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INSURANCE: RIGHT OF INSURED TO ATTORNEY'S FEES

Phoenix Indemnity Co. v. Anderson's Groves, Inc., 176 F.2d 246 (5th Cir. 1949)

Insurer sought by declaratory judgment to determine whether it was obligated to defend an action for damages pending against its insured. The court of appeals, in affirming judgment imposing this liability, further HELD, the district court properly allowed the insured a reasonable attorney's fee under Florida law,[1] Circuit Judge Hutcheson dissenting.

Two semantic difficulties peculiar to declaratory actions were surmounted in arriving at the instant decision: (1) is a judgment or decree any the less so because declaratory; and (2) does "prosecuting the suit" under the Florida statute include defending? *Continental Casualty Co. v. Giller Concrete Co.*[2] decided that "recovery is had" when a declaratory judgment is rendered.[3] The principal case, in turn, construes "prosecuting the suit" to include defending when the insurer brings the action.[4] The result is reasonable. A declaratory judgment against a responsible insurer is the practical equivalent of a judgment for damages;[5] the merits are settled with finality. Furthermore, the result is a determination of a controverted issue of law, regardless of who initiates the action. To relieve the insurer of his statutory obligation to compensate counsel for the insured merely because the latter is defendant rather than plaintiff places on litigiousness a premium not contemplated by the Legislature.

The principal case is of even broader significance, however. It clarifies in large measure a long-standing confusion respecting the proper interpretation of the statute. The majority opinion presents

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[1]FLA. STAT. §625.08 (1949) provides:

"Upon the rendition of a judgment or decree by any of the courts of this state against any insurer in favor of the beneficiary under any policy or contract of insurance executed by such insurer, there shall be adjudged or decreed against such insurer, and in favor of the beneficiary named in said policy or contract of insurance, a reasonable sum as fees or compensation for his attorneys or solicitors prosecuting the suit in which the recovery is had."

[2]116 F.2d 431 (5th Cir. 1940).

[3]*Accord,* as to definition of "recovery," Covert v. Randles, 53 Ariz. 225, 87 P.2d 488 (1939).

[4]*Cf.* Badger v. Shaw, 58 Vt. 585, 3 Atl. 535 (1886).

[5]See BORCHARD, DECLARATORY JUDGMENTS 490 (1934).

a liberal view, whereas the dissent prescribes strict construction on the ground that the remedy is in the nature of a penalty.[6] This notion is traceable to an early comparison of the mode of pleading the statute with that of alleging entitlement to a penalty.[7] Transplanted into an interpretational context, the dictum has appeared often;[8] but it is not in harmony with the mass of decisions under the statute.[9] A similar Oregon enactment has been held "compensatory" rather than penal.[10]

From the due process standpoint, the Supreme Court of the United States has upheld a statute providing for an additional twelve percent of the face amount of the policy plus attorney's fees,[11] even when the insurer contests liability in good faith and on reasonable grounds.[12] Significantly, Justices Butler, Sutherland and VanDevanter, who dissented in respect of the additional damages, approved the award of attorney's fees.[13]

The statute is broad in its terms and application.[14] It demands that an insurer include the fees of counsel for the insured as part of the amount at risk in a contested case.[15] A statute providing for fees

[6]Laws v. New York Life Ins. Co., 81 F.2d 841, 844, *modified,* 82 F.2d 811 (5th Cir. 1936); Union Indemnity Co. v. Vetter, 40 F.2d 606, 609 (5th Cir. 1930); Main v. Benjamin Foster Co., 141 Fla. 91, 96, 192 So. 602, 604 (1939); Pendas v. Equitable Life Assur. Soc'y, 129 Fla. 253, 272, 176 So. 104, 111 (1937); *see also* the dissenting opinion in the principal case, 176 F.2d at 248.

[7]United States Fire Ins. Co. v. Dickerson, 82 Fla. 442, 453, 90 So. 613, 616 (1921).

