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Analysis of the Rights and Duties of Insurers in Nigeria

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Abstract

The paper analyses the rights and duties of Nigerian insurers at common law emanating from the contractual relationship between the insurer and the insured as amplified or abridged under the statute. It argues that the statutory incursion into the common law rules of uberrimae fidei, insurable interest, conditions and warranties and assignment of policies, circumscribing some of the rights exercisable by the insurer against the insured to defeat just claims as well as expanding the scope of the insurer's duties in order to improve on service delivery is salutary. The paper, however, concludes that further reform measures, aimed at addressing some other salient issues, are still essential in the overall interest of the insuring public.

Key Words: Insurers, Rights, Duties, Nigeria, Common Law, Statute

I Introduction

The concept of "right" and "duty" is central to jurisprudence and legal theory.[2] A 'right' generally connotes what may be lawfully claimed. It has been defined as 'something that is due to a person by just claim, legal guarantee, or moral principle. A legally-enforceable claim that another will do or will not do a given act,; a recognised and protected interest, the violation of which is a wrong.' [3] A right is thus one's affirmative claim against another, which is generally recognised and protected by law. It may also be described as any interest, respect for which

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[2] Jurists, including Austin, Hart, Dworkin and Hohfeld, developed a theory of right/duty relative - see Freeman, M.D.A. 1994. *Lloyd's Introduction to Jurisprudence.* 6th ed. London: Sweet & Maxwell 387-499.

[3] Garner, B.A. 2009. *Black's law dictionary.* 9th ed. U.S.A: Thomson Reuters. 1436

is a duty and the disregard of which is a wrong.[4] On the other hand, "a duty or a legal obligation is that which one ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated." [5] In general, where a right is conferred on one distinct entity, a duty is imposed on another and to ascribe a duty to a man is to claim that he ought to perform a certain act."[6] A duty, therefore, is the invariable correlative of a right or claim. [7] In *Kabo Air Ltd v Mohammed,*[8] it was stated that "a legal duty" is that which the law requires to be done or forborne to a determinate person or the public at large, correlative to a vested and co-existence right in such person or the public, and a breach of which constitutes negligence.

Insurance has been defined as 'a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the perils specified to certain things which may be exposed to them.' [9] Thus, insurance contract, like all other forms of contracts, is one between two contracting parties, namely the insurer and the insured with its attendant reciprocal rights and duties. These reciprocal rights and duties are governed at common law by the general principles of contract and the terms of contract as agreed to between the contracting parties. In view of the importance of insurance to the economy of a nation, however, laws are generally enacted to either derogate from the common law provisions or widen the scope thereof.

The aim of this paper is to examine the rights and duties of insurers in Nigeria at common law and under the statutes. Perceived areas of concern, requiring the intervention of the

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[4] Fitzgerald, P.J. 1957. *Saimond on jurisprudence.* 12th ed. London: Sweet and Maxwell. 216; Salmond, J. 1957. *Jurisprudence.* 11th ed. 278

[5] *Lake Shore & M.S.R. Co. v Kurts*(1894) 10 Ind. App., 60; 37 N.E. 303 at p. 304.

[6] Fitzgerald. *op. cit.* 216.

[7] Hohfeld, W.N.. 1933. Fundamental legal conceptions as applied in judicial reasoning. *Yale LJ* 23.1:16-59 at 31. Retrieved May 27, 2018 from http://www.digitalcommons.law.yale.edu/yij/vol23/iss1/4/

[8] (2015) 5 NWLR (Pt. 1451) 38

[9] Lawrence J in *Lucena v Crauford* (1805) 127 E.R. 630 at p. 642

policymakers, would also be brought to the fore with a view to getting them addressed in order to further enhance the legal protection available to consumers of insurance products.

The paper is organised as follows. The second and third sections analyse the rights exercisable by the insurer at common law and the duties imposed respectively. Section four examines the specific areas where statutory intervention has impacted on the said common law rights. Sections five and six are focussed on the analysis of the rights and duties of insurers as conferred and imposed respectively under the relevant statutes. The last section is the conclusion.

11 Rights of Insurers at Common Law

The rights of the insurer at common law have arisen mostly out of the contract entered into with the insured and against whom it may assert any of those rights. These rights are discussed hereinafter in no particular order.

First, it is a cardinal principle of law that no one, but the parties to a contract, may be entitled or bound by the terms of a contract, nor sue or be sued under it.[10] Thus, as a general rule, insurance contract , being an agreement between the insurer and the insured, affects only the parties thereto and cannot be enforced by or against a third party.[11] In this wise, the insurer has a contractual right to resist the claims of a stranger to the contract of insurance. In *Rayner v Preston,*[12] it was stated that "the contract of insurance is merely a personal contract. It is not a contract which runs with the land, it is a mere personal contract and unless it is assigned, no suit or action can be

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[10] *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* (1904) 2 Ch. 306 at p. 395; *Price v Easton* (1833) 4 B & Ad. 433; *Febson Fitness Centre& Anor v Cappa Holdings Ltd & Anor* (2015) 6 N.W.L.R. (Pt. 1455) 263; *Minstreet Bank Ltd v Chahing* (2015) 11 N.W.L.R. (Pt. 1471) 479; *Ekwuogor Investment (Nig) Ltd v Asco Investment Ltd* (2011) 13 NWLR (Pt. 1265) 565; *New Resources International Ltd v Oranusi* (2011) 2 NWLR (Pt. 1230) 102; *Akinsulie v Ogunyanju* (2011) 12 NWLR (Pt. 1261) 264.

[11] *Rayner v Preston* (1881) 18 Ch.D.1; *Phonex Assurance Co v Spooner* (1905) 2 K.B. 753; *Peters v General Accident Fire and Life Assurance Corporation Ltd* (1958) 2 All E.R. 267.

[12] (1881) 18 Ch, D. 1

maintained upon it except between the original parties to it."[13] Thus, in *Re British and French Bank Ltd, Jia Enterprises Ltd v British Commonwealth Insurance Ltd*[14] the application of the Bank to be joined as a party to the suit was rejected and the Court further held that, although the policy was issued in the joint names of both the debtor and the Bank in respect of the debtor's property used as security for the debt, it did not make the Bank an insured or a competent party to the insurance contract who could thereby sue on the policy. Also, in *Royal Exchange Assurance Coy v Anumnu*[15] it was held that, though it was the insurable interest of both the Bank and the respondent/debtor that was insured, the contract of insurance was between the insurance company and the respondent/debtor and that the latter could enforce it without the Bank. Similarly, in *United Bank for Africa Ltd v Achoru*,[16] it was held that in cases involving motor vehicle accidents, a third party, in an action against the insured for damages for negligence causing personal injuries, has no claim against the insurer and cannot join the latter as a co-defendant in the Suit.[17]

Secondly, the insurer has a contractual right to insist on arbitral trial previously agreed to between it and the insured.[18] Usually, insurance policies do contain a clause providing for reference of all disputes or differences arising thereunder to arbitration.[19] Such arbitration clause, generally referred to as

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[13] *Ibid*, at p.7, per Brett, L.J.

[14] (1962) 1 All N.L.R 363; see also *Royal Exchange Assurance Coy v Anumnu* (2003) 6 N.W.L.R (Pt. 815) 52.

