SELECTED ESSAYS ON THE LAW OF INSURANCE IN NIGERIA

Insurance Decree No. 58 of 1991 In Perspective

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Selected Essays on The Law of Insurance in Nigeria is a product of the Seminar on Insurance Decree No 58 of 1991, held under the auspices of the Faculty of Law, Lagos State University from November 12th - 13th 1992.

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Selected Essays on the law of insurance in Nigeria has a long history. Some years back when the Insurance Decree No. 58 of 1991 was promulgated the Faculty felt there was the need to highlight and sensitise the reforms introduced by the new Decree as a current law. Hence, it decided in 1992 to organise a seminar at which members of the academia and the business community will be able to interact their ideas.

Regrettably, the dates scheduled for the Seminar fell into the period of the crisis that rocked the University system (LASU inclusive). This culminated in the postponement of the Seminar on not less than two occasions, before it was finally held on the 12th and 13th of November, 1992. A total of fourteen papers were presented at the Seminar out of which twelve were finally selected for publication. These twelve papers formed the basis of this book.

It is no exaggeration to say that what we have endeavoured to put together here are indeed searching critical analysis of the various segments and facets of the law of insurance. It is in the light of this that we give our sincere thanks to all the paper contributors. Special mention must be made here of Mr O. A. Fagbohun who pioneered the Seminar and never relented in his efforts until this book saw the light of day. But for his patience, earnestness and enthusiasm, this success story would have been otherwise.

We would like to conclude with a note of appreciation to Mr. I. O. Smith, Director, Law Centre, Faculty of Law of the Lagos State University. He could not imagine that the essays herein contained have been gathering dust for upward of one year due to lack of funds. The funds which his centre provided saved the day.

We hope you enjoy the book and find it helpful.

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INTRODUCTION:

In evaluating the role of the insurance agent, broker or loss adjuster, it is pertinent first to
consider that all of them are intermediaries in the business of insurance who either assist a buyer (the
insured) or the supplier (the insurer) in the purchasing and supply process. As for the agent and
broker, their duties start right from the proposal stage and probably span through the whole contract
until loss adjusters or the claim is discharged. The loss adjuster's job on the other hand only begins when a
loss arises. He is as the name connotes, the middleman only in time of crisis (or loss) and not before.
At his job is much more than adjustment of losses. It is far much more, as it involves the carrying out of
enough investigations as we would see later. For now we shall start with the legal perspectives.

Who is an Agent?

An agent, under the law of Agency, is one who has the contractual capacity to bring into
existence a contract, both between the person called his principal and another (called the third party). In
other words an agent is that person who acts on behalf of another in his dealings with third parties.1
According to the principle "Qui facit per alium facit per se," any person (except in certain exceptional
situations)2 can act through an agent.

There has been attempts to classify agents into various classes.3 The determinant factor in all
categorisation is whether or not such an agent has the authority to bring his principal into contractual
relationship with others, or can bind him by his acts so as to make him liable to third parties.4 From
what has been said so far, it can be seen that the agency relationship is structured tripartitally, that is:
(1) between the agent and his principal, (2) between the principal and third party and (3) between
the agent and third party.

At this juncture, the questions that naturally come to mind are: how does the insurance agent fit into
this fold? How, for example, does he bind his principal? In fact, who is his principal in an insurance
transaction?, if it is the insured or the insurer? Before we can answer these questions, it is advisable to start by looking into
statutory provisions in respect of an insurance agent in Nigerian

According to Section 28 of the Insurance Decree,5 every person, provided he is not a minor, or of
sound mind, or had both been convicted of breach of trust, cheating or criminal misappropriation of funds
may apply to the Director of Insurance to be licensed as an Insurance Agent. The Director, if satisfied that the
applicant has complied with the provisions of the Decree shall issue license to the applicant and such license
which is renewable yearly, entitles the holder to act as an insurance agent for the insurer or insurers named
in the license. From the foregoing, it could be seen that the agent is that of the insurer and not the insured.

