TRIAL TACTICS IN DEFENDING LIFE INSURERS

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Neither the insureds nor the agents who try to sell them insurance are angels. In a significant number of cases the public regards the insurers as wealthy, "bottomless pits" who will not mind a bit of lying, even if it leads to a big verdict.

Insurance agents are not without sin. Due to the stress of earning a living, living solely on commission, they "cut corners" or, more precisely, cut the cash reserves of their insurers to make a sale or to get money.

Very often the agent is wrongfully accused of conniving by the spouse of the insured. That unhappy situation frequently presents a unique difficulty in life insurance litigation: the client who lied about his health has died; his position is thereafter represented by his widow, who is morally blameless and in need of money. Thus, sympathy for her is strong, while any anger at the misrepresenting insured is dissipated by his death. Moreover, defense must attack a dead man, thereby violating the maxim of Diogenes: "Of the dead, nothing but the good."

This article explores some of the conniving or blundering on both sides of such transactions and the ways to defend against such activities. Let us first examine some examples of wrongs and then consider various strategies to defend claims based on the wrongs.

I. THE WRONGS

A. *Intentional, Admitted Wrongs by the Agent*

1. Lying to Insured

Agents, once in a while, will misrepresent the terms of a policy to make a sale. When that misrepresentation is in writing, the deception is easy to prove. Not too long ago, Anthony Athens, a man who operated a fleet of hotdog pushcarts in a city, was approached by Edward Eager, a life insurance agent. Eager allegedly suggested the purchase of an annuity,

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so he submitted to the prospect a partially handwritten tabulation, bearing a sticker with the insurer's logo on it. In essence, the column of figures asserted that after Athens paid his premium for five years ($40,170) and achieved the age of 38 years, he would receive $977 a month for life. If he lived to be age seventy, $375,000 was to be the total payout. If he did not, his beneficiaries would receive the difference between what the insured received and $375,000. When Athens found that the payout should be only $84.84 per month he became exceedingly unhappy.

Although this deal was too good to be true, Athens sued to reform the policy and make the insurer live up to the brochure rather than the unread policy, which was entitled "Whole Life with Accidental Death Benefits." Needless to say, the agent denied any conscious wrongdoing and asserted that the tabulation was sent to him from an unknown person in the home office. Like many insureds, the agent claimed that he (the agent) did not read the tabulation before presenting it to the applicant.

Mentioned below are some of the successful maneuvers used to defeat that claim.

2. Stealing

When an agent steals the money of the insurer, the insurer suffers. When he steals the money of a third party, should the insurer reimburse the victim? The answer is often yes. For example, an agent may often cause the issuance of phony policies, which a premium finance company "finances." The proceeds of the loan are turned over to the agent by the gulled lender. Due to earlier rulings,[1] most lenders know enough to elicit home office confirmation of the issuance of the policies. When the home office foolishly confirms the issuance of the policies, the insurer becomes liable when the scheme is discovered.[2] In one recent case, the lender never checked with the home office because the cheating induced the lender to write to the insurer in care of the cheat. Needless to say, the agent was ready to confirm his phony transactions. Because the agent was in sole command of the branch office, he inculpated his insurer when he pocketed the proceeds of notes to finance nonexistent policies.[3]

Where the insurers resist those claims, they do so on the theory that the agent had no power to cheat anyone. Since he exceeded his powers,

1. *See, e.g.*, First Trust & Deposit Co. v. Middlesex Mutual Fire Insurance Co., 18 N.Y.S.2d 936, *aff'd*, 284 N.Y. 743, 31 N.E.2d 509 (1940); Fargo National Bank v. Agricultural Insurance Co., 184 F.2d 676 (8th Cir. 1950).