[15] (2003) 6 NWLR (Pt. 815) 52

[16] (1987) 1 N.W.L.R. (Pt. 48) 172

[17] In *Abousaleh v White Cross Insurance Co. Ltd* (1968) (2) A.L.R. Comm. 1 the insurer also successfully asserted this right against a third party to a Motor Vehicle insurance contract. See also *Ajufor v Ajarbor* (1978) 1 L.R.N. 295 *Nasidi v Mercury Assurance Co. Ltd* (1971) NCLR 387; *Dede v United Arab Airlines* (1969) N.C.L.R. 58; *Anifowoshe v Jegede* (1968) N.C.L.R. 482. Cf. *Bentworth Finance Ltd v Royal Exchange Assurance* (1971) N.C.L.R. 157

[18] *Oghene & Sons Ltd v Royal Exchange Assurance* (1968) (1) A.L.R. Comm 119; *Omole Motors Ltd v Riverbank Ins. Coy* Suit No. 1/174/81, (Oyo State High Court, Ibadan) of 2/2/82 (Unreported).

[19] *Abili v United Nigeria Insurance* (1969) N.C.L.R. 196

the *Scott v Avery clause*[20], is valid and binding on the contracting parties as it does not oust the jurisdiction of the court; rather it is a condition precedent to the institution of any legal proceedings by any of the two contracting parties. This right is given statutory recognition under the Arbitration and Conciliation Act, 1988[21] and section 5 thereof empowers the court to stay any proceedings begun by either of the parties without having had recourse to arbitration.[22]

Moreover, the insurer has a right to receive premium as agreed between the parties. It is noteworthy, however, that the validity of an insurance contract is not dependent upon actual payment of the premium by the insured. Once the essential terms, including the amount and mode of payment of the premium, have been agreed upon by the parties, the contract is consummated.[23] However, failure on the part of the insured to pay the premium imposes some legal limits on the enforceability of the insurance contract. In *Esewe v Asiemo & Anor*[24], it was held that although insurance companies will conclude insurance transactions once premiums are agreed, nonetheless, they will avoid liability on the basis of non-payment of premiums, agreement on premiums payable, notwithstanding. In *Chime v United Nigeria Insurance Coy Ltd,*[25] the claim of the plaintiff was rejected due to his failure to pay the appropriate premium to the defendant during the risk. The court held that it is a basic principle of insurance law that where there is no payment of the premium, there is no contract and having found that the plaintiff did not pay the premium, the risk was not covered at the date of the accident.

It is noteworthy that the common law right of the insurer to avoid a policy due to non-payment of premium has been given statutory expression under section 50 of the

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[20] (1856) 5 H.L. Cas. 811

[21] Cap. A18, Laws of the Federation of Nigeria (LFN) 2004

[22] *Obienu v Okeke* (2006) 16 NWLR (Pt. 1005) 225; *Enyelike v Ogoloma* (2008) 14 NWLR (Pt. 1107) 247; *M.V. Lapex v N.O.C.& S Ltd* (2003) 15 NWLR (Pt. 844) 469

[23] *Jammal Transport (Nig) Ltd v African Insurance Coy Ltd* (1971) 2 NCLR 145; *Adie& Sons v The Insurance Corporation Ltd* (1898) 14 T.L.R. 544

[24] (1975) N.C.L.R. 433 at p. 439

[25] (1972) 2 ENLR 808

Insurance Act, 2003[26] wherein payment of premium is made a condition precedent to a valid contract of insurance and there is to be no cover in respect of an insurance risk unless the premium is paid in advance. In *Corporate Ideal Insurance Ltd v Ajaokuta Steel Coy Ltd & Ors,* [27] the Supreme Court held that "no premium, no cover" is mandatory by the provisions of section 50(1) of the Insurance Act and that for a valid contract to exist between the parties thereto, the premiums agreed to by the parties must be paid by the insured before there is cover in respect of an insurance risk. Also in *Industrial and General Insurance Coy Ltd v Adogu,* [28] the Court of Appeal reiterated that the payment of insurance premium is a condition precedent to the contract of insurance and where parties have entered into a conditional contract, the condition precedent, like in the instant case, that is full payment of premium must happen before either party becomes bound by the contract.

Also, an insurer has the overriding contractual right to avoid its contract with the insured on a number of legitimate grounds such as breach of the duty of utmost good faith which encompasses the duty to disclose and not to misrepresent material fact. Contracts of insurance are contracts in which *uberrimae fidei* is required, not only from the assured, but also from the company insuring.[29] The doctrine, therefore, creates mutual binding duties on the contracting parties. On the part of the insured, his inevitable duties under the doctrine have cast a burden to volunteer information which s(he) ought to have reasonably imagined was indispensable to the appraisal of the risk by the insurer or its decision whether to underwrite the risk or not.[30] Breach of the duty of utmost good faith entitles the insurer to avoid the contract in its entirety. In *Bamidele & Anor*

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[26] Cap. I 17 LFN 2004
[27] (2014) 7 N.W.L.R (Pt. 1405) 165
[28] (2010) 1 N.W.L.R (Pt. 1175) 337
[29] *Re Bradley & Essex et al Indemnity Society* (1912) 1 K.B. 415 at p. 430; *Irukwu v Trinity Mills Insurance Brokers & Ors* (1997) 2 NWLR (Pt. 531) 113; *Northern Assurance Co Ltd v Idugboe* (1966) 1 All NLR 88; *Tabs Assurance Ltd v Awuzie Industries (Nig.) Ltd* (1995) 4 NWLR (Pt. 388) 223; *Century Insurance Co Ltd v Atuanya (No 2)* (1966) 2 A.L.R. Comm. 314.
[30] *Carter v Boehm* (1766) 3 Burr 1905 at p. 1909, Lord Mansfield

v Nigerian Gen. Ins. Co. Ltd[31] it was held that failure of the insured to state his occupation accurately entitled the insurer to avoid the contract on the ground that the assured had not demonstrated utmost good faith. The deceased assured had described himself as a horticulturist and greengrocer when he was, in fact, a labourer.

An insurer can also avoid a policy on breach of a condition or warranty of the contract of insurance. A breach of warranty, especially, entitles the insurer to avoid the policy in its entirety, irrespective of its materiality or otherwise to the risk insured, and notwithstanding that the insurer is not, in anyway, prejudiced by the breach.[32] In *Akpata v African Alliance Insurance Coy Ltd,*[33] the deceased assured had warranted that he had no other insurance on his life whereas, in fact, he had another one. It was held that the deceased, having warranted the truth of the statements in the proposal and having agreed that they form the basis of the contract and that the contract should be declared null and void if any of the statements were untrue, he could no longer be heard to claim on the policy of life insurance through his legal representatives.[34]

An insurer can also avoid a contract of insurance on grounds of the absence of insurable interest, by the insured, in the subject matter of insurance even in cases where the insurer cannot show any loss in consequence thereof. By section 1 of the Life Assurance Act 1774,[35] any insurance made by any person(s), bodies, politick or corporate, on the life or lives of any person(s) or any other event whatsoever, wherein the person(s)for whose use, benefit, or on whose account such policy is made has no interest, or by way of gaming or wagering is null and void to all intents and purposes