The Role of the Insurance Agent

Basically, the role of the insurance agent is best appreciated when viewed against the background of
his relationship to the insurer and the insured (a) before the contract, (b) whilst the contract is still subsisting,
and (c) after the loss has arisen. It is in this light that we shall now proceed.

[Deborah was not aware of any Available document reference]

The Role of the Insurance Agent

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Before the Contract

When a person intends to purchase a policy, or insure, what he does is to approach an insurance
company or the latter's agent stating his intention, whereupon he is given a form (called proposal form)
to fill. At this stage the person is referred to as the proposer. The proposal form contains a variety of
questions ranging from the proposal's name, address, occupation, to age, health, particulars of the
proposed subject matter of insurance etc., etc., and could be cumbersome at times or difficult for
the proposed insured to answer. It is at this stage that the insurance agent gets involved, and if care is not
taken, the nature of his involvement might implicate his principal. Generally an insurance company will
be estopped from denying that its agent did not pass on information received from him to them as the
knowledge of an agent is deemed imputed to his principal. In Wing V. Harvey6 an English case on the
point, an insurer having been authorised to do so, collected premiums on behalf of his company and later
passed them to his directors even though he knew at the time of the collection that the insured had broken
a condition of the policy. It was held that the agent having been authorised to collect premiums on behalf
of the company, and having had knowledge of the insured's breach of a condition of the policy before
acquisition, the company is deemed imputed of that knowledge and the insured is entitled to rely on the
agent passing on his knowledge to the company. Where however, fraud is involved, e.g. as for where the
agent colluded with the insured in order to defraud his company, no estoppel can arise. In Newsolmoke
Brothers v. Road Transport and General Insurance Company Limited7 an agent whose agency
authority does not extend to the filling of proposal forms but only to the soliciting of business for his
company in defiance of his authority filled in a proposal form on behalf of the proposer and in it wrote
answers which were materially untrue. The proposer warranted the truth of the statements in the
proposal form, and this made the basis of the contract. When a claim arose, the insurance company
repudiated liability on the ground of the untrue statements in the proposal form. The court held that the
company was entitled to repudiate liability on that ground for the knowledge of the true facts by the agent
in this case could not be imputed to the company. In the case, the agent although said not to be regarded
as that of the proposer was described as his amanuensis.8 The decision in the Newsolmoke case followed
that in the earlier case of Bigger v. Rock Life Assurance Company.9 However in Bigger's case the
court seem to be of the opinion that once an agent, whose scope of authority is limited or not fills a
proposal form on behalf of the proposer, then he should be regarded as the agent of the proposer for that
purpose and not that of the insurer again. It is submitted that this view is harsh considering the
implication on the insured. For even though, he might not be able to recover from the insurance
company, he could still proceed on a personal action against the agent for negligence or fraud. But if the
law now regards him as his agent, then his (the insured) claim becomes more cumbersome he was to
proceed against him on a personal action, for it would be deemed that he had authority to do what he did
acted in that behalf. It is, however, understandable where the scope of his authority is expressly
limited.10 The view in the latter case of Newsolmoke where he (the agent) was described as only the
proposer's amanuensis is therefore preferred. One thing that is clear from the two cases, however, is that
whether the proposer and the agent know the answers to be false, the agent is committing a fraud on
his company, and his knowledge would not be imputed to the company. Although it could be argued that
in that Newsolmoke's case, the proposer was not aware of the agent's acts, however, it appears the
government in the decision in that case was hinged upon the fact that the proposer warranted the truth
of the answers in the proposal form by signing it. According to Scruton L.J.-
It is important to say here that contracts of insurance are contracts \textit{Ubi est fides, ibi est justitiae}. that is, they are based on the principle of good faith that neither party to the contract shall do anything material to the contract. 20 The need for this duty is usually required mostly at the beginning of the contract (i.e., the proposal stage) since it is a requirement that may influence the judgment of a prudent insurer in fixing the premium or determining whether or not he will underwrite the risk. 21 Because the acceptance or rejection of a risk, or how much to charge in order to bear (the premium) is conditional upon the nature of such risk which can only be gleaned by the insurer from the amount of information received from the proposer/insured, most policies usually stipulate as a condition precedent, the continuous disclosure of any circumstance or material fact which may arise during the life or the existence of the policy. If this condition is imposed, then any material change in the information already supplied at the proposal stage must be communicated to the insurer and this is where the role of the agent comes in once again. Will any knowledge of such change already communicated to the insurer be deemed imputed to the insurer? As said earlier on, this would appear to certainly be the case.

