

Subject: New Topic—Contract Provisions of Insurance Code

Professor Albert A. Ehrenzweig of Bolt Hall suggests that there is a pressing need for a complete revision of the private law (contract) provisions of the California Insurance Code. He sent us a copy of Patterson, Some Contract Provisions of the California Insurance Code, 32 So. Cal. L. Rev. 227 (1959), which summarizes the situation as follows:

The contract provisions form a relatively minor part of the Insurance Code of California. . . . [These provisions consist] of nine chapters that establish rules by which to determine the validity and meaning of insurance contracts generally and of their essential terms. The present comments are directed at those chapters, and more particularly at the sections that will be discussed in detail below. The critical remarks about these sections are not intended to reflect upon the great bulk of the Insurance Code which is, for the most part, admirably drafted and kept down to date.

Unfortunately the same cannot be said for the contract provisions mentioned above. Many of them, it is believed, are or have become at least partly obsolete. In part their present defects are due to changes in the practices of insurers since these provisions were originally drafted. Some examples will be mentioned below. In part they are obsolete because of changes in case law and legislation. For instance, the right of a third person to recover on a contract made for his benefit was at least uncertain when these provisions were drafted. Again, some of these provisions were, it is believed, ineptly drafted or plainly erroneous at the very beginning. Furthermore, there are some sections that are scarcely reconcilable with others in the same chapter. Even when they are not confusing or wrong, many of them are at least useless deadwood in the Insurance Code.

Fortunately the California courts have either ignored the obsolete or irrelevant provisions, or have piously construed the sections to mean what they ought to mean, so that it is not easy to demonstrate that any one of these sections has "caused" a California court to give an unjust decision affecting the rights and duties of private persons. In spite of its panoply of "codes," California seems to be still, fundamentally, a "case law" jurisdiction. Hence, any attempt to show that the legislative defects above referred to have produced injustice to individuals will be of secondary importance for the purposes of this article. It is assumed, however, that muddled statutes are likely to make the law uncertain, and thus cause litigants needless expense to establish their rights. The requirement that a federal court shall conform to state statutes seems to have led to at least one unfortunate decision by way of a literal interpretation of an obsolete provision. The chief purpose of this article is, then, to point out some of the defective or useless provisions without assuming the burden of summarizing all of the California case law on the subjects referred to in these sections. It is primarily a study in legislation.

An examination of the article indicates that a number of sections could simply be repealed, others revised to conform to case law. The provisions, drafted more than 100 years ago, should be reviewed and brought up to date. The article includes specific suggestions as to the disposition of some, but far from all, of the pertinent sections. If the study were limited to the matters covered by the article, it might not require a substantial effort on the part of the Commission. However, if the study were to be a comprehensive one, it would require considerable resources and the staff believes that these resources would be better devoted to areas of law where the law results in injustice rather than to a mere cleanup job. If the Commission is willing to limit the study to the matters mentioned in the law review article, it would be a small topic that might be worth studying.

Respectfully submitted

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Executive Secretary