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[31] (1973) 3 U.I.L.R. (Part IV) 418; For another form of breach, see *Phoenix Ass. Co. Ltd v Olabode* (1968) (2) A.L.R. Comm 7

[32] *Dawson v Bonin* (1922) 2 Lloyd's Rep. 237; *Welch v Royal Exchange Assurance* (1939) 1 K.B. 294; *Ejiofor v Arrowhead Insurance Co (Nig.) Ltd* (1992) 2 N.I.L. R. 57

[33] (1967) A.L.R. Comm. 12

[34] See also *Narsons (Nig) Ltd v Lion of Africa Insurance Coy Ltd* (1969) NCLR 185

[35] The Statute is one of general application in Nigeria by virtue of section 32(1) of the Interpretation Act, Cap. I 23, LFN 2004

whatsoever. Generally, a person is said to have an insurable interest in a thing when he is so situated that the happening of the event on which the insurance money becomes payable would, as a proximate cause, involve him/her in the loss or demunition of any right recognised by law, or in any legal liability; he would then be said to have insurable interest in the happening of that event to the extent of the possible loss or liability.[36] In *Macaura v Northern Assurance Co*[37] the insurer successfully asserted its legal right to avoid the contract of insurance due to lack of a so-called insurable interest in the insured property. In the instant case, Macaura had always insured a timber plantation in his personal name at a time when legal ownership of the property resided in him. He, thereafter, formed a company and transferred the plantation to it. However, he, apparently, did not appreciate the technical implication that, from the date of the effective transfer, he could no longer continue with the insurance in his own name because he was deemed to have no direct proprietary or "insurable" interest in it any more even though he was the legal "owner" of the company itself and the *de facto* and equitable owner of its property. Premiums were duly paid to the insurer until the plantation was totally destroyed by fire. Without any qualms, the right of the insurer to avoid the contract on the ground of absence of insurable interest in the property was freely asserted and the court upheld it. This most unfortunate decision, which has since become part of Nigerian law, was quoted with approval by the Federal Supreme Court in *Re British & French Bank Ltd, Jia Enterprises (Electrical) Ltd v British Commonwealth Insurance Co. Ltd*[38] to dismiss the application made by the Bank seeking to be joined as a party to the Suit between its debtor and the insurance company.

Another technical rule, which has given rise to one more right for the insurer, is that which stipulates that an insurer's agent who assists a proposer to complete an application form for insurance, or a proposal, is deemed to have

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[36] *British India General Insurance Coy Ltd v Thawardas* (1978) 3 S.C. 143; *Adefuye & Co v Royal Exchange Assurance Coy* (1962) L.L.R. 43

[37] (1925) A.C. 619

[38] *(Supra)*

done so as the agent of the proposer.[39] In *Northern Assurance Co. Ltd v Idugboe,*[40] that common law principle was upheld to defeat the claim of the insured even though he was an illiterate.[41] This common law right of the insurer has also been re-affirmed in section 54 of the Insurance Act, 2003 wherein it is provided that, an insurance agent, who assists a proposer or insured to complete a proposal or other application form for insurance, is deemed to have done so as the agent of such proposer, or the insured.

Another right of the insurer, arising from the contractual relationship between the insurer and the insured, is the right of subrogation, which the insurer may freely assert against the tortfeasor of the insured. [42] This right, however, does not rest on contractual obligations but on equity. Subrogation, which arises only in contracts of indemnity, denotes substitution; placing the insurer in the position of the insured. Thus, an insurer, who has paid for a loss covered by an insurance policy, is substituted for the insured so as to enable it receive the benefits of all the rights and remedies of the latter against third parties in respect of the subject matter of insurance, whether such right exists in contract, tort, or statute, or in any other right, whether by way of legal or equitable interest, which, if satisfied, will extinguish or diminish the ultimate loss sustained by the insured.[43] The whole essence of the principle, as stated in *Castellain v Preston,*[44] is to prevent the insured from obtaining more than a full indemnity for his loss. However, this right is not exercisable by the insurer until it has admitted its

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[39] *Salako v Lambard Insurance Coy Ltd* (1978) 10-12 CCHCJ 215; *Iwuola v Express Insurance Coy Ltd* (1976) 2 CCHCJ 275

[40] (1966) (1) A.L.R. Comm 155; *American International Insurance coy v Dike* (1978) NCLR 408

[41] That unfortunate decision had been critically reviewed in Olawoyin, G.A. 1973. *Northern Assurance Co. Ltd v Idugboe* – A Penalty for Illiteracy. *N.B.J.* 11: 81.

[42] Subrogation may be described as the transfer of right from one person to another without the assent of the person from whom the right is transferred and takes place by operation of law. – *Orakpo v Mason Investment Ltd* (1971) 1 All E.R. 666 at p. 676.

[43] Yerokun, O. 2013. *Insurance law in Nigeria.* Lagos: Princeton Publishing Coy. 409; *Weide & Co Ltd v Hashim Hashim* (1976) A.L.R. Comm. 235

[44] (1883) 11 Q.B.D. 380, Brett, L. J

liability to the insured and has paid him the amount of loss.[45] Furthermore, unless there is a formal assignment of the insured's right of action against a tortfeasor, an action for subrogation by the insurer must be instituted in the name of the insured.[46]

Another right given to the insurer is that of contribution, which is exercisable against its fellow insurer(s), depending on how many insurers the insured had insured the same risk with. Like subrogation, it is a right rooted in equity and is generally designed to prevent the insured from making a profit out of the insurance scheme on account of over-insurance of the risk.[47] In this wise, where two or more contracts of indemnity that are in force cover the same interest, in a common subject matter, and in respect of the same risk, the law does not permit the insured to recover insurance proceeds under the respective policies in order to make a profit on his loss. In effect, if the insured is to receive but one satisfaction, natural justice demands that the several insurers will pay just one lump sum *pro rata* to satisfy that loss against which they have all insured.[48]

III Duties of Insurers at Common Law

The common law does not seek to control the activities of insurers beyond the requirements of contract law to which the insurance contract has been subject. The first of these general contractual duties is that which requires the insurer to issue a policy of insurance, in the ordinary form employed in its office, to the insured. In other words, once the terms of the insurance contract have been agreed upon by the parties, there is, *prima facie*, a binding contract of insurance and the insurers must deliver a policy containing the agreed terms. In this instance, it would be immaterial that the parties have not discussed and expressly agreed on every individual term of the policy.[49]

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[45] *British India General Insurance Coy Ltd v Kalla* (1965) 1 All N.L.R. 240; *Scottish Union National Insurance Co v Davies* (1910) 1 Lloyd's Rep. 1

[46] *Lion of Africa Insurance Coy Ltd v Scanship (Nig) Ltd* (1969) NCLR 317.

[47] *Stir-Living v Forester* 3 Bligh 590 at p. 591, Lord Redesdale.

[48] *Godin v London Assurance Co.* (1758) 1 Burr. 489 at p. 492, Lord Mansfield, C.J.

