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IN THE SUPREME COURT OF THE STATE OF UTAH

MERLIN L. ANDREW, WANDA C. ANDREW, and JAMES VON WOOD, on behalf of themselves and all others similarly situated,
Plaintiffs and Appellants,
vs.
IDEAL NATIONAL INSURANCE COMPANY,
Defendant and Respondent.

JOYCE CORDNER OLPIN and LEROY M. RICHMAN, for themselves and for and on behalf of all other persons similarly situated,
Plaintiffs and Appellants,
vs.
IDEAL NATIONAL INSURANCE COMPANY, a Utah corporation; W. W. CLYDE; WILLIAM I. SPERE; JAMES D. MOYLE; ALAN B. BLOOD; CHARLES T. S. PARSONS and JOHN S. BOYDEN,
Defendants and Respondents.

Case No. 13040

BRIEF OF APPELLANTS

Appeal from Third District Court of Salt Lake County
Honorable Marcellus K. Snow, Presiding

FILED
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Clerk, Supreme Court, Utah

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Defendants and Respondents.

Case No. 13040

BRIEF OF APPELLANTS

STATEMENT OF NATURE OF CASE

This is a "class action" to enforce an agreement

contained as an endorsement to a life insurance policy issued by the defendant insurance company.

DISPOSITION OF CASE IN LOWER COURT

The District Court granted summary judgment dismissing all claims of plaintiffs.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the summary judgment for defendant with a remand to the District Court to make an accounting of the Bonus Fund as written and sold by the defendant, or in the alternative a remand for the purpose of trial as to the proper amounts to be returned to the plaintiffs.

STATEMENT OF FACTS

In 1948 and 1949, the plaintiffs (consisting of a class numbering approximately 170) purchased life insurance policies from the defendant insurance company.[1] (R. 51 and R. 162) These policies of insurance were called the "President's Special Expansion Policy." (R. 94, 120)

---

[1]The company issuing these policies was Mutual Life of America, which changed its name to Great Mutual Life Insurance Company, and then to Pacific Western Insurance Company. Ideal National Insurance merged with Pacific Western Insurance Company in 1960. In legal fact, Ideal is not just the successor to the company issuing these policies—it is the surviving ego. That is the legal fact, but it was also an express condition of the merger agreement approved by the Insurance Commissioner. Therefore, Ideal is hereafter referred to simply as the "insurance company."

Everyone purchasing the "President's Special Expansion Policy" received as a part of the policy an "Expansion and Bonus Fund Endorsement." (See Appendix 1) The policies were of a type which was common to new companies of the era, known as special founders policies, which did not designate a separate premium amount attributable to the Bonus Fund but were of a high premium variety. (R. 116) The Bonus Fund Endorsement specifically provides that the defendant insurance company would place in a special bonus fund a sum of not more than $2 and not less than $1 for each $1,000 of life insurance sold by the defendant company in the following twenty years, together with a deposit of $1 to $2 to this special fund for each renewal premium received by the defendant on all insurance written by the defendant. (R. 88)

The defendant accepted full premiums from the plaintiffs each year from 1948 or 1949 until August 22, 1968, on which date the defendant wrote the plaintiffs and advised them that the Bonus Fund Endorsement was illegal and void and made alternative settlement proposals to them. (R. 51, 162) In context, therefore, it is important to consider that the defendants by their settlement proposals essentially admit liability. The matter at issue is not whether the plaintiffs and the class have compensable injury, but whether they may seek redress in the courts for an accounting, in adversary proceedings, or if they must accept unilateral determination by the company of their rights in proceedings in which neither they nor their interests were represented.

The insurance company knew as early as April 5, 1960, that there was a question as to the legality of the Bonus Fund Endorsement attached to the President's Special Expansion Policy. (R. 94, 120) No notice of this was given to any of the plaintiffs although the defendant continued to send the premium notices and collect plaintiffs' premiums.

When the plaintiffs purchased the insurance policy, they received a letter from the President of the insurance company congratulating them upon making "a wise and sound Investment." (R. 97) This letter stated:

> "By the simple procedure of depositing into the Special Bonus Fund a sum of not more than two dollars ($2.00) and not less than one dollar ($1.00) for each $1,000 of Life Insurance sold by your Company in the next twenty years, and by a like deposit for each renewal premium on such insurance, this Fund will accumulate at a rapid rate.
>
> "Yes—you made a sound and wise decision when you made application for this protection. You are now a member of a fast-growing organization, and with the help of each of you, we will most certainly be one of the large Insurance Companys of the West." (R. 97)