In \textit{Pimm v. Lewis}, 22 a water cornmill was insured under a fire policy. Rice chaff which was more inflammable than pollard (i.e., the final part of the husk of corn) was used in the cornmill, to the knowledge of the insurance company's agent. In fact the agent lived in the corn-mill's neighbourhood and even inspected it at the proposal stage. It was held that the insurer was not duty bound to disclose that rice chaff was ground at the mill, since this fact was deemed known to the company through its agent 23 The position in Nigeria seems to be that an insured would only be able to rely on the insurer's agent knowledge if only the latter had express authority to receive such a disclosure or representation on behalf of the insurer. 24

\section*{After a Loss Has Arisen}

After a loss has arisen one of the conditions precedent to a claim (sometimes referred to as conditions subsequent to contract) is that the insurer must give notice of loss within a stipulated period or in some cases, as soon as possible, or immediately. Sometimes the mode of giving such notice is stipulated (e.g., at the insurer's head office). 25 Sometimes it is not. Where not so stipulated, is notice to the insurer's agent valid, or deemed to be notice to the insurer himself? From decided cases, the answer would appear to be in the affirmative. In the case of \textit{Marsden v. City and County Assurance Co.}, a policy was effected through a local agent of the defendant and was subject interalia, to a condition that 'in case of loss or damage, an immediate notice must be given to the manager, or to some known agent of the company'. After making the policy, but before the loss, the defendants transferred this branch of their business (plate glass cover) to another company. The Plaintiff was not aware of this transfer and so when loss occurred, served notice to the local agent who thereupon made his report to the latter company. It was held that notice to the local agent was sufficient notice, within the stipulated condition. 26 Where mode of giving notice is stipulated and an agent is not authorised to receive same and he does so in defiance of his authority, the notice will be void. Ivamy rightly contends that an agent whose authority has so been limited has no 'usual authority' to waive compliance by the insured with this condition. 27

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13. \textit{Ibid.} at page, 375, C.F. Another early case which also followed the decision is \textit{Bigger v. Rock Life} (supra).
15. (1932) 2 Q.B. 534.
15. Queer? will the illiterates Protection Act afford such a man any defence were it to be in Nigeria.
18. (Supra).
19. Queer? But supposing the proposer is illiterate, or blind and this caveat is not translated or read to him by a fraudulent agent.
20. It is submitted that the proposer can invoke the Illiterates Protection Act against such an agent in case he brings a personal action against him for claim or damages.
24. See also the case of \textit{Wing v. Harvey} (supra).
25. See S. 49(3) of the Insurance Decree (supra).
27. See particularly P. 239 of the report, per Erle, C.J.
THE INSURANCE BROKER

Generally, a broker is also regarded as an agent under the law of agency. However, under the law of insurance, he is an agent with a technical type of job to do. Hence he must be an expert and demonstrate some versatile knowledge regarding the job of insurance broking. Unlike the insurance agent therefore, not just anybody can be an insurance broker. To be one you must have the required qualification, and experience.30

Qualification

To qualify as an insurance broker, an individual or firm consisting of the individuals must have also been qualified professionally as an insurer and must be registered with the professional body of insurance brokers. In Nigeria, there is the Nigerian Corporation of Insurance Brokers which acts as the professional body and which all Nigerian brokers must register with.31

From the foregoing, it would therefore be seen that the job of the insurance broker entails much more than just acting for a party, he is in all an organised person or set up whose job is the placing of insurance business on behalf of his clients, with insurance companies. He is the agent of the insured paid by the insurer from the premiums collected. We can, therefore say that he is indirectly paid or remunerated by the insured since his commissions comes from the premiums collected from the insured.