[49] *Adie & Sons v The Insurance Corporation Ltd* (1898) 14 T.L.R. 544

Also, the insurer has the duty to exercise utmost good faith when transacting insurance business with members of the public.[50] In this wise, before the contract is concluded, the insurer is required to disclose to the prospective insured, all information that may influence the decision of the latter to enter into the contract, whether or not such information is requested for. Thus, the insurer, when making any statement as to the nature and effect of the risks sought to be covered, or the recoverability of a claim under the policy, the statement must be accurate, for they are crucial factors which a prudent insured would ordinarily take into account in deciding whether or not to place the risk for which he seeks cover with the insurer.[51] It has thus been noted in *re Bradley and Essex and Suffolk Accident Indemnity Society*[52] that, in observing the duty of utmost good faith, it is incumbent on insurance companies to make clear, both in their proposal forms and in their policies, the conditions which are precedent to their liability to pay, for such conditions have the same effect as forfeiture clauses and may inflict loss and injury on the assured and those claiming under him out of all proportion to any damage which could possibly accrue to the company from non-observance or non-performance of the conditions. Similarly, where an underwriter conceals a fact, which ought to have been made known to the insured, such as where the underwriter concealed the fact that he insured a ship on her voyage, which he privately knew to have arrived,[53] or where the insurer effected a fire insurance policy on a house, which the insurer knew had been demolished, the policy could be avoided by the insured.[54]

There is also a contractual duty on every insurer to settle insurance claims and promptly too. The whole essence of taking out a policy of insurance is to get cover for an insurance

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[50] As noted, this is a duty imposed upon the two contracting parties. See note 28 above.

[51] See Shade LJ in *Banque Financier v Westgate Ins. Co.* (1989) All E.R. 952 at p. 990, CA; approved by the House of Lords in (1990) 2 All E.R. 947 at p. 950 HL.

[52] (1912) 1 K.B. 415 at p. 430

[53] Lord Mansfield in *Carter v Boehm Loc. cit*

[54] Lord Jauncey in *Banque Financier v Scandia (UK) Insurance Co. Ltd* (1990) 2 Lloyd's Rep. 377 at 389

risk. In *Prudential Insurance Co v Inland Revenue Commissioners,*[55] the court stated that, the purpose of insuring a ship or a house is not to insure that the ship shall not be lost or the house burnt; it is that the insured should be compensated on the happening of the specified contingency. Thus, whenever the insurers have accepted liability for the claim put forward by the assured or have been forced to do so as a result of a legal action brought against them or as a result of an arbitral award in favour of the assured, they are under a duty to pay.[56]

There is also the general duty on the part of the insurer to adhere strictly to the terms of the insurance contract, such as the duty to submit to arbitration as a condition-precedent to a legal action.[57]

Generally, the foregoing discussion on the rights and duties of insurer at common law have revealed that the grounds upon which the insurer may rest a claim of right arising from breach of contract by the insured are quite many.[58] It would thus seem that the policy of the law has been more liberal towards the insurer than the insured. However, the Insurance Act 2003 has, in some of its provisions, modified or out rightly derogated from some of the afore-mentioned known common law rights of the insurer. Specifically, the common law rules relating to privity of contract, avoidance of contract on grounds of breach of condition or warranty, or on such technical grounds as insurable interest have all been affected. It is to a discussion of these issues that we now turn our attention.

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[55] (1904) 2 K.B. 658

[56] Ivamy, H. 1979. *General principles of insurance law* 4th ed. London: Butterworths. 453,

[57] See e.g. *Oghene & Sons Ltd v Royal Exchange Assurance Corporation* (1968) 1 A.L.R. Comm. 119.

[58] In *Malik Motor v Norwich Union Fire Ins.* (1965) A.L.R. Comm. 268, the insurer's claim of right to avoid the insurance contract was sustained by the Court on grounds of the insured's breach of warranty to keep business records.

1V Statutory Derogation from the Common Law Rules on the Right of Insurers

The common law doctrine of privity of contract, which entitles the insurer to resist the claim of a stranger to the insurance contract, has been modified under section 60 of the Insurance Act in respect of assignee of life insurance policies. An assignment is a transfer of the policy by the insured (assignor) to a third party (assignee). At common law, assignment of life policy is a chose in action, that is, a legal right to recover a sum of money, and is freely transferable because of its nature as having reversionary interest. [59] However, the assignee of such life insurance policy cannot sue the insurer to enforce payment of the insurance moneys at maturity without joining the assignor as a party or, if he is dead, joining his representatives.[60] The joinder ensures that the discharge given to the insurer, when it pays the insurance sum, binds the person with the legal title.[61] The Insurance Act 2003, in section 60 thereof, now accords any person, who has acquired a right to a life insurance policy by an assignment or by another derivative title, and who, whenever an action is brought to enforce that policy, has the usual right in equity to receive and to give an effectual discharge to the insurer of his liability for the sum of money assured or secured under that policy, the right at law to sue in his or her own name when such money is to be recovered.[62] However, such right of action will not bestow on

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[59] Policies of Assurance Act 1867 defines "Policy of life assurance" as any instrument by which the payment of monies by or out of the funds of an assurance company, on the happening of any contingency depending on the duration of human life, is assured or secured; *Re Moore* (1878) 8 Ch. D 519; *Dalby v India and London Life Assurance* (1854) 15 C.B. 365

[60] *Spencer v Clark* (1979) 9 Ch. D. 137; *Crossley v City of Glascow Life Assurance Co* (1876)4 Ch. D. 421.

[61] Anifalaje, J.O. 1998. An experiment in statutory decolonization of insurance principles in Nigeria. *Current developments in Nigerian commercial law.* I.E. Sagay & O. Oliyide. Ed. Lagos: Throne of Grace Ltd. 203-213 at p. 212.

[62] Any person, within the context of the section could be a mortgagee, such as a banker or an insurer. – *Newman v Newman* (1885) 20 Ch. D. 674 at 679. Hitherto, in the enforcement of his right, an equitable mortgagee must join the mortgagor as a co-plaintiff, if he is willing, or as a co-defendant, in an action to enforce payment of the debt, while a legal mortgagee, as legal

the assignee (or any other derivation title holder) a better title than the insured had in such life insurance policy. Similarly, section 10 of the Motor Vehicle (Third Party) Insurance Act as well as section 69 of the Insurance Act, 2003, empowers a third party, who has obtained judgement against an insured motorist in respect of death or bodily injury, to enforce the said judgement against the insurer of the said motorist. The respective provisions require payment of such judgement debt within 30 days from the date of delivery of judgement.[63] In the same vein, under section 11 of the Motor Vehicle (Third Party) Insurance Act, if either before or after the bankruptcy or winding up (where the insured is a company), any liability for death or bodily injury is incurred by the insured, his rights against the insurer under the policy in respect of that liability is to be transferred to and vest in the third party to whom the liability was incurred. In this instance, the third party can claim directly from the insurer as if he was a party to the policy of insurance.[64] The essence of these provisions is to place the third party in the position of the insured so as to be able to claim directly against the insurer under the policy in order to satisfy the liability incurred by the former. Also, section 15 of the Motor Vehicle (Third Party) Insurance Act preserves the right of action accorded a third party against the insurer in respect of any policy issued under the provisions of the Act, notwithstanding the death of the insured to whom the policy was issued.