For the first two or three years following the sale of these policies, the insurance company funded the reserves for these policies as they were written. As of December 31, 1951, the insurance company had accumulated $6,930.95 in the Bonus Fund (Examination Report for 1951, pp. 31-32). (R. 137) During the next

three years, the defendant "reconsidered" the amounts it was depositing in the Bonus Fund and the Examination Report for 1954, p. 51, showed a "recalculation" of the Fund balance as of December 31, 1954 at $2,416.46. (R. 141) No notice of this reduction was given by either the State Insurance Commissioner or the defendant insurance company to the plaintiffs owning the Bonus Fund Endorsement, but the insurance company nevertheless continued to accept full premiums from all owners of the insurance policies until the time when the Bonus Fund Endorsement became payable. After collecting plaintiffs' premiums for the full twenty-year period, defendant advised the holders of the Bonus Fund Endorsement that the endorsement was illegal and void. (R. 12)

Plaintiffs Olpin and Richman commenced an action in the United States District Court for the District of Utah alleging that the Bonus Fund Endorsement constituted a security under the Federal Securities law. Judge Christensen of the United States District Court for the District of Utah dismissed the action for lack of subject matter jurisdiction, which was affirmed by the Court of Appeals for the Tenth Circuit, and *certiorari* was denied by the United States Supreme Court in 1970. (R. 226)

Plaintiffs then filed this action in the State District Court, pursuant to the suggestion of the federal courts that the state court was the proper forum, seeking an accounting of the Bonus Fund Endorsement or

in the alternative return of premiums, plus acquisition costs and other expenses attributable to the claimed illegal portion of the insurance contract. (R. 1-3) Proceedings were had before the trial court for the establishment of a class action and the court determined the extent of the class of plaintiffs. (R. 55-56) A preliminary pre-trial was held and both parties moved the court for summary judgment on the legal question of the validity of the Bonus Fund Endorsement. (R. 85 and 279) After having the matter under advisement for several months, the District Court concluded, in apparent disagreement with the federal court decisions, that the Bonus Fund Endorsement was invalid, illegal and unenforceable because of its discriminatory features. (R. 311-313) The court further granted defendant's motion for summary judgment as to all issues raised by the pleadings, including the dismissal of plaintiffs' alternative prayer. (R. 311-313)

POINTS RELIED ON

I. The District Court was in error in denying plaintiffs, as a matter of law, any accounting concerning the Bonus Fund.

1. The Bonus Fund Endorsement was valid, legal and enforceable under Utah law.

2. Defendant may not avoid its contract after accepting its benefits for twenty years.

3. The validity of the Bonus Fund Endorsement is *res judicata* or binding under the related doctrine of *collateral estoppel* by virtue of the decision of the Court of Appeals for the Tenth Circuit in *Olpin v. Ideal.*

II. The District Court was in error in holding that the officers and directors of the insurance company could deprive the plaintiffs of property without notice or hearing.

III. The District Court was in error in dismissing the plaintiffs' alternative prayer for a refund of the premiums plus other amounts previously allowed by this Court which the plaintiffs paid for the illegal portion of the agreement.

ARGUMENT

POINT I

THE DISTRICT COURT WAS IN ERROR IN DENYING PLAINTIFFS, AS A MATTER OF LAW, ANY ACCOUNTING CONCERNING THE BONUS FUND.

1. *The Bonus Fund Endorsement was valid, legal and enforceable under Utah law.*

The trial court held the Bonus Fund Endorsement illegal and unenforceable under the laws and statutes of

Utah because it was a "discrimination" between the policyholders of defendant.[2]

The section of the Utah Insurance Code pertaining to "unfair discrimination" in effect at the time of the sale of the insurance policies, and which the trial court thus alluded to,[3] was § 43-27-22 of the *Laws of Utah 1947*. This section provides as follows:

> "43-27-22. Unfair Discrimination.—Revocation of Authority.
>
> (1) No insurer shall make or permit any unfair discrimination in favor of particular individuals or persons, between insurants or subjects of insurance having substantially like insuring, risk, and exposure factors or expense elements, in the terms or conditions of any insurance contract, or in the rate or amount of premium charged there-

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[2]The court did not find that the Bonus Fund Endorsement violated any specific statutes contained in the Utah Insurance Code, but did state in its Memorandum Decision that defendant's changes in the administration of the policy, which the trial court validated, were

> "* * * to minimize the possible or probable inequities and discrimination the Bonus Fund Endorsement would have on other defendant insurance company policyholders of the same risk class and premium payment schedules, * * *" (R. 311, 312)

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[3]Another section of the Insurance Code of Utah relied upon by the insurance company in its argument to the trial court, but not relied upon by the trial judge, was:

> "43-27-15. Gift, Promise or Allowance. No insurer, general agent, broker, solicitor, or other person, shall, as an inducement to the purchase of insurance, or in connection with any insurance transaction, provide in any policy for, or offer, or sell, buy, or offer or promise to buy or give, or promise, or allow, in any manner whatsoever:
> "(1) any shares of stock or other securities issued or at any time to be issued or any interest therein or rights thereto; or
> "(2) any special advisory board contract, or other contract, agreement, or understanding of any kind, offering, providing for, or promising any profits or special returns or special dividends; or
> "(3) any prizes, goods, wares, or merchandise of an aggregate value of one dollar." *Laws of Utah 1947*

The Bonus Fund contained no provisions for gifts or prizes.