2. New England Acceptance Corp. v. American Manufacturers Insurance Co., 9 Mass. App. 172, 344 N.E.2d 200 (Ct. App. 1976), *aff'd*, 373 Mass. 594, 368 N.E.2d 1385 (Sup. Jud. Ct. 1977); *see also* Industrial Insurance v. First National Bank, 37 So. 2d 23 (Fla. Sup. Ct. 1953) (refunds of premiums when to agent, not lender); Lofton v. Great American, 213 So. 2d 333 (La. App. 1968) (same); *contra*, First Trust & Deposit Co. v. Middlesex Mutual Insurance Co., 259 App. Div. 80, 18 N.Y.S.2d 936 (4th Dept. 1940) *aff'd*, 284 N.Y. 743, 31 N.E. 2d 509 (Ct. App. 1940) (lender never checked with home office); Fargo National Bank v. Agricultural Insurance Co., 184 F.2d 676 (8th Cir. 1950) (same).

3. Baker & Co. v. Preferred Risk, 569 F.2d 1347 (5th Cir. 1978).

they urge that the companies should not have to pay. Unfortunately the argument rarely succeeds, because the agent has apparent authority to act.[4] The calling card, the stationery and the office, all bearing the logo of the employer, give the illusion to the outsider that the agent has power to do what the agent says he wishes to do. Under those circumstances the insurer is liable because the agent's "apparent authority" binds the principal.[5] If, however, the victim of the fraud did its own checking and did not rely on the apparent authority of the agent, there is no liability of the insurer.[6]

B. *Improvident Purchase*

Some time ago in Ocean County, New Jersey, an eighty-four-year-old druggist contacted a life insurer to buy an annuity. He lived alone, did his own shopping, visited his terminally ill wife, drove his car, and did his own banking. After hearing the various options, he selected a single premium, nonrefundable annuity, which: (a) guaranteed him a 20 percent return on his premium of $30,000; (b) gave him a monthly income of about $550 per month; and (c) left him or his heirs nothing in death. If he had selected a ten-year guaranteed payout (whether alive or not), he would have received only $318.76 per month.

At the time of the sale, the insured suffered from (a) depression caused by his wife's slow death, and (b) cancer of the prostate which surfaced shortly after the annuity purchase. The insured's gamble was that he would live at least seven more years. If he did so, he would make money on the annuity. If he did not, the insurer (or more properly the other annuitants) made money.

Both the agent and his supervisor thought that the single premium, nonrefundable annuity was unwise. Even though they so advised the octogenarian, he still decided on the nonrefundable premium.

About eight months after the purchase and after he learned that he had cancer, the insured told his son-in-law, an attorney, that he had purchased such a policy, which he did not understand. After a discussion, he told his son-in-law to try to set aside the policy.

Around the same time, a social science supervisor interviewed the insured and concluded that he was competent. His son-in-law thought that he was competent enough to execute a power of attorney, and his doctor concluded that he had the capacity to consent to an operation to remove his cancer. After recovery from the operation, the insured committed suicide by taking an overdose of drugs.

4. *Id.*

5. Skyways Aircraft v. Slanton, 348 Cal. App. 2d 372, 31 Cal. Rptr. 352, 358 (Ct. App. 1966) (oral binder of life insurance for overseas flight); 2 HARPER & JAMES, THE LAW OF TORTS, § 29.9 (1956); RESTATEMENT (SECOND) AGENCY §§ 257(b), 261. Under current law the parol evidence rule is on the wane. *See, e.g.*, Rempel v. Nationwide Life Insurance Co., 227 Pa. Super. 57, 323 A.2d 193 (Super. Ct. 1974), *aff'd*, 471 Pa. 204, 370 A.2d 366 (1977).

6. National Premium Budget Plan v. National Fire Insurance Co., 108 N.J. Super. 248, 254 A.2d 819 (App. Div. 1969).

His heirs sued to recover the $30,000 premium, alleging in essence that eighty-four-year-olds should never be permitted to buy such a policy. Defending this claim was unusually difficult due to the skill of the plaintiff's attorney and the pretrial comments of the judge who tried to coerce a settlement. Fortunately, it did not present the kind of overselling in *Anderson v. Knox*,[7] where the insured was induced to borrow $100,000 in additional life insurance.[8] In that case the insured, who earned only $8,100 per year, became mired in debt and was unable to make the payments.