Moreover, the right of the insurer to avoid a policy of insurance on grounds of breach of the duty of utmost good faith, either because of non-disclosure or misrepresentation of a material fact, has been circumscribed under section 54 of the

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owner of the debt, can sue the debtor without such joinder. – Sheridan, L.A. 1974. *Rights in security.* London: Collins. 276

[63] *Sese v Sentinel Assurance Co. Ltd* (1986) 3 NWLR (Pt. 31) 633

[64] At common law, a third party is not secured in the event of the bankruptcy or liquidation of the insured notwithstanding the availability of compensation under a third party insurance policy. The third party can only prove as a creditor against the general assets of the insured. – Adeyemi, F. 1998. Reflections on insurance law reform in Nigeria. I.E. Sagay and O. Oliyide Eds. *Current development in Nigerian commercial law.* Lagos: Throne of Grace Publishers Ltd. 185-202 at p. 195.

Insurance Act 2003. In this wise, the blind legal duty imposed on the insured to volunteer information has been jettisoned and replaced with a realistic duty that the insured would only be bound to answer the questions which have been expressly and specifically asked by the insurer. Failure on the part of the insurer to ask any question is conclusively deemed to be absolute waiver of such questions concerning the enforceability of the insurance contract. The intolerable injustice meted out to the insured at common law, sequel to his failure to disclose information which was not inquired or answer questions which were not asked by the insurer, has been significantly addressed.

Furthermore, the right of the insurer to avoid a policy, on ground of a breach of a condition or warranty, has been curtailed under section 55 of the Insurance Act in order to ensure that the just expectation of the insured is not defeated on mere technical grounds. In the first instance, the distinction usually made at common law between condition and warranty, has been removed and they are now both regarded as policy terms and given the same legal effect. Secondly, the insurer can no longer exercise the right to avoid the policy nor set up a defence to the insured's claim on grounds of breach of any term, which has been described either as a warranty or a condition, as relevance and materiality to the insured risk or loss are to be the guiding factors in determining the competing rights and liabilities of the contracting parties. Also, regardless of whatever any other written law may contain, an insurer will have no right to repudiate an insurance contract or an insurance claim on account of a breach of any term of the insurance contract unless such a breach amounts to a fraud or is a breach of a fundamental term, which might or might not have actually been described as a warranty in the contract.

The grave limitations of the common law rule in the formulation of insurable interest and its attendant iniquitous implications have also been addressed under section 56 of the Insurance Act 2003. Whilst retaining the requirement of insurable interest, the Act has expanded the scope of insurable interest, in respect of insurance on another person's life, to include "legal relationship" often created under either Islamic or Customary laws whereby one person assumes responsibility

for the maintenance and care of the other.[65] The twin relationships of Customary law and Islamic law have been premised on the familiar fawning care, which is expected of privileged members of what is loosely known as the extended family system in Nigeria. Furthermore, section 2 of the Life Assurance Act, which makes it unlawful to make any policy on the life of any person(s), or other event(s) whatsoever, without inserting in such policy, the name of the person(s) interested therein, or for whose use, benefit or on whose account such policy is so made or underwritten has been amended. Whilst also retaining the need to insert in the policy, the name of the person(s) interested therein or the beneficiaries, an exception has been created under section 57 in respect of a policy of insurance for the benefit of a group of unnamed persons belonging to a specified class or answering a description as beneficiaries from time to time. Such policy is not to be invalidated, merely because of failure to state therein the names as required, if the identity of the respective beneficiaries is ascertainable from the description of that class in the insurance policy. Thus, the common law right of the insurer to avoid a claim on grounds of absence of insurable interest, as encapsulated in the Life Assurance Act, 1774, has generally been curtailed.

V Statutory Rights of Insurers

The statutory rights of insurers are derivable majorly from the Constitution of the Federal Republic of Nigeria 1999[66] (1999 Constitution) and three other Statutes, namely, the Insurance Act 2003,[67] the Motor Vehicles (Third Party Insurance) Act[68] and the Companies and Allied Matters Act, 1990.[69] These statutory rights would now engage our attention starting with the 1999 Constitution.

Under the 1999 Constitution, there are two dominant rights which insurers in Nigeria may assert either against the

[65] Section 56 of the Insurance Act 2003
[66] (As amended)
[67] Cap I 17 LFN 2004
[68] Cap M 22 LFN 2004.
[69] (As amended) Cap. C20, LFN 2004

insured or the regulatory authority. The first is the right to fair hearing under section 36 thereof. Generally, in any event that an insurer may suffer a penalty under an administrative organ, such as the National Insurance Commission (hereinafter referred to as the Commission), it is required that such organ observes the rule of fair hearing otherwise the organ's decision will be null and void.[70] Secondly, the insurer has the right, under section 44 of the 1999 Constitution to just compensation in the event of the nationalisation or mere expropriation of any of its assets.

The Insurance Act, 2003, in section 6 thereof, gives the prospective insurer the pre-eminent right to be registered as an insurer, if it can satisfy all the requirements listed thereunder.[71] The first of these requirements is that the Commission must be satisfied that the class and category of insurance business to be conducted by the prospective insurer/applicant would be in accordance with sound insurance principles.[72] The prospective insurer must also have been duly incorporated as a limited liability company under the Companies and Allied Matters Act 1990 or be a body duly established by or pursuant to any other enactment to transact the business of insurance or reinsurance. Other requirements include the payment of the prescribed paid-up share capital and statutory deposit; provision of adequate and valid arrangements for reinsurance treaties; acceptable

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[70] E.g. under sec. 8 of the Insurance Act 2003, which deals with "cancellation of registration", where the Commission is of the opinion that the class of insurance business of the insurer is not being conducted in accordance with sound insurance principles, or that it has contravened any of the provisions of the Act, the Commission is required to give notice, in writing , to the insurer, of the Commission's intention to cancel the registration in respect of the particular class of insurance business and also to comply with the provisions of section 7 thereof as regards timeframe for appeal to the Minister of Finance. See *Cooper v Wardsworth Board of Works* (1863) 14 C.B. (N.S) 180; *Franklin v Minister of Town and Country Planning* (1948) A.C. 87; *Awobokun v Sketch Publishing Co.* (1973) 3 U.I.L.R. (Pt. IV) 502 at p. 514 *et seq; Tulu v Bauchi N.A.* (1965) NMLR 343; *Falomo v Lagos State Public Service Commission* (1977) 5 S.C. 51.

[71] *Excelsior Insurance Co. Ltd v The Registrar of Insurance* (1976) 2 FRCR 1

[72] Sec 2 of the Insurance Act 2003 makes provision for two categories of insurance business, namely, general and life insurance businesses.

proposal forms, terms and conditions of policies which must also be in order; availability of competent and professionally qualified persons to manage the company and possession of a satisfactory business plan as well as feasibility study of the insurance business to be transacted within the next succeeding five years from the date of the application

The insurer also has a right, under section 85 of the Act, to use the word "insurance", "insurer", or "underwriter", or any derivative thereof, as part of its business name or for describing the nature or object of such business.

Under the Motor Vehicle (Third Party Insurance) Act, the insurer has the right, under section 16 thereof, to receive the Certificate of Insurance from the insured after a policy issued under the Act has been cancelled, either by mutual consent or by virtue of any provision in the policy, within seven days from the taking effect of such cancellation. And where such policy has been lost or destroyed, a statutory declaration to that effect must be made by the insured.