> for, or in the dividends or other benefits payable thereunder.
>
> "(2) It shall be the duty of the Commissioner, upon being satisfied that any insurance company or any agent thereof has violated any of the provisions of the section, to revoke the certificate of authority of the company or agent so offending, and no authority shall be issued to such company or agent within six months from date of such revocation."

The mischief in the determination of the trial court is that it disregards both the plain meaning and the philosophy and purpose of the statute relied upon, for this court has declared that the purpose of the statute is to protect policyholders such as the plaintiffs, not to defeat their reasonable expectations.

The persons for whose protection the Utah Insurance Code was enacted have been clearly set forth by this court in the case of *Utah Ass'n, of Life Underwriters v. Mountain States Life Ins. Co., et al.*, 58 Utah 579, 200 P. 673, wherein the court stated:

> "Then, again, it is manifest that the statute was enacted for the protection of the public and especially for the protection of those who are solicited to enter into life insurance contracts who may lack the experience and the opportunity to guard themselves against the wiles of the experienced life insurance solicitor. The statute should therefore be construed so as to accomplish its purpose and so as to protect those it intends to protect."

Significantly, in the *Utah Ass'n. of Life Underwriters* decision, the Utah Supreme Court quoted the

Utah statute relating to discrimination in life insurance which was in effect at that time.

This Court has also commented in the past upon an insurance company entering into an agreement and then taking advantage of such a statute to say the agreement was void. In *Ashton Jenkins Ins. Co. v. Layton Sugar Co.*, 85 Utah 333, 39 P.2d 701, this court stated:

> "The statute provides a penalty for an insurance company, its officers or agents violating any of the provisions of the cat. It was not contemplated by the statute that the insurance Company could enter into such an agreement and then take advantage of it by saying that the agreement was void."

Section 43-27-22 provides that "No insurer shall * * *" perform any of the prohibited acts. The statute does not make the insurance policy or the Bonus Fund Endorsement void or unenforceable, but provides for the Insurance Commissioner to revoke the certificate of authority of the insurance company which makes unfair discrimination in favor of particular individuals or persons. (§ 43-27-22(2) of Utah Code Annotated 1943)

The trial court in this case has done exactly what this Court would not allow the insurance company to do in the *Ashton Jenkins* case. The defendant, by its own admission, guilty of violating the statute, has been permitted to set up its own wrong to enrich itself. If that decision is allowed to stand, a new era has been ushered into insurance law.

Section 43-27-22 of Utah Code Annotated 1943

does not make it an offense for an *insured* to *purchase* a policy containing an unfair discrimination. Courts in other jurisdictions have uniformly held that in construing statutes of this kind it should be presumed that the person purchasing is innocent of any crime or wrongdoing.[4]

Courts quite uniformly hold that a contract which violates a statutory regulation of business is not void unless made so by the terms of the act. ***Ritter v. Shotwell,*** 388 P.2d 527 (S.Ct. of Wash. 1964) See also ***Henecy v. Vanderhoff,*** 461 P.2d 581 (Wash.), where the court stated:

> "Assuming for the purpose of argument only that there was a rate discrimination, this would not establish that the contract was invalid. Our state has adopted the rule that a contract which violates a statutory regulation of business is not void unless made so by the terms of the act."

Contrary to the trial court's conclusion that the Bonus Fund was void, the statutes of the State of Utah in force in 1948 appear to have contemplated contracts of this very type.

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[4]*E.g. Hemmeon v. Amalgamated Copper Mines Co.*, 273 P. 74 (1928), where the California Supreme Court reasoned that to deny a plaintiff relief because of defendant's argument that their securities were sold in violation of law and therefore void and unenforceable would be to penalize those for whose benefit the laws are established; *American Nat'l. Ins. Co. v. Tabor,* 11 Tex. 155, 230 S.W. 397 (1921), where the Supreme Court of Texas stated that even though the policy was discriminatory, it did not necessarily follow that the courts would adjudge it void for, "It would not be in accord with either the public policy declared by the Act wherein the statute is found or the ends of justice to permit insurance companies to issue discriminatory policies of life insurance and collect and retain the premiums thereon and to then refuse payment after the death of the insured"; *National Fidelity Life Ins. Co. v. Gerard*, 52 P.2d 1 (Okla. 1935) where the court declared that, "Our statute does not provide that a policy issued in violation of the above statute shall be void, * * *."

