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Fraud and False Swearing Clauses in Insurance Contracts

Insured had a fire in its store and under a "use and occupancy" endorsement in its policy of fire insurance claimed a business interruption loss. The insurer pleaded fraud and false swearing which would void the contract of insurance under a clause in the policy. The trial judge charged that the fraud and false swearing clause was applicable to testimony at trial. The Court was bound to apply the substantive law of New Jersey. *Held*: The clause voiding the policy for fraud and false swearing has no application to testimony given at trial. *American Paint Service v. Home Insurance Co. of N. Y.*, 246 F.2d 91 (3d Cir. 1957).

Most fire insurance policies contain a clause voiding the contract in case of fraud or false swearing. 8 CYCLOPEDIA OF INSURANCE LAW 7195 (1931). In some states this clause has been written into a standard form policy by statute. N. Y. INSURANCE LAW §168, N. J. REV. STAT. §17:36-5.20 Supp. 1957). This clause in a policy of fire insurance is designed to cover cases of fraudulent misrepresentations of material facts made by the insured to the insurer which might affect the action of the insurer in issuing the policy or in settling claims. The clause operates when the act of fraud or false swearing is performed wilfully with intent to unjustly deprive the insurer of its property and misstatements as to value made after a fire will not void the policy unless it can be shown that such misstatements were made with intent to defraud the insurer. *American Alliance Insurance Co. v. Pyle*, 62 Ga. App. 156, 8. S.E.2d 154 1940).

The obvious purpose of a clause such as this is to induce veracity in the insured in making statements to the insurer since the sanction for untruthfulness is the destruction of the insurance contract. But this would seem an advantage given to the insurance company at the time of preliminary proofs and examination and not to testimony given at trial. *Republic Fire Insurance Co. v. Weides*, 14 Wall. 375 (U.S. 1872). Such sanctions as the prosecution for perjury induce veracity at trial.

A contrary construction would present a logical difficulty. The defendant-insurer pleads fraud and false swearing in his answer and then at the trial offers no proof of fraud or false swearing except the trial testimony of plaintiff. This is not fraud and false swearing within the pleadings. *Halbreicht v. Urbaine Fire Ins. Co.*, 238 App. Div. 842, 262 N. Y. Supp. 742 (2d Dep't 1933). However this might be overcome by amending the pleadings. N. Y. CIV. PRAC. ACT §434; N. Y. R. CIV. PRAC. 166.

When there is fraud and false swearing at the trial in the testimony given by plaintiff and also fraud and false swearing in furnishing preliminary proofs the clause has been held effective to void the policy. *Weber Leather Coat Co. v.*

Niagara Fire Ins. Co., 254 App. Div. 298, 5 N.Y.S.2d 1 (2d Dep't 1938). This case places equal stress on both incidents of fraud in voiding the policy.

There are a number of federal cases similar to the *Werber* case holding the policy void because of fraud and false swearing. *Hyland v. Milles National Assurance Co.*, 58 F.2d 1003 (N.D.Cal 1932), *aff'd.* 91 F.2d 735 (9th Cir. 1937), *cert. denied* 303 U.S. 645 (1938); *Cuetara Hermanes v. Royal Exchange Assurance Co.*, 23 F.2d 270 (1st Cir. 1927), *cert. denied* 277 U.S. 590 (1928); *Atlas Assurance Co. v. Hurst*, 11 F.2d 250 (8th Cir. 1926). In point of time all of these cases follow a Supreme Court case that establishes the rights of the insurance company under such a clause and holds the force of the clause limited to preliminary proof of loss and examination. *Republic Fire Insurance Co. v. Weides*, *supra*. The decisions in these federal cases, however, may be reconciled with the *Weides* case on their facts since they arose out of situations involving fraud and false swearing before trial as well as at trial.

It would thus appear that the rule in the instant case is the more sound since it provides the insurer with adequate protection in examining preliminary claims but protects the adversary nature of the trial. The cases advocating a contrary result are generally found to be grounded on fact situations containing fraud or false swearing before the trial and at the trial, and so while correct in themselves, are distinguishable from cases under the majority rule.

Thomas Beecher

Labor Law: Validity of "Hot Cargo" Clause in Contract Between Employees and Common Carriers.

Employment contracts between common carriers and their employees included a typical "hot cargo" clause providing that refusal by the employees to handle "unfair goods" should not constitute a violation of the agreement. The goods of a shipper, involved in an economic strike with the union, were handled by the carriers for about two weeks after commencement of the strike, but with union encouragement, the employees refused to handle them thereafter. On hearing of unfair labor practice charges filed by the shipper, *held* (4-1): the union was guilty of an unfair labor practice under the Taft-Hartley Act. *Genuine Parts Co.*, 119 N. L. R. B. No. 53 (1957). The case is particularly significant, since it is the first time a majority of the Board has held that a "hot cargo" clause itself, as distinguished from efforts to enforce such a clause, was invalid.

Section 8(b)(4)(A) of the Labor Management Relations Act (Taft-Hartley Act), 61 STAT. 141 (1947), 29 U. S. C. §158(b)(4)(A) (1952) makes