The rights exercisable by an insurer under the Companies and Allied Matters Act, 1990 are conferred by the provisions of section 100 of the Insurance Act 2003 which vest in the insurer, as a duly incorporated entity, all the rights which a registered company may legitimately assert against any other person or institution. For example, it can sue and be sued in its corporate name; own its own property, and commence insurance business immediately after incorporation and registration by the Commission.[73]

VI Statutory Duties of Insurers

The statutory duties of insurers would be found in the Companies and Allied Matters Act (CAMA), the Companies Income Tax Act (CITA)[74] and the Insurance Act. The duties of the insurer under the CAMA have arisen by virtue of its status as an incorporated entity. Thus, all the duties required of all companies in Nigeria, including the keeping of accounting records to show and explain the transactions of the company and the filing of annual returns, are to be performed by the

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[73] Secs. 37 and 39 of the CAMA, 1990 (As amended), Cap C20 LFN 2004.
[74] Cap C21 LFN 2004

insurer.[75] Under the CITA, the insurer is required to pay tax at the specified rate upon the profits of the company.[76] Specifically, under section 16, tax is payable by the insurer, in respect of its general insurance business, on the balance of the gross premiums and interest and other income receivable in Nigeria after deducting a percentage certain as reserve for unexpired risks. In respect of the life insurance business, tax is payable on the investment income less the management expenses, including commission.

The duties of the insurer are mostly contained in the Insurance Act 2003 and are hereinafter examined in no particular order.

First, it is a pre-eminent statutory duty of an insurer in Nigeria to be prepared to operate its insurance business in accordance with sound insurance principles, failing which, it will not be registered or, if already registered, it may have its registration cancelled.[77]

Sections 9 requires the insurer to pay the appropriate minimum share capital for the relevant class of insurance business[78] while section 10 requires the payment of the statutory deposit, which is fixed at 50 per cent of the stipulated paid-up share capital. Indeed, failure to maintain the requisite minimum paid-up capital or to make the necessary statutory deposit with the Central Bank, as required under section 10, constitutes a ground for cancellation of the Certificate of an insurer.[79]

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[75] See generally, CAMA, Part VIII , secs 211 – 243 in respect of meetings and proceedings of companies; Part XI, secs 331 - 356 in respect of Financial Statements and Audit and Part XII, secs 370 – 378 in respect of Annual Returns.

[76] Secs. 9 and 40 CITA

[77] Secs. 6 (1) (a) and 8 (1) (a) of the Insurance Act 2003.

[78] The Implementation Guidelines for the Re-Capitalisation of Insurance Companies released on 17 October 2005 by the Commissioner for Insurance increased the paid-up share capital of the three categories of insurance business in Nigeria.. For Life Insurance business, the share capital was increased from N150,000,000 to N2billion; General Insurance business from N200,000,000 to N3billion and that of Re-Insurance business from N350,000,000 to N10billion.

[79] Secs. 9(3)(a) and 10(6) of the Insurance Act 2003.

There is again the statutory duty of an insurer, under section 11(2), to give notice of the location of its principal office or of any subsequent change to the Commission within 21 days. An insurer, which fails to comply with this directive is liable, on conviction, to a fine of N500 (Five Hundred Naira) for every day during which the insurer so carries on business.

Section 13 requires the insurer to obtain the permission of the Commission before appointing a director, chief executive, manager or secretary, whose appointment will contravene the provisions of section 12. The prevention of corporate mismanagement, protection of the interest of the policyholders and the promotion of the efficient and disciplined management of the insurance business in the overall interest of the insuring public are the general objectives of the provisions of section 12. Thus, an insurer is prohibited, under that section, from appointing, or having in its employment, a director, chief executive, manager or secretary who is, or has become of unsound mind or, as a result of ill health, is incapable of carrying out his duties. Also precluded from being employed is any person who has been convicted of any offence involving dishonesty or fraud; or not a fit and proper person for the position as well as any person who has been found guilty of serious misconduct in relation to his duties or, in the case of a person with professional qualifications, has been disqualified or suspended from practising his profession in Nigeria by the order of any competent authority made in respect of him personally. Others include any person who is or has been a director of or been directly connected with the management of an insurance or financial institution whose licence to operate is cancelled or whose business has been wound up on grounds specified in sections 408(d) and 409 of CAMA[80]; or any person whose appointment with an insurance or a financial institution has been terminated, or who has been dismissed for reason of fraud or dishonesty, or has been convicted by a court or tribunal of an offence in the nature of criminal misappropriation of funds or breach of trust or cheating. A contravention of this

[80]Sec. 408(d) of CAMA provides that a company may be wound up if the company is unable to pay its debts while sec. 409 thereof defines what is meant by inability to pay debts.

provision renders the insurer and his accomplice liable, on conviction, to a daily fine of ₦ 5,000(Five Thousand Naira) during which the contravention continues.

An offshoot of the afore-mentioned duty is contained in section 14(2), which enjoins the insurer to promptly notify the Commission in writing, before the expiration of the period of 30 days, of the exit of its chief executive from its office. A contravention of this provision attracts a fine of ₦1,000 (One Thousand Naira) for every day the default continues.

Under section 15, the policy document, evidencing the contract of insurance, is required to be delivered to the insured, not later than 60 days after payment of the first premium. An insurer who contravenes the provisions of the section commits an offence and is liable, on conviction, to a fine of ₦5, 000.00 (Five Thousand Naira).

Section 16 imposes a duty on the insurer to obtain the prior approval of the Commission before the introduction of any new product into any class or category of insurance business. A contravention of this provision entails a fine of ₦10,000.00 (Ten Thousand Naira) on conviction.

Section 17 requires the insurer to rigorously keep vital records, such as the Memorandum and Articles of Association or other evidence of its constitution. Other documents required to be kept are those relating to the identity of members and every aspect of the business of the insurer, including a cash book; a current account book; a register of all policies and that of claims, investments, the insurer's assets; reinsurance ceded; a register of open policies in respect of marine insurance transactions as well as management report by external auditors. Furthermore, in respect of life insurance business, the insurer is required to keep a register of assured under group policies, including that of loans on policies; cash surrender values and of lapsed and expired policies. The failure of the insurer to comply with these provisions is punishable, on conviction, with a fine of ₦ 25,000.00 (Twenty-Five Thousand Naira). Similar duty is imposed on a re-insurer under section 18 with similar consequential liability in case of default.

There is also the duty imposed on the insurer, under section 19, not to co-mingle the premium funds in its possession where it engages in both life and general insurance

businesses. The insurer is restrained from applying the fund, directly or indirectly, for any purpose other than those of the class of business to which the fund is applicable. No penalty is prescribed for contravention.

As a means of protecting the interest of the insured with regard to settlement of claims, the insurer is mandated, under section 20, to establish and maintain provision for unexpired risks and outstanding claims in respect of its general business. The section prescribes no penalty for non-compliance.