Utah Code Ann. (1943) § 43-8-6 permitted a life insurance policy "to participate from time to time in the earnings of the insurer through dividends." Section 43-8-6(3) permitted a domestic insurer to issue both participating and non-participating life insurance contracts, provided the right or absence of the right to participate was reasonably related to the premium charged.

The defendant insurance company can cite no statutes and no Utah case law in force in 1948 which specifically makes the Bonus Fund Endorsement invalid, illegal and unenforceable. It is the general principle of law that courts strive for the construction which favors legality. See generally 43 Am. Jur., § 262.

2. *Defendant may not avoid its contract after accepting its benefits for twenty years.*

Competition for insurance premiums has resulted in all types of ingenious plans and schemes for the selling of insurance to the public. The Insurance Commissioner, pursuant to express authority contained in Utah Code Ann. § 43-19-9, has approved such schemes, and he specifically approved these contracts, both by permitting their original issuance pursuant to Utah Code Ann. § 43-19-9 (1943) and in a letter to one of the plaintiffs answering his specific inquiry concerning their validity:

> "This policy form they have explained to you is a special policy, granted this company to get them established. All the older companies have had the same privilege. This company is allowed

> to write only so many such policies by this department." (Letter of March 15, 1948 of Oscar W. Carlson, Commissioner of Insurance, by Regnall W. Garff, Deputy Insurance Commissioner, to plaintiff Merlin L. Andrew) (R. 116)

This Court recognized the validity of this practice in *Utah Ass'n of Life Underwriters v. Mountain States Life Ins. Co., et al., supra*:

> "In concluding this opinion we feel constrained to add that by anything we have here said we do not wish to be understood as holding that an insurance company may not formulate a plan of insurance which contains special features that are, or are deemed to be, of special interest or benefit to the insured, and that it may not urge and exploit such features as 'an inducement to insurance.' "

In the instant case, the Bonus Fund Endorsement provided that the defendant would place in a special fund a sum of not more than $2 and not less than $1 for each $1,000 of life insurance sold. The defendant has sold numerous similar policies containing inducements to buy, as the record herein discloses. The "Golden Harvest Special Expansion Contract" contained a "Surplus Fund Certificate" which the company agreed to issue to the insured in each policy year after the first. (R. 99) The Surplus Fund Certificates specially provided that the certificate holder "shall be deemed to have elected to receive insurance company stock for his certificate, * * * " if the certificate is not surrendered for cash within 30 days after notice. (R.

The "Providers' Economy Policy" contained a

profit sharing rider which guaranteed a dividend return of not less than ten percent of premiums on the policy. (R. 100-101)

The "Savings Endowment Policy" contained "guaranteed coupons." (R. 102-108)

The "President's Special Investment Policy" contained the following endorsement:

> "PRESIDENT'S SPECIAL INVESTMENT FUND
>
> "The Company agrees to create and maintain a Special Investment Fund for this Select Group:
> "1. Ten dollars ($10.00) per thousand of face amount of insurance, and
>
> "2. Twenty per cent (20%) of the annual premium, exclusive of any premium for special benefits and extra ratings, and
>
> "3. Not less than one dollar ($1.00) nor more than two dollars ($2.00) per thousand dollars of face amount as the Board of Directors of the Company may annually elect.
>
> "All policies of this plan issued by the Company in the same calendar year as this policy and containing a Special Investment Fund provision shall constitute a select group and the words, 'Select Group' as used herein shall mean all such policies.
>
> * * *
>
> "If the Insured be living and if this policy be in force on the twentieth anniversary of the date of issue hereof and all the premiums have been duly paid, this policy will have qualified for its share of the Special Investment Fund which

> will be distributed by the Company upon the expiration of the then calendar year, herein called the distribution date. This policy's share of the Special Investment Fund shall be an amount of money bearing the same proportion to the whole of the accumulated Special Investment Fund as the amount contributed to such Fund by this policy bears to the total of such contributed amounts of all policies in this Select Group qualifying for a share. * * * " (R. 111)

The insurance company has honored all policies containing this President's Special Investment Fund. They have not been the least bit concerned about the discrimination imposed upon the policyholder who pays premiums into the fund for several years and then allows the policy to lapse.