What would you do to defeat the claim of the druggist's heirs?

C. *Inadvertent Deception*

Sometimes an agent will write a letter which is ambiguous in connection with a sale. For example, Edward Eager approached Larry Loophole, an attorney, and suggested that he buy additional life insurance by: (a) using the values in the old policy to pay in part for the new policy; and (b) continuing to pay the premiums on the old policy. Unfortunately, Loophole did not recall the conversation that way and asserted that he was entitled to both policies without having to pay the premiums. While that position was again too good to be true, it was not a frivolous one due to: (a) the agent's letter, which was ambiguous; (b) the fact that the cash values of the old policy were sufficient to carry both policies for about two years before the gloomy message came that Loophole had to pay more.

What would you do to defend the claim?

D. *Contested Wrongs by Agents*

Suppose the insured gave truthful answers to the agent, who wrote out false answers. The applicant signed the application without reading its answers. In many jurisdictions the issue is for the jury which usually decided in favor of the beneficiary.[9]

7. 207 F.2d 702 (9th Cir. 1961).

8. This case is extensively examined in Leatherberry, *Remedies for the Buyer or Beneficiary of an Unsuitable Life Insurance Plan*, 32 RUTGERS L. REV. 431, 436-458 (1979).

9. Rider v. State Farm Mutual Insurance Co., 514 F.2d 780 (10th Cir. 1975) (policy period shorter than promised); Blair v. Prudential Insurance Co., 472 F.2d 1356 (D.C. Cir. 1972) (agent falsely concealed high blood pressure); Jamet v. John Hancock Mutual Life Insurance Co., 416 F.2d 829 (6th Cir. 1969) (on signing notes the agent said you are "technically covered"; immaterial that the conditional receipt did not issue); Mathis v. Minnesota Mutual Life Insurance Co., 302 F. Supp. 996 (M.D.N.C. 1969) (agent filled out application wrongfully because he asked no questions about health); Bank of Coushatta v. Thomas, 378 So. 2d 1041 (La. Ct. App. 1979) (banker falsely stated age of borrower); Willis v. Colonial Life & Accident Insurance Co., 353 So. 2d 480 (La. Ct. App. 1977) (agent ignored truthful answers and wrote false answers); Beck v. Capital Life Insurance Co., 48 Ill. App. 3d 937, 369 N.E.2d 170 (App. Ct. 1977) (agent failed to ask health questions and answered them negatively); Gavin v. North Carolina Mutual Insurance Co., 265 S.C. 306, 217 S.E.2d 591 (1975) (agent to illiterate: "I see your health is all right" A. "Yeah our health is holding up pretty good."); Rempel v. Nationwide Life Insurance Co., 227 Pa. Super. 67, 323 A.2d 193 (Super Ct. 1974) (negligent misrepresentation of amount); Prudential Insurance Co. v. Torres, 449 S.W.2d 335 (1970) (agent assumed negative medical history).

In all those decisions (and seemingly in every case) the insured never read the application. Under the old cases, that was fatal for the insured.[10]

While some states still adhere to this view[11] it is not the majority view. See the cases cited at pp. 00-00. If however, the insured knows that the application was answered falsely, he loses.[12]

E. *Intentional Lying by the Insured*

When a person suspects that he is in questionable health, he will often seek life insurance. To obtain insurance he will deny recent visits to a doctor or forthcoming hospitalizations.

Suppose a chap had a lump on the side of his chest. His doctor said that it probably was nothing serious but he should have it checked out at the hospital. Although no admission date was given to him at the time, the man knew that he was to enter the hospital for a check within thirty days of his cursory examination by his family's doctor. Following an altogether too common pattern, his next visit was to his insurance agent. After the necessary application was signed, he visited the company doctor who asked him about his prior visits to a doctor and advice about hospitalizations. He lied and failed to disclose them. The policy was issued in due course. Nine months later the insured died of cancer.