Furthermore, as a means of ensuring the solvency of the insurer, section 21 mandates it to set up and maintain certain technical reserves such as contingency reserves to cover fluctuations in securities and variation in statistical estimates. The reserve is required to be credited with an amount, not less than three per cent of the total premium or 20 per cent of the net profit, whichever is greater, until it reaches the amount of the minimum paid-up capital, or 50 per cent of the net premiums, whichever is greater. Again, there is no penalty for non-compliance. Also, in respect of its life insurance business, the insurer is required, under section 22, to maintain a general reserve fund, which is to be credited with an amount equal to the net liabilities on policies in force at the time of the actuarial valuation, with an additional 25 per cent of its net premium for every year between valuation date. A contingency reserve fund, in respect of such life insurance business, is also to be credited with an amount equal to one per cent of the gross premiums or ten per cent of the profits, whichever is greater, and accumulated until it reaches the amount of the minimum paid-up capital. No penalty is prescribed also for default.

In addition, an insurer has the duty, under section 24, to maintain, at all times, in respect of its general insurance business, a solvency margin, being the excess of the value of its admissible assets in Nigeria over its liabilities. The solvency margin is to make provision for unexpired risks, outstanding claims, claims incurred but not yet recorded, and funds to meet other liabilities of the insurer. In this respect, the solvency margin is not to be less than 15 per cent of the gross premium income, less reinsurance premiums paid out during the year, or the minimum paid-up capital, whichever is greater. Where the insurer falls short of the required margin of solvency, the

Commission is empowered to direct the insurer to make good the deficiency by way of cash payments into its accounts and satisfactory evidence of such payments is to be given to the Commission within 60 days of the receipt of the directive. Failure to make payment and produce satisfactory evidence of the payment constitutes a ground for the cancellation of the registration of an insurer. In order to underscore the importance of the maintenance of the solvency margin, the Act requires the auditor, who audits the balance sheet, profit and loss account and the revenue account of the insurer, to issue a certification stating the extent to which the required margin of solvency has been satisfied by the insurer.

The insurer also has a very important duty, under section 25, to invest and keep invested only in authorised property and security in Nigeria, its annual premium income as reflected in the balance sheet and revenue accounts. And as a means of ensuring the financial stability of the insurer, investment in highly risky and speculative options is curtailed by restricting its investment drive to specified property and security. These include shares of limited liability companies, shares in securities of registered co-operative societies, loans to building societies approved by the Commission, loans on real property, machinery and plant in Nigeria, loans on life policies within their surrender value, cash deposit in or bills of exchange accepted by licensed banks and such other investments as may be prescribed by the Commission. In essence, apart from helping to curtail the capital outflow from the domestic economy, these authorised areas of investment are prudent and reasonably safe and would also help in the development of the Nigerian economy. The maximum percentage of the assets of the insurer that could be invested in real property, in respect of its general insurance business, is, however, restricted to 25 per cent while that of its life insurance business is restricted to 35 per cent. A contravention of the provisions of this section entails a penalty of a fine of ₦ 50,000.00 (Fifty Thousand Naira).

There is also a duty on the insurer, under section 26, to submit to the Commission, not later than 30th June of every year and in the prescribed form, a duly audited balance sheet, its profit and loss account, a revenue account and a statement of

investments representing the insurance funds. Failure to file the returns and accounts attracts a fine of ₦ 5,000.00 (Five Thousand Naira) for each day of default. In addition, after the receipt of the approval of the Commission, publication of such balance sheet, together with the profit and loss account, is required to be made, at least, in one widely-circulating Nigerian newspaper. The distribution of dividend is also forbidden until the Commission has approved the annual returns of the insurer. No penalty is, however, prescribed for non compliance.

With a view to promoting financial rectitude, section 28 places the insurer under a statutory duty to ensure the annual audit of its balance sheet, profit and loss account and revenue account by a professionally qualified external auditor. There is no provision for penalty in case of default.

Under section 29, an insurer transacting life insurance business is required, once in every 3 years, to cause an investigation to be made into its financial position by an actuary appointed or secured by it. Such investigation is to include a valuation of the insurer's assets and liabilities as well as a determination of any excess over those liabilities, of the assets representing the funds maintained by it. No penalty is prescribed for non-compliance.

The insurer is mandated, under section 30, not to amalgamate its business with, transfer to, or acquire from any other insurer, any insurance business or part thereof, without the approval of the Commission. Also, the insurer is prohibited, without the sanction of the Federal High Court and in accordance with the elaborate procedure laid down in that section, from amalgamating its business with any other insurer carrying on life insurance business or Workmen's Compensation insurance business[81] or transferring to or acquiring from any other insurer, any such insurance or part

[81] The Workmen's Compensation Act (WCA) 1987, Cap. W6 LFN 2004, under which a registered insurer in Nigeria could engage in the insurance of death or bodily injury or disease to a worker, has since been repealed and a new law, the Employee's Compensation Act (ECA) 2010, has been enacted. The ECA establishes a Fund to provide for an open and fair system of guaranteed and adequate compensation for all employees or their dependants for any death, injury, disease or disability arising out of or in the course of employment.

thereof No penalty is, however, prescribed for a contravention of these provisions.

Similarly, the insurer is barred, under section 33, from winding up a life insurance business, unless it was for the sole purpose of effecting an amalgamation, transfer or acquisition as authorised under section 30. Again, no penalty is prescribed for contravention of this provision.

In order to control the activities of insurance intermediaries, the insurer is required, under section 35, to maintain a register showing the name and address of any insurance agent employed by it and the date on which his services were employed and, where applicable, terminated. The insurer is also obligated not to knowingly, or recklessly, transact any insurance business with unlicensed agent. Whilst a contravention of the latter is punishable, on conviction, with a fine of ₦ 100,000.00 (One Hundred Thousand Naira), there is no provision for penalty in case of breach of the former. In the same vein, the insurer is prohibited, under section 36(9), from knowingly or recklessly transacting any insurance business with unregistered insurance brokers. A substantial fine, in the sum of ₦500,000.00 (Five Hundred Thousand Naira) is incurable by an erring insurer and the Court is empowered to make additional order, including the refund of the sums involved to the rightful owners thereof or other persons entitled thereto.

The protection of the insuring public from arbitrary increment in the rate of premium payable on policies of insurance made compulsory by law is the objective of the provisions of section 51. This section imposes a duty on the insurer not to increase the minimum rate of premium charged, or to be charged, with respect to such class of insurance business without prior official approval of the Commission.[82]

[82] Policies of insurance made compulsory by law include that of the Motor Vehicle (Third Party) Insurance for every motorist to cover death or bodily injury to third parties; the Builders' Liability Insurance under sec. 64 of the Insurance Act 2003; the Occupiers' Liability (Public Building) Insurance under sec. 64 of the Insurance Act 2003; the Statutory Group Life Insurance required of every employer for the benefit of his employees under sec. 4(5) of the Pension Reform Act 2014 and the Healthcare Professional Indemnity Insurance required of medical practitioners and dental surgeons under Rule

The law makers were unsparing in the penalty to be meted out to offenders under this section for a convicted insurer will be sentenced to a fine, which is ten times the amount of the premium charged and received, or ₦100,000.00 (One Hundred Thousand Naira), whichever is greater. The convicted insurer will also be compelled to make a refund of the excess payment to every person making such payment, or to other persons entitled thereto. In addition, the insurer could either be suspended from underwriting new business for, at least, six months, and at most three years, or have its certificate cancelled.[83]

Again, there is the duty on the insurer, under section 53, not to pay more than the approved commission to any insurance agent, broker or any other intermediary. In this wise, 12.5 per cent of the premium is payable in respect of motor insurance business; 15 per cent in respect of workmen's insurance compensation[84] and 20 per cent in respect of any other subdivision of insurance business. A contravention of this provision is punishable, on conviction, with a fine of ₦100,000.00 (One Hundred Thousand Naira) and an additional fine amounting to the excess commission.