As a special inducement for the sale of the "President's Special Investment Fund", the insurance company recognized this discrimination and supplied an "Estimated Return" based upon:

> "The above estimated return is based on the rate of policy termination according to a standard persistency table, deemed by the Company to be applicable, and estimates the return that may reasonably be realized by a persisting policyholder." (R. 110)

The only difference between the special inducements in these policies and the special inducement in the Bonus Fund Endorsement is the cost to the insurances company. In this case the defendant did not fund the policy as it was written because of the cost. Defendant has honored each of these policies, despite the

rather obvious special benefits which they grant to particular classes of policyholders—or at least they have yet to assert that any of these plans were void as constituting a discrimination. The only difference between the Bonus Fund and each of these other plans, along with numerous similar plans issued by other companies, is that in retrospect defendant views its obligation under the contract as being unfair. The company took that risk when it issued these contracts, however, and both general equity concepts and the Contract Clause of the Constitution (U.S. Constitution, Art. I, § 10) bar the abrogation of the agreement.

If the Supreme Court of Utah holds the Bonus Fund endorsement illegal under this section of the Utah statutes, it will open a veritable Pandora's Box of opportunities for insurance companies to avoid contracts they do not favor after they are written. Insurance policies contain numerous inducements and special provisions which enable them to be sold. What policy in the law permits an insurance company to void a policy merely because it costs more than they would like?

The Supreme Court of Utah has recognized that insurance companies may formulate a plan which contains special features which are of special interest to the insured. *Utah Ass'n. of Life Underwriters v. Mountain States Life Ins. Co., et al., supra.*

There was no evidence before the trial court that any other insurance policies were being sold by the insurance company selling the policy containing the

Bonus Fund Endorsement. Therefore, any discrimination which the defendant claims should release it from its obligations under the Bonus Fund Endorsement can be provided only by the defendant itself. None of the policyholders owning the Bonus Fund Endorsement had any right to require the defendant insurance company to sell other insurance policies. The only amounts which the defendant must credit to the Fund are for policies which it sells. Thus, it is the action of the company in continuing to sell later policies which did not contain the Bonus Fund Endorsement which they now claim makes the Bonus Fund Endorsement void and unenforceable.

All holders of the President's Special Expansion Policy were issued the Bonus Fund Endorsement. They constitute a class who are all treated equally. There are no facts in this proceeding showing any discrimination against any other insured parties of the insurance company. It was error for the trial court to grant a summary judgment to the insurance company on the ground that the Bonus Fund Endorsement is illegal and void.

Surely, under general concepts of equity, an insurance company which has collected premiums from the plaintiffs and the members of the class for twenty years, almost half of those during a period when the company had already determined to assert that the contract was invalid, should now be estopped to deny its obligations under the contract.

3. *The validity of the Bonus Fund Endorsement is res judicata or binding under the related doctrine of collateral estoppel by virtue of the decision of the Court of Appeals for the Tenth Circuit in Olpin v. Ideal.*

In a case involving the same parties, the Court of Appeals for the Tenth Circuit determined that the Bonus Fund Endorsement is a valid contract of insurance. *Olpin v. Ideal National Insurance Company,* 419 F.2d 1250 (10th Cir. 1969), *cert. denied,* .... U.S. .... (1970). Plaintiffs in the *Olpin* case, who are the same plaintiffs in this proceeding, had filed an action in the Federal District Court claiming the Bonus Fund Endorsement was an investment trust within the meaning of the Investment Company Act of 1940 (15 U.S.C., §§ 80a-1, *et seq.*) The defendants successfully resisted that action by urging that the contract was exempt from the Investment Company Act by virtue of the provisions of the McCarran-Ferguson Act (15 U.S.C., §§ 1011, 1912(b)), which exempts the business of insurance from federal regulation. Having persuaded the federal courts that the contract was "insurance" and not a "security," the defendant insurance company would now have this Court excuse it of all responsibility at all by declaring the reverse of that proposition—that the contract is not insurance at all, as the federal courts have held.

In the *Olpin* case, the defendants moved to dismiss the complaint on the grounds that the federal courts

did not have subject matter jurisdiction. In resolving the matter in favor of the defendants, the Court of Appeals construed the Bonus Fund as a valid contract of insurance:

> "Ideal and its predecessors each set up a reserve from which to discharge its obligations under such Endorsement, and, no doubt subject to the limitations and requirements of the laws of Utah and its Department of Insurance, invested such reserve funds, but those facts, in our opinion, tend to show that *such Endorsement was an insurance contract and not a security.* Life insurance companies are normally required by state insurance laws or regulations thereunder to set up reserves to guarantee the performance of their life insurance policy obligations. And they invest such reserve funds at their own risk in the normal operation of their insurance businesses." (Emphasis added)

And

> "When a policyholder died prior to the 1968 distribution date and the benefits were paid to his beneficiary, the *Endorsement had many of the characteristics of an ordinary life insurance policy.* When the policyholder survived the 1968 distribution date and the benefits were payable to him, *the Endorsement had many of the characteristics of a 20-year endowment policy.*" (Emphasis added)

That determination being essential to the decision reached, it also became *res judicata* between the parties and their privies in any subsequent proceedings.