II. DEFENDING AGAINST THE WRONGS

In contesting many of the claims based on alleged wrongs, the defense counsel must determine the state of the law in his jurisdiction and then guess whether the trial judge will read it or understand it. All too often the essayist's view of the law (that is, the appellate judge's view) is honored in the breach at the trial level. Compounding that uncertainty is the jury system where sympathy plays a large role. Here are some suggestions in defending claims based on alleged misconduct.

A. *Strike the Jury*

If you have a reasonably decent trial judge, the insurer will be better off with a nonjury trial. How do you get it? You label the crucial theory in the case as *equitable*. In at least New Jersey, jury demands will be stricken by state court judges where the insurer counterclaims for fraud, saying that the insured lied when he applied for a policy, because fraud

10. New York Life Insurance Co. v. Fletcher, 117 U.S. 519, 6 S. Ct. 837, 29 L. Ed. 934 (1886).

11. *See* Sullivan v. Manhattan Life Insurance Co., 611 F.2d 261 (1st Cir. 1980); Marsinet v. John Hancock Mutual Life Insurance Co., 145 N.J. Super. 301, 367 A.2d 901 (App. Div. 1976); Sordines v. Aetna Life Insurance Co., 21 Md. App. 453, 319 A.2d 858 (Ct. Sp. App. 1974); Jessup v. Franklin Life Insurance Co., 117 Ga. App. 389, 160 S.E.2d 612 (Ct. App. 1968).

12. Tesluk v. Metropolitan Life Insurance Co., 120 Ill. App. 2d 280, 364 N.E.2d 586 (1970).

is the basis for rescission, an equitable remedy.[13] The same rationale should work for suits for reformation of the contract.

If you have such a doctrine in your jurisdiction, do not remove the case to federal court, because the federal system will grant a jury trial, even where the state court system will not.[14]

B. *Rely on Equitable Fraud*

If your jurisdiction will permit the rescission of a contract for an inadvertent misstatement (equitable fraud) as to medical consultations, rely on that theory.[15] Obviously, it is a lot easier to prove an inadvertent lie than a deliberate lie.

C. *Rely on the Discrimination Statutes*

As shown by the sampling below almost all states have enacted statutes prohibiting special favors or "discrimination in favor of individuals between insurants of the same class and expectation of life . . . in any other terms. . . ."[16]

Those statutes should permit the insurer to void the corrupt deal offered by the agent as an inducement to the applicants. Thus, in the case involving the huge annuity offered to the hotdog seller, it was very beneficial to be able to say to the trial judge: (a) the plaintiff is trying to obtain the benefit of an unfair discrimination; and (b) the plaintiff wants this court to enforce an arrangement which is illegal due to its discrimination. Needless to say, the court will not want to help the insured, so you will be able to give the insured a choice of either: (a) take back your payments with interest; or (b) keep the policy you now have without further complaint.

I know of no case where a discrimination statute was used to support the following reasoning, but it should work: (a) the president of the company cannot cause the issuance of a policy to his dying son in violation of company rules; so (b) for the same reason, the agent cannot do

13. Gallagher v. New England Mutual Life Insurance Co., 33 N.J. Super. 128, 109 A.2d 457 (App. Div. 1954), *aff'd* 19 N.J. 14, 114 A.2d 857 (1955); Locicero v. John Hancock Mutual Life Insurance Co., 32 N.J. Super. 300, 108 A.2d 261 (App. Div. 1954); Aetna Life Insurance Co. v. Sussman, 111 N.J. Eq. 368, 162 A. 132 (Chan. 1932); Scott v. Stewart, 2 N.J. 506, 67 A.2d 171 (1949); Prudential Insurance Co. v. Merritt-Chapman & Scott Corp., 112 N.J. Eq. 179, 119, 113 A. 894 (Ch. 1933).