[8]See note 6 *supra.*

[9]*E.g.,* Continental Casualty Co. v. Giller Concrete Co., 116 F.2d 431 (5th Cir. 1940); Bowen v. Railway Mail Ass'n, 54 F.2d 391 (S.D. Fla. 1931); Orlando Candy Co. v. New Hampshire Fire Ins. Co., 51 F.2d 392 (S.D. Fla. 1931); New York Life Ins. Co. v. Lecks, 122 Fla. 127, 165 So. 50 (1935).

[10]Hagey v. Massachusetts Bonding & Ins. Co., 169 Ore. 132, 127 P.2d 346 (1942).

[11]Life and Casualty Co. of Tennessee v. McCray, 291 U.S. 566 (1934).

[12]In New York Life Ins. Co. v. Lecks, 122 Fla. 127, 165 So. 50 (1935), the Florida Court reached the same result with regard to FLA. CONST. Decl. of Rights, §§1, 12.

[13]*Cf.* Union Central Life Ins. Co. v. Chowning, 86 Tex. 654, 26 S.W. 982 (1894) (12% given as damages for failure to comply with the contract by payment, and the attorney's fees allowed as compensation for the costs of collecting the debt), cited with approval in Fidelity Mutual Life Ass'n v. Mettler, 185 U.S. 308 at 325 (1902).

[14]Bowen v. Railway Mail Ass'n, 54 F.2d 391 (S.D. Fla. 1931); Orlando Candy Co. v. New Hampshire Fire Ins. Co., 51 F.2d 392 (S.D. Fla. 1931).

[15]An attack on the ground that the statute violates the equal protection clause,

only should be so construed as to effectuate the legislative purpose,[16] namely, to enable the insured to secure the recoupment he has bargained and paid for, when entitled thereto, without the expense of litigation. It is of no practical assistance to him to be told that he can avoid this outlay if the insurer refuses to pay, but must incur it if the insurer chooses to go to court without first specifically refusing to perform his obligation.

On the whole, the statute has been sensibly interpreted. The insurer is still protected from liability for such counsel fees when he is powerless to avoid litigation, as, for example, after he interpleads rival claimants,[17] or when he admits liability but must before payment obtain an order electing a mode of settlement for an incompetent beneficiary.[18] When, however, he deliberately chooses to litigate the matter, he must expect to pay for his choice if it proves incorrect. The principal case properly refuses to sacrifice legislative intent to verbal niceties.[19]

CLARENCE M. WOOD

FLA. CONST. Decl. of Rights §1, in failing to prescribe payment of attorney's fees of the insurer by the insured when he loses, was repulsed long ago in New York Life Ins. Co. v. Lecks, 122 Fla. 127, 165 So. 50 (1936); L'Engle v. Scottish Union & National Fire Ins. Co., 48 Fla. 82, 37 So. 462 (1904); Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 37 So. 62 (1904); Tillis v. Liverpool & London & Globe Ins. Co., 46 Fla. 268, 35 So. 171 (1903). For a similar federal construction of U. S. CONST. Amend. XIV, *cf., e.g.,* Farmers' & Merchants' Ins. Co. v. Dobney, 189 U.S. 301 (1903).

[16]1 BL. COMM. *86; 1 KENT COMM. *460; Hall, *Strict or Liberal Construction of Penal Statutes,* 48 HARV. L. REV. 749 (1935); Pound, *Common Law and Legislation,* 21 HARV. L. REV. 383 (1908).

[17]Laws v. New York Life Ins. Co., 81 F.2d 841 (denying fees), *modified,* 82 F.2d 811 (5th Cir. 1936) (fees allowed for work of beneficiary's counsel performed before insurer filed its plea in the nature of interpleader).

[18]Pendas v. Equitable Life Assur. Soc'y, 129 Fla. 253, 176 So. 104 (1937).

[19]Caveat: A legislative intent to permit recovery in instances of this type is not clear to all; for a contrary view see 4 MIAMI L.Q. 398 (1950).