The proposition is stated in *Restatement of Judgments* § 68:

> "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action, except as stated in §§ 69, 71 and 72."

Comment c. explains the *Restatement* rule in language appropriate to the facts of this case:

> "c. *Where a question of fact is actually litigated.* Where a question of fact is put in issue by the pleadings and is submitted to the jury or other trier of facts for its determination, and it is determined, the question of fact is actually litigated, and the judgment is conclusive between the parties in a subsequent action on a different cause of action."

Perhaps the leading authority on the subject is the frequently cited opinion of Justice Roger Traynor in *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942). This Court has recently affirmed the doctrine in *Richards v. Hodson*, 26 Utah 2d 113, 485 P.2d 1044 (1971), and observed that the trend of recent cases[5] is to approve the *Restatement* and *Bernhard* doctrine:

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5 **E.G. Peay v. Salt Lake City**, 11 Utah 341, 40 Pac. 206, 208 (1895); **Commissioner v. Sunnen**, 333 U.S. 591, 597-99 (1948); **Cromwell v. County of Sac.**, 94 U.S. 351, 24 L.Ed. 195 (1877); **Rachal v. Hill**, 435 F.2d 59 (5th Cir. 1970) **cert. denied** 403 U.S. 59; **Zdanok v. Glidden Co.**, 327 F.2d 944, 954-56 (2d Cir. 1964) **cert. denied** 377 U.S. 934.

"Strictly speaking, the term 'res judicata' applies to a judgment between the same parties who in a prior action litigated the identical questions which are present in the latter case. Not only are the parties bound by the ruling on matters actually litigated, but they are also prevented from raising issues which should have been raised in the former action. The rule of law is wise in that it gives finality to judgments and also conserves the time of courts, in that courts should not be required to relitigate matters which have once been fully and finally determined."

The Court of Appeals for the Tenth Circuit, which authored the *Olpin* opinion, applies the doctrine,[6] and it has recently been applied by the United States Supreme Court in ***Blonder-Tongue v. University Foundation***, 402 U.S. 313, 322-26 (1970).

Defendant should be estopped to now assert the invalidity of the contract, for in its Motion and Memorandum filed with Judge Christensen, they took the position that the Bonus Fund Endorsement was a valid insurance contract as follows:

"Thus, while the principal of the fund increased

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6 See **Vile v. Prudential Ins. Co.**, 124 F.2d 78, 81 (10th Cir. 1941) **cert. denied** 315 U.S. 816 (1942):

"Any right, fact or matter in issue and directly adjudicated, or necessarily involved in the determination of an action before a competent court in which a judgment or decree has been rendered upon the merits, is conclusively settled by the judgment therein and cannot again be litigated between the same parties and their privies, whether the claim, demand, purpose or subject-matter of the two suits is the same or not."

See also **Henderson v. United States Radiator Corp.**, 78 F.2d 674, 675 (10th Cir. 1935) **cert. denied** 296 U.S. 635.

in proportion to the issuance and persistency of a certain class of insurance sold by the issuing company, the policyholder was to receive a fixed $2\frac{1}{2}$ per cent interest of the fund so determined. *This type of insurance is distinguishable from a variable annuity contract,* which is *not insurance* but rather gives to the annuitant an amount varying according to the wisdom of the investment policy of the issuer of such contracts . . .

" . . . The endorsement is part of a life insurance contract

* * *

"It is respectfully submitted that this court should not permit *this valid state claim* for the specific performance of an endorsement to a life insurance contract to be tortured into a federal securities suit on the ground that such endorsement, or a tendered release thereof,is a 'security.' "The McCarran Act (15 U.S.C. Sec. 1012(b)) broadly excludes the field of insurance from federal regulation in favor of state supervision. The Investment Company Act (15 U.S.C. Sec. 80a-3(3)) and the Securities Act (15 U.S.C. Sec. 77c(2)) respectively exempt insurance companies and insurance contracts issued by corporations subject to state regulation. There is here no compelling reason in concept, procedure or remedy to extend the coverage of federal securities acts in order to take jurisdiction in the case at bar, and this suit should therefore be dismissed." (Emphasis added)

The defendant Ideal National in its Memo to Judge Christensen further stated:

> "*The life insurance policy and its critical endorsement have been approved, controlled and regulated under state law by the Utah Insurance Commission for many years.*" (R. 232) (Emphasis added)