14. Ellelsam v. Metropolitan Life Insurance Co., 137 F.2d 62 (3d Cir.), *cert. denied*, 320 U.S. 777 (1943); *Cf.* Ross v. Bernhardt, 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 729 (1970).

15. Formosa v. Equitable Life Insurance Co., 166 N.J. Super. 8, 398 A.2d 1301 (App. Div. 1979); Reller v. N.Y. Life Insurance Co., 437 F.2d 41 (3d Cir. 1971); Gatlin v. World Service Life Insurance, Tenn. S. Ct. 1981, 616 S.W.2d 606, ("I am in good health"; policy voided); Process Plants Corp. v. Beneficial Life Insurance Co., 58 App. Div. 2d 214, 395 N.Y.S.2d 308 (1st Dept. 1976), *aff'd* 42 N.Y.2d 928, 366 N.E.2d 1361, 397 N.Y.S.2d 1007 (Ct. App. 1977); Wisener v. Metropolitan Life Insurance Co., 895 F.2d 904 (5th Cir. 1965) (interpreting Florida law); *but cf.* Johnson v. Metropolitan Life, 58 N.J. 433, 231 A.2d 357 (1960).

16. Conn. Gen. Stat. 38-58; 38-149; 38-172. *See also* 18A Florida Stat. Ann. 626.962; 626.9541(7)(a); 73 Ind. Ann. Stat. § 976, § 1023(3); Mass. Ann. Laws c. 175 § 120, N.J.S. 17:29A-3, 17:29A-6, 17:29A-7, 17:29B-4(7); N.Y. Insurance Law § 209; 39 Ohio Rev. Code Ann. § 3911.19; 40 Pa. Stat. § 477a (Purdon).

that either by writing down false answers to the medical questions and tricking the company into issuing the policy.[17]

D. *Show the Shrewdness of Insured*

While many beneficiaries claim that the insured was dumb or gullible, it is often possible to show a shrewdness in dealing with insurers due to: (a) his past dealings with insurers and letters which he wrote; (b) his paying premiums in cash when he had a cash business and when he used cash for many disbursements; (c) his claiming to have read in detail some writing of the insurer on which he relied; and (d) his education.

E. *Show the Lack of Prejudice to the Insured*

Where the applicant has concealed his cancer or other serious disease, he cannot get insurance elsewhere. The underwriter should be prepared to testify that under his company's rules he was uninsurable. Based on his training, his attendance at seminars or discussions, he knows that no other insurer would insure the applicant. In some jurisdictions it may be enough for the underwriter to assert only that the policy in suit, rather than a rated policy, would not issue. The rationale for this is often based on a statute defining materiality as a statement which would affect "either the acceptance of the risk of the hazard assumed by the insurer."[18]

If the insured were uninsurable, he was not harmed by the agent who falsely answered the medical questionnaire. The insured was not entitled to a policy and the courts should not give him one. Courts should not award damages to anyone who was not harmed by a wrong.[19]

F. *Stress the Agent's Lack of Incentive to Oversell*

Where a nonrefundable annuity is contested, be prepared to show that the agent would have made the same commission if a refundable annuity had been purchased.

G. *Stress the Benefits to Other Annuitants*

Be prepared to show that nonrefundable annuities benefit other annuitants rather than the company.

17. *See* Homestead Supplies v. Executive Life Insurance Co., 81 Cal. App. 3d 978, 147 Cal. Rptr. 23 (Ct. App. 1978) (statute does not render inadvertent discriminatory deal unenforceable); Simmons v. Continental Casualty Co., 410 F.2d 861 (9th Cir. 1969) (statute permits exclusion of wife from disability benefits); Douglas v. Mutual Benefit Health Ass'n, 42 N.M. 190, 76 P.2d 453 (1938) (oral assurance of coverage, statute's only penalty is for relocation of authority to do business); Kaufman v. N.Y. Life Insurance Co., 315 Pa. 34, 172 A. 306 (Sup. Ct. 1934) (statute does not prohibit "occasional and inadvertent mistakes"); Metropolitan Life Insurance Co. v. Asofsky, 38 F. Supp. 481 (D.N.J. 1941) (improperly low premium charged, antidiscrimination statute no defense).