According to Section 30 of the Insurance Decree, no person shall transact insurance broking business in Nigeria unless he is issued with a certificate of insurance broking by the Director of Insurance after due application for same has been made to the Director. The director must be satisfied that

(a) the person has the prescribed qualification
(b) has unlimited liability and
(c) has deposited with CBN a fixed deposit of a sum not less than N25,000.00.

The certificate is renewable yearly and the Director is vested with power to cancel same within that period in order to check various abuses ranging from contravention of the provisions of the decree, to making of false statements, misrepresentation to clients, and conviction for fraudulent or dishonest practice.

The Role of The Insurance Broker

The Insurance Broker is the agent of the insured simpliciter and so it is best to examine his role in the light of his relationship via his obligations and responsibilities to the insured as his principal.

Firstly, the broker is under a duty to the insured to act carefully otherwise he may be liable to the latter for negligence. He must observe the duty of care and skill in carrying out the insured’s instructions. In Fraser v. B. N. Furman (Productions) Ltd., Miller Smith & Partners (A firm) Third Party,32 the defendants (a manufacturing company), employed the third parties who are insurance brokers, to replace their insurance. Subsequently, one of the defendant’s employees got injured during the course of his employment with the defendant and brought an action against them for negligence and breach of statutory duty which they duly recovered. In a third party action by the defendants, the defendants claimed, to be indemnified against the damages and costs which they had been ordered to pay to the plaintiff (the employee), contending that the insurance broker had, in breach of contract, failed to secure them insurance cover against employer’s liability. The Court held them so liable to the defendants even though they tried to raise a defence that they had still placed the insurance, a condition to the effect that

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anybody can be a Lloyds broker. To be a broker at Lloyds, you must be appointed by the committee of Lloyds, which is responsible for the day to day administration of Lloyds. The committee must be satisfied as to the expertise, integrity and financial standing of such applicant.

Apart from the technical job required of him at Lloyds, however, the broker's position as the agent of insured does not materially alter. Indeed in the case of Regans v. Bowen,[38] Scrutton L.J. re-emphasised this when he said "The individual members of Lloyds sit at Lloyds and brokers come to them and present proposals for risks. ... I agree, that in the case of marine insurance there is not the slightest doubt, and never has been the slightest doubt, that the broker is not the agent of the underwriter."[39]

However, by a special custom of Lloyds, the broker is regarded as the agent of the underwriter for the purpose of collection of premium only and he is liable to the underwriters for same.[40]

**THE CONTROVERSIAL CASH AND CARRY PROVISION IN THE INSURANCE DECREE AND THE ROLE OF AGENTS/BROKERS:**

This paper will be incomplete without touching on the role of agents and brokers in the collection of premium in view of the provision of Section 37 of the Insurance Decree which is a new provision in Nigeria. It provides as follows:

"The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of an insurance risk, unless the premium is paid in advance."

This provision in effect makes the policy of insurance available only on a 'cash and carry' basis. and allows an insurer to avoid the whole policy altogether where premium was not paid before its issuance. Traditionally, what most insurers do, is to issue policies in advance of payment of premium and debit the accounts of agents and brokers, on the mutual understanding between both (i.e., agents/brokers on the one hand, and Insurers on the other), that the premiums will be paid later. Even though insurance companies put provisions similar to S. 37 in their policies, they seldom enforce it, and the tradition was that once a loss arises, and the insured (for his agent/broker) later pays the premium (even after the loss), the insurance company would still go ahead and settle the claim. This tradition followed the Common Law position that once there is an agreement between the insurer and the insured, the latter is bound by his promise to pay. Thus, in Wooding v. Monmouthshire and South Wales Mutual Indemnity Society Ltd[41] Viscount Maugham had this to say in relation to premium:-

"There is, I think no principle of law that there must be implied in a contract of insurance a provision that the right to indemnity by the assured is conditional on his previous payment of the premiums. As a matter of commercial goods sense, there is a great deal to be said for the terse phrase - 'no premium no cover!' It is doubtful for that reason that insurance companies usually require that the consideration for which they undertake to indemnify the assured must be paid before the risk attaches. There is, however, no doubt that a contract of insurance may involve merely a promise by the assured or his broker to pay the premium."[42]