The defendant re-asserted its position in the appeal of the *Olpin* case to the Court of Appeals for the Tenth Circuit, wherein they stated in their brief:

> "The fundamental and dispositive question in this case is whether the Bonus Fund Endorsement attached as a rider to a life insurance policy was 'insurance' or an 'investment company' within the definition of the Investment Company Act of 1940." (p. 31-32, R. 234)

It can be seen from the statements of the Court of Appeals for the Tenth Circuit and the statements made by defendants in their brief to Judge Christensen and to the Court of Appeals that the pivotal issue was whether the Bonus Fund Endorsement was a valid contract of insurance. The federal courts determined that it was and that they therefore lacked subject matter jurisdiction under the McCarran-Ferguson Act. Now defendant, in this state court proceeding, has convinced the trial judge that the Bonus Fund Endorsement is not a valid contract of insurance.

The doctrine of *collateral estoppel* prevents the result defendants seek, for it declares that when a controlling issue has been decided, it may not later be re-litigated. The doctrine relates to issues rather than to causes of action or parties.

POINT II

THE DISTRICT COURT WAS IN ERROR IN HOLDING THAT THE OFFICERS AND DIRECTORS OF THE INSURANCE COMPANY COULD DEPRIVE THE PLAINTIFFS OF PROPERTY WITHOUT NOTICE OR HEARING.

After finding that the Bonus Fund Endorsement was invalid, illegal and unenforceable since its inception, the District Court went on to find that the defendant insurance company and its predecessors made significant administrative decisions and changes respecting the Bonus Fund. Of this there is no question! During the first three years of the existence of the Bonus Fund, the company has accumulated $6,930.95 in the Fund. (Examination Report for 1951, pp. 31-32) (R. 137) The 1954 Report filed with the State Insurance Commissioner showed the sum of $2,416.46 standing in the Fund as of December 31, 1954. (R .141) The District Court found that this and other administrative decisions and changes were made under the direction of and upon the advice and with the approval and acquiescence of the Utah State Department of Insurance. The trial court went on further to find that the administrative changes and decisions were fair, equitable, legal and proper under the circumstances.

There are absolutely no facts supporting the District Court's finding that the re-calculations of the

Fund were either fair or equitable. There is no evidence whatsoever showing that notice was given to the owners of the insurance policies containing the Bonus Fund Endorsement. There is no evidence that they ever had the opportunity of a hearing concerning the denial of their legal rights under the Bonus Fund Endorsement.

Principles of fair play, justice and equity would accord both a notice of actions taken by the defendant insurance company's officers and directors and a hearing. Particularly is this true where there were twenty years of time in which to do so. The plaintiffs received neither notice nor a hearing.

The Constitution of Utah provides that no person shall be deprived of property without due process of law. (Article I, § 7, Constitution of Utah). The Constitution of the United States provides that no state shall deprive any person of property without due process of law. (Amendment XIV, § 1 of the Constitution of the United States)

"Due process of law" requires that before one can be bound by a judgment affecting his property rights, some process must be served upon him which, in some degree at least, is calculated to give him notice. *Naisbitt v. Herrick*, 76 Utah 575, 290 P. 950.

In addition to the notice required to be given to persons whose rights are to be affected, due process requires a fair opportunity to submit evidence at some

form of a hearing. *Christiansen v .Harris,* 109 Utah 1, 163 P.2d 314.

Appellants recognize that administrative process can constitute due process of law. However, the decision of an administrative body issue without notice to affected individuals violates due process. *Morris v. Public Service Commission,* 7 Utah 2d 167, 321 P.2d 644.

In making settlement proposals to the plaintiffs, the insurance company has admitted owing something to the plaintiffs. The decision of the trial court has upheld the unilateral determination of this amount by the insurance company and denied an accounting in a proceeding where their interests are represented. In doing so, the trial court has committed fundamental error which should be reversed. Surely, in matters involving the financial stake of hundreds of persons, purchased over a twenty-year period, our judicial system ought to be able to afford the accounting which plaintiffs have requested, and such a request should not be summarily denied.

POINT III

THE DISTRICT COURT WAS IN ERROR IN DISMISSING THE PLAINTIFFS' ALTERNATIVE PRAYER FOR A REFUND OF THE PREMIUMS PLUS OTHER AMOUNTS PRE-

VIOUSLY ALLOWED BY THE COURT WHICH THE PLAINTIFFS PAID FOR THE ILLEGAL PORTION OF THE AGREEMENT.

After finding that the plaintiffs' legal rights pertaining to the funding of the Bonus Fund Endorsement by the officers and directors of the defendant could be determined without notice and hearing, the court finally found that the only method of procedure for the plaintiffs, as well as any other policyholders of the Bonus Fund Endorsement, to retire their Bonus Fund Endorsement claims against the defendant is for the policyholders to accept and choose one of the four options made available to them by the defendant.