18. N.J.S. 17B:24-3(d); Kerpchak v. John Hancock Mutual Life Insurance Co., 97 N.J.L. 196, 117 A. 636 (E. & A. 1921); Gallagher v. New England Mutual Life Insurance Co., 19 N.J. 14, 20-21, 114 A.2d 857, 861 (1955); Minsker v. John Hancock Mutual Life Insurance Co., 334 N.Y. 333, 173 N.E. 4 (Ct. App. 1930); Sullivan v. Manhattan Life Insurance Co., *supra*; *Contra*, Lettieri v. Equitable Life Assurance, 627 F.2d 900 (9th Cir. 1980) (California statute permitted explanation of false answers).

19. 5 CORBIN, CONTRACTS § 997 (1951); PROSSER, TORTS § 41 (4th ed. 1971).

H. *Combat Sympathy*

Of course, there is no perfect or ideal way of combating sympathy. You can, however, point to the fact that your client is a mutual company composed of thousands of ordinary people who struggled to pay their premiums. The claim in this case will have to come indirectly from the premiums which they pay.

I. *Stress the Utmost Good Faith When Applying for Insurance*

Chief Justice Harlan Fisk Stone's famous pronouncement that a life insurance contract is one of the utmost good faith is still sound law.[20] That concept and the expanding notions of fraud in the mail fraud statutes and securities laws should motivate the courts to deal firmly with the insured who conceals his true health or who wishes to exploit the dishonest agent who lies about the insured's health.[21]

J. *Stress the Warning Signals to the Insured*

Questioning of the treating doctor, especially if he is talkative, will often lead to disclosures that the insured knew he was seriously sick.[22]

K. *Sue the Agent Rarely*

In most cases you will not want to file a crossclaim against the blundering agent, because:

a. he disputes his knowing participation in a wrong;
b. he may be entitled to a free defense from his employer;
c. the esprit de corps will be harmed if the insurer impleads or crossclaims against him;
d. he lacks money to pay a judgment;
e. his retaining a separate lawyer means that two attorneys will be fighting with the plaintiff: two against one is viewed as unfair by the jury; and
f. he will get angry with the company if the latter attacks him.

Nevertheless, you will on occasion sue the agent where you have fired him for dishonesty or incompetence. When he sees that he might have to pay a judgment because of his actions or words, he will be tempted to switch his pro-insured bias to a more objective and truthful position. Suing the agent might offset the jury's willingness to find liability

20. Stipcich v. Metropolitan Life Insurance Co., 277 U.S. 311, 48 S. Ct. 512, 72 L. Ed. 895 (1928). Gallagher v. New England Mutual Life Insurance Co., *supra*; Sullivan v. Manhattan Life Insurance Co., *supra*.

21. 18 U.S.C. § 1341; United States v. Bryza, 522 F.2d 414 (7th Cir. 1975), *cert. denied*, 462 U.S. 912 (1976); Section 17 of the Securities Act of 1933, 15 U.S.C. § 77q; Section 10b of the Securities Act of 1934, 15 U.S.C. § 78j(b); *cf.* Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 92 S. Ct. 165, 30 L. Ed.2d 128 (1971).