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**SELECTED ESSAYS ON THE LAW OF INSURANCE**

Today the position in Nigeria is different, for apart from the provision of Section 37 of the Insurance Decree, sections 29(2) and (3) and 31(2) and (3) expressly makes it an offence for an agent or a broker respectively, to collect premium on behalf of the insurer and refuse to turn it over. While section 37 has the effect of voiding the insurer's claim sections 29 and 31 seeks to punish an erring agent or broker the effect of voiding of the insured's claim, sections 29 and 31 seeks to punish an erring agent or broker irrespective of any other right of action that the insured may have against him for his negligence and/or fraudulent act in failing to turn over the premium.

**THE LOSS ADJUSTER**

When a loss arises, and the insured duly notifies the insurer, usually the insurer will consult its claims department which then swings into action by making sure that the insured complies with all the terms and conditions of the policy both implied and expressed. The claims department would also be called upon to look into the peril that gave rise to the loss, whether it is an excepted peril or one which is covered by the policy. In all, the claims department must investigate the claim thoroughly and if it sees nothing with it, the insured is settled, or in other words indemnified. Where a loss, however, involves a large sum of money (e.g. a large fire breakout, aircraft accidents, marine perils etc) the job of claims investigation becomes cumbersome and sometime technical. It is at this crucial stage that the job of the loss adjuster becomes relevant.

**Who is a Loss Adjuster**

A loss adjuster is one who conducts investigation into the cause or causes of loss arising from claims and recommends the appropriate amount of money or otherwise, which is adequate enough to compensate or indemnify the claimant.

According to Section 33 of the Insurance Decree,[43] no person shall transact business in Nigeria as loss adjuster unless he is licensed by the Director of Insurance. Such an applicant must satisfy the Director by being duly incorporated as a company under the Companies and Allied Matters Act; has a paid-up share capital of not less than N100,000.00; has as his Chief Executive a person who is a member of the Chartered Institute of Loss Adjusters or equivalent professional qualification, or has in his employment a qualified loss adjuster who is responsible for the conduct of the business, and where he has been carrying on business before the commencement of the decree has a person though not yet qualified, but has at least 10 years working experience with a Chartered Loss Adjuster.

The licence is renewable yearly and the director is also vested with wide powers either to refuse to renew or cancel altogether an already issued license. It must be pointed out here, that the decree prohibits an insurer from owing loss adjusting companies.[44] In effect a loss adjuster shall be an independent person.[45]

**The Role of The Loss Adjuster**

From the foregoing, it would be seen that a loss adjuster is an independent person employed by the insurer in order to investigate claims on its behalf. In performing this function, the loss adjuster, therefore, stands in the position of agent to the insurer. Thus, it is submitted that the law governing the relationship of principal and agent shall apply between them, the insurer being the principal in this case, and the loss adjuster being the agent.

In investigating the claims, therefore, the loss adjuster must act in good faith, and not unreasonably or capriciously. He must observe the duty of care and diligence, and must not be negligent otherwise he would be liable to the insurer. If for example, the insurer loses money by paying a claim.

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42. (1939) 4 All E.R. p. 570.
which they should otherwise not have paid, due to bad investigation by the loss adjuster, it is submitted
that the latter will be held liable to indemnify the insurer for the loss.

Finally, even though he is the agent of the insurer, the loss adjuster in the investigation of
claims, must always have at the back of his mind, the reputation of his principal and also remember the
following words of a learned writer on claims.47

"A claims handler has to combine a lot of qualities. He's got to have a thick
hide, but be understanding and flexible. He's got to try to maintain an even
keel, and steer a course which is acceptable to the finances of his company
(principal). He must straddle a line between parsimony and lavishness, not
being too stingy or overtly generous. Yet the work is done amidst the
hostilities of a harsh legal environment and occasional deceit from multiple
parties, while trying to resolve complex issues affecting the lives of people
who may or may not be as disabled as they allege."48

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47. See Bill Kizorek, Fishy Claims Experts In Colour published by P.S.I. publications 1163 E. Ogden Ave. Suite 705 - 360;
Naperville, K., U.S.A.