The defendant contended in its Memorandum to the trial court that it had contacted all of the holders of the Endorsement and tendered to them several alternative options, which included the return of all premiums collected for the Endorsement plus interest. The plaintiffs denied that they had been returned the premium which was actually charged for the Bonus Fund Endorsement.

There were absolutely no facts before the trial court showing that defendants had complied with this Court's prior pronouncements as to how an insurance company should return a refund for the illegal aspects of a particular transaction. In *Ross v. Producers Mutual Ins. Co.*, 4 Utah 2d 396, 295 P.2d 339, the Utah Supreme Court considered the question of the amount

to tender as a refund for the illegal portion of an insurance policy. In this case, the court said:

> "However, the question remains whether the defendant tendered the correct amount as refund for the illegal aspect of the transaction. Although agreeing that the plaintiffs should recover the sum allocable to the illegal portions of the agreement, defendants seek to retain for themselves the entire premiums received except for the net sum that Mutual was required to pay over to Finance under the Trust Agreement. This is no more fair or equitable than it would be to permit the defendant company to retain only the bare costs of term insurance for the coverage given plaintiffs and to require the return of the rest of the amount collected to plaintiffs.
>
> "It is conceded by all concerned that of the premiums collected, particularly the initial premiums, a high percentage goes to what are called acquisition costs, including payment of salesmen's commissions, establishment and maintenance of office procedures, salaries of personnel and the fixed expenses in carrying on the business. These costs were as much chargeable pro rata to the advantage of the Finance Company and that aspect of the business as they were to the sale and handling of the insurance feature of the policy. Yet the defendant has charged the entire cost to the insurance, or legal aspect of the transaction. It is willing to return only the net cost to it of the Finance Company or illegal part of the arrangement. In fairness to Mutual, it should undoubtedly be allowed to charge against these premiums more than the basic cost of term insurance for the coverage given. But

> it should also be required to return to the plaintiffs whatever portion of the premiums received as are properly allocable to the acquisition and other costs of the trust agreement part of the transaction. We are aware that this may present some difficulties, but the plaintiffs should not be denied recovery simply because the amount they are entitled to is difficult to determine. This is particularly so *when the defendant company was at fault in initiating and selling the illegal trust agreement.*" (Emphasis added.)

Defendant in no way attempted to follow this prior decision of the Utah Supreme Court in calculating premiums to be refunded. If this court should affirm the trial court's decision that the Bonus Fund Endorsement is illegal, invalid and unenforceable, the case should be returned to the District Court for a determination of the fair and equitable amount owing to plaintiffs in accordance with the ***Ross*** decision.

CONCLUSION

The error committed by the trial court is that it has summarily determined that an insurance company may unilaterally abrogate its obligation under a contract without affording the insured notice or hearing of its action. The statutes of this state in effect when the contracts were written permitted contracts such as the Bonus Fund, and this Court should declare its validity.

However, assuming for purposes of argument that the contracts were invalid, the fundamental error remains, for even in that event the plaintiffs should be granted an accounting concerning their rights in accordance with prior pronouncements by this Court.

Respectfully submitted,

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APPENDIX 1

GREAT MUTUAL LIFE INSURANCE — COMPANY —

BONUS FUND ENDORSEMENT

This endorsement and the benefits provided for herein are limited to 2500 units of insurance under policies bearing this endorsement.

The Company agrees to annually set aside in a special fund on December 31, of each year, until the calendar year 1968, not less than $1.00 and not more than $2.00 per thousand as the Board of Directors may annually elect, for each thousand dollars of life insurance issued on a paid-for basis and for each one thousand dollars of such life insurance which continues in force on a premium paying basis between .... and the end of the calendar year 1968, except insurance of the class to which this Endorsement is attached and any Group Life insurance which may be issued by the Company. Such special bonus fund shall be accumulated at 2½% annual compound interest.

Within ninety days (90) following January 1, 1969, such accumulated bonus fund deposit, together with interest accreations, will be distributed by the Company to all surviving policyholders whose policies bear this endorsement and are in full force and on a premium paying basis. The share to be paid to each qualifying policyholder will be the proportion which the number of units in this policy bears to the total number of units of similarly qualifying policies.

No deduction whatsoever will be made from the Bonus Fund, prior to the date of distribution above provided, except in case of the death of the insured prior to

the 1969 distribution date, in which event the designated beneficiary of the insured shall be paid in addition to the face amount of this policy, the full proportionate share of this policy in the bonus fund accumulation calculated as of the end of the calendar year prior to the date of death.

Date	Endorsement