22. *See, e.g.*, Beller v. N.Y. Life, *supra* (lump in chest); Sullivan v. Manhattan Life Insurance Co., *supra* (diabetes); Findley v. Time Insurance Co., 599 S.W.2d 736 (Ark. 1980), 1980 CCH Life Cas. 1437 (1980) (excessive vaginal bleeding); Massachusetts Mutual Life Insurance Co. v. Mayes, ___ Tex. ___, 592 S.W.2d 393 (Tex. Civ. App. 1979), 1980 CCH Life Cas. 1291 (1979) (change in health prior to delivery of policy), *writ of error granted*.

against a large company, when an agent might have to reimburse the company. Recently, a federal judge in New Jersey recognized that an agent had a fiduciary duty of loyalty to the company and could be sued for writing an application on his father-in-law's life when he knew the father was dying of cancer.[23]

L. *Oppose the Evidence on Advertising Campaigns*

Professor Leatherberry has argued persuasively that the television advertising campaigns of life insurers should be considered in determining the degree of professionalism imposed on the agent when recommending unsuitable insurance.[24] Those ad campaigns ought to be excluded from the trial, because: (a) the insured rarely sees them or if they did see them they cannot recall what was said or state how they rely on them; or (b) they do not expressly promise anything which is not delivered.

If the plaintiff says that there is a hidden message in the ads and that hidden message is made explicit by an advertising expert, then the defense had better be prepared with its own contrary expert. Such a clash of experts will significantly expand the time needed to try a case.

III. PREVENTING LITIGATION

From a litigator's point of view several things can be done to diminish litigation.

A. Require the purchaser to write more than his own signature. Assuming the state regulator approves, the applicant could be required to write:

1. "I have read everything on this page. The answers are true";
2. "I must read this policy and tell the company of inaccurate statements"; and/or
3. "If I or any beneficiary assert that I did not read this application, there shall be no insurance."

B. Write the policies in "plain language" as mandated by many statutes.[25] Insert examples where the insured or the beneficiary does not get paid. If your computer permits, have each policy prepared to fit the insured's order for insurance, thereby eliminating riders or endorsements which amend the policy in a complex way.

C. Circularize your insureds by mail with a premium notice and ask how they were approached by the agent, how the agent handled the transaction, if they read the application, and if they read the policy.

23. Strawbridge v. New York Life Insurance Co., 504 F. Supp. 894 (D.N.J. 1980), *citing* N.J.S. 17:22-6.1; Bohlinger v. Ward, 34 N.J. Super. 563, 591 (App. Div. 1955), *aff'd*, 20 N.J. 53 (1956).

24. Leatherberry, *Remedies for the Buyer or Beneficiary of an Unsuitable Life Insurance Plan*, 32 Rutgers L. Rev. 431 (1979).

25. Conn. Public Act No. 79-532; Act 36, 1980 Hawaii Laws, Chapter 483, 1979 Maine Laws; N.J. Session Laws, Chapter 125, P.L. 1980; N.Y. General Obligations Law § 5-702.

D. If that is too oppressive, do the same thing by a telephone call on a random basis. To anyone who says he has not read the application have an office manager (not the agent) call and tell him what he signed, what he said about his health, and what are the major points in the policy.

E. Mail with premium notices "horror stories" in which the insurer had to spend large sums to defend improper claims. Point out that such expenses came out of the pockets of honest insureds. That will make them more sympathetic to the insurers when they become jurors.[26]

F. Pay your agents enough money to live or to prevent a substantial reduction in income during a lean year.

G. Program your computer to select for investigation cases which bear the badge of trouble: large policies for persons with small income; using the cash value of one policy to buy more insurance; and twisting.

H. In agents' training manual put cases summarizing how agents get sued by the companies when they fill out forms improperly.

I. In bulletins to sales force mention the recent decisions involving liability of the agents.

IV. CONCLUSION

If the courts were as firm in stopping overreaching by applicants as they are in stopping overreaching by the agents, the defense bar would have a much easier time in preventing improper payments by insurers. Unfortunately, this is not the case. Consequently, we shall continue to see extensive litigation due to agent misconduct. If the agents start to carry malpractice insurance and if the malpractice will cover the insurer for the fraud of the agent, we shall see many more claims against agents and their malpractice carrier. This will make the suits lengthier and more expensive. That additional cost will be paid, of course, by the premiums of honest policyholders.

[26] Lofton, *Insurance Advertising and Jury Awareness*, 65 A.B.A.J. 68 (1979).