies are devised, framed, and issued by the insurers and therefore, they are only the natural and sole depositary of much of that information, a full and true communication of which is absolutely essential to the assured in order that he may have a right knowledge of the nature of risk covered.

Thus any departure from the normal standard terms, conditions, not customarily prevalent and understood in the business market or any vague or additional imposition of warranties by way of rubber stamps or otherwise put on the policy will not save the insurer from liability.

Many times, the insurers have blamed the assured for misrepresentation and concealment of the facts and thus have run away with the liability under the insurance contract, but any innocent act on a part of the assured of which he was not aware, at the time of proposing insurance, will not save the insurer from liability under the policy.

At the trial in Morrison Vs : Universal Marine Insurance Company Mr. Blackburn J. directed the jury that "when the underwriter discovers that there has been a concealment or misrepresentation he is not entitled to wait until he hears that there has been a loss, and then repudiate the policy. He must make election, not, indeed, with hot speed but in a reasonable time".

Many insurers today, either due to lack of knowledge or due to working in a Government organization, conceal and neglect to communicate to the assured, the material facts within their knowledge about the concepts of claims settlement which the assured have not the means of knowing, or is not presumed to know.

Meaning Of Material Fact

A material fact is one which is calculated, if communicated to the other of the parties, to induce him either to refrain altogether from the contract

or not to enter into it except on more favourable terms. (Tindal C.J. in Elton Vs : Larkins). This definition is equally applicable to the assured and the underwriter.

The unfortunate part is that the underwriters neither reveal what policy they are issuing nor explain what more favourable terms could be offered to the assured in similar circumstances. The contract of "uberrimae Fidei" (the contract of utmost good faith) on the plainest principles of equity such a contract which one party has thus been induced to enter upon from his ignorance of the thing concealed shall not be enforced against him by the other who has concealed it. Whether such suppression of the truth arise from willfull intention, or merely from mistake,

negligence, or accident, the consequences will be the same.

Many a times the insurers deny the liability on a pretext that such lapses are due to clerical mistakes or typing errors or assign the reasons due to their particular departmental set up. This type of argument tantamount to deceiving the insured.

Insurer Should Know His Business

In many cases, although the insurers are aware of the facts of and the circumstances of the risks have made the assured responsible for not revealing to them the knowledge of it. It is however, not necessary to disclose any circumstances which is knwon or presumed to be known to the insurer.

The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business as such, ought to know. (Marine Insurance Act). Thus an insurer is presumed to know that it is impossible to make a floating drydock as seaworthy as an ordinary ocean-going craft.

A knowledge of the political state of the world of the allegiance of particular countries, of their standing mercantile regulations, of the risk and embarrassment affecting the course of trade contem plated by the insurance, must all necessarily be imputed to the underwriter, and therefore, need not be disclosed by the assured.

Warranties Explained

Another gimmick, the insurer adopts is to put express warranties on the face of the policy without the knowledge of or understanding of the assured. This is a dangerous trend in this country and the underwriter runs away from the liability and the booty of premium without assigning any reasons. The assured is warned and should immediately contact his insurance experts and advisers against this unhealthy practices of the insurance companies, who have clauses containing warranties printed on a slips of paper, which are fastened with gum (now pinned) to the policy.

In Bize Vs : Fletcher trial the court held that any warranty, must necessarily be printed on the face of the policy. But in a judgement by Lord Halsbury in Bensaude Vs : Thames and Mersey Marine Insurance Company held that clauses, pinned or gummed to the policy from part of it However, the Supreme Court of Texas has held that a slip fastened with gum to a fire policy did not from part of the policy. In Kenyon Vs : Berthon case it was held that although it is absolutely essential that the express warranty should be written somewhere or other on the face of the policy, or in some documents incorporated herewith, yet it need not be written in the body or printed part of the policy. It may be in the margin or at the foot-note, and written in the usual way or transversely.

As argued earlier this trend of Insurance Companies, if unnoticed by the assured will prove fatal in case there is claim on the policy.

Insurance Act provides that a warranty means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done or that some condition shall be fulfilled or whereby he affirms or negatives the existence of a particular state of facts.

A warranty as defined above, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not complied with, then, subject to any express provision in the policy, the insurer is discharged from the date of the breach.

In the language of Lord Mansfield, "contract depends on the event taking place. There is no latitude, no equity: the only question is, has that event happened?". He further adds that "the warranty in a contract of insurance is a condition or a contingency, and unless that be performed there is no contract".

"It is a clear and first principle of Insurance Law", says Lord Eldon, "that when a thing is warranted to be of a particular nature of description, it must be exactly what it is stated to be."

Thus where a horse insured by a marine policy was described as 2 by Soult X St. Paul (mare)" and it was found that the pedigree was incor-

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