In drawing up its proposal form or other application form for insurance, an insurer is under a duty, under section 54, to draw it up in such a way that it would elicit all such information as the insurer considers material in accepting the application for insurance of the risk. Although no provision is made for contravention of this provision, any information not specifically requested for by the insurer in such proposal or application form is deemed immaterial. The insurer is further required, under this section, to ensure that the proposal form or

126 of the Code of Medical Ethics 2008 and sec. 45 of the National Health Insurance Scheme Act 1999/ .

[83] It is noteworthy that, under sec. 51(5) of the Insurance Act, an exception is created in respect of non-tariff insurance business where premiums are chargable according to the risk covered by the insurance policy.

[84] The provision relating to Workmen's compensation has been rendered otiose by the repeal of the Workmen's Compensation Act and the subsequent enactment of the Employees Compensation Act.

such other application form for insurance is drawn up in legible letters so as not to mislead the proposer. It is also required of the insurer to notify the proposer, by stating in a conspicuous place on the front page of such proposal form or other application, the implication of allowing an agent fill the proposal form on his behalf. No penalty is prescribed also for a contravention of this provision.

Section 63 requires an insurer, on whom a written notice of assignment of any policy has been served, to deliver an acknowledgement of the receipt of the notice, upon request in writing, to the person by whom the notice was given or his personal representative. The acknowledgement, if signed by a duly authorised representative of the insurer is conclusive evidence of the notice having been duly received by the insurer.

An insurer, who has insured a public building against the hazards of collapse, fire, earthquake, storm and flood, is required, under section 65, to make quarterly payment of 0.25 per cent of the net premium received on such insurance into a Fire Service Maintenance Fund for the purpose of providing grant or equipment to institutions engaged in fire fighting services. Any insurer who defaults in making the payment is liable, on conviction, to a fine of ten times the amount payable and persistent non-compliance could be a ground for cancellation of the registration of such insurer.

The insurer, under section 69, has the duty to pay any claim as a general rule. Thus, where a judgement has been obtained against an insurer in respect of any risk required to be insured against under the Act or any other law, the insurer is generally required to settle the claims within 30 days from the date of delivery of the judgement, notwithstanding the fact that the insurer is entitled to avoid or cancel the policy, or may have avoided or cancelled the policy on the ground of breach of policy condition by the insured.[85] The insurer is only relieved of this liability where it has not been duly notified of the institution of the proceedings before or within seven days after

[85] See *Tabs Assurance Coy Ltd v Oyebola* (2001) 3 N.W.L.R. (Pt. 701) 428 wherein the provisions of sec. 43(1)&(2)(a) of the Insurance Decree 1976, which were *mutatis mutandis* with the provisions of sec. 69of the Insurance Act 2003, were considered and given effect.

the commencement of the proceedings in which the judgement was given; or where there has been a stay of execution in consequence of an appeal; or where, before the happening of the insured risk, there has been a cancellation of the policy by mutual consent or by virtue of any provision contained therein; or where the insurer has, in an action commenced before or within three months after the commencement of the proceedings in which the judgement was given, obtained a declaration that, notwithstanding any provision contained in the policy, it was entitled to avoid the policy on the ground of non-disclosure or misrepresentation of a material fact.

Furthermore, in order to further protect the interest of the insured or beneficiary of a policy in the claims settlement process, section 70 requires the insurer, where liability is admitted, to settle the claim within 90 days after the issuance of discharge voucher. Where the insurer defaults in the settlement, the Commission is empowered to effect the payment from the statutory deposit of the insurer. However, where the insurer disclaims liability, a statement to that effect is required to be delivered to the person making the claim or his/her authorised representative, not later than 90 days from the date on which a claim is made on the insurer. A contravention of this provision is punishable, on conviction, with a fine of ₦ 500,000.00 (Five Hundred Thousand Naira).

Again, under section 71, in order to expedite the claim process arising out of motor accident cases, the requirement of police report is to be dispensed with by the insurer once there is sufficient proof of loss or damage. The only exception is where death of or serious bodily injury to a person results therefrom,

The insurer has the duty, under section 76, not to offer, either directly or indirectly, as an inducement to any person to take out or renew or continue an insurance contract in respect of any kind of risk to lives and property in Nigeria, any rebate of either the whole or part of the commission payable under the Act, or of the premium shown on the policy, except such rebate as may be allowed in accordance with published prospectus or table of the insurer. A contravention of this provision is punishable, on conviction, with a fine of ₦250,000.00 (Two Hundred and Fifty Thousand Naira) while a continuous

contravention is a ground for the cancellation of the certificate of registration of such insurer.

Also, under section 77, the insurer is prohibited from extending to any of its officers, either directly or indirectly, unauthorised loans. A fine, which is a double of the amount of the loan, is the penalty for non-compliance. The only authorised loan is loans on life policies issued to such officer by the insurer and loans normally forming part of the terms and conditions of service of the officer.

By section 79, every registered insurer has the duty to subscribe to and conform to the Code of Conduct of the insurance profession. No penalty is prescribed for non-compliance with this provision.

VII Conclusion and Suggestions

Regulation of insurance business is changing with times. By and large, the Nigerian policymakers have striven to enhance the confidence of the Nigerian public in the insurance industry through fairly stringent regulatory measures aimed at balancing the interest of the parties to the insurance contract as well as projecting the social purpose of insurance. Although insurance is basically contractual between the insurer and the insured, statutory interventions, from inception of the contract through the claims stage, aimed at curtailing or amplifying the correlative rights and duties of the contracting parties have been salutary. Also, the duties imposed upon the insurers, in respect of the paid-up share capitals, the keeping of technical reserves; re-insurance treaties and prescribed investments, are all geared towards ensuring that the insurer remains solvent and that the interest of the insured is assured. The provisions have also, generally, helped in ensuring that the just expectations of the parties, especially the insured, in taking out the policy are not jettisoned on the altar of technicalities. Nevertheless, there is still the need for the insured to understand the extent of the insurer's rights against him in order to guard against the possibility of avoidance of the policy by the insurer on legitimate grounds.

Furthermore, while the statutory interventions in some of the common law rights and duties of insurers are laudable, there is the need to revisit some of the common law provisions

which are considered to be unduly prejudicial to the interest of the insured. For instance, the provisions of section 54(2) of the Insurance Act, 2003, which have restated the common law rule on the status of the agent who assists a proposer to complete the application form for insurance, as the agent of the proposer, have failed to take into consideration the high level of illiteracy among the Nigerian citizenry as well as the trends in some other common law jurisdictions. For example, in the United Kingdom, under the Consumer Insurance (Disclosure and Misrepresentation) Act (CIDRA) 2012, an agent is just not regarded as the agent of the insured by merely assisting the applicant to complete the proposal form. A number of factors would be taken into consideration in the determination of the status of an agent. Generally, an agent would be taken to act on behalf of the consumer where, for example, the agent undertakes to give impartial advice to the consumer or he is paid a fee by the consumer.[86].Similarly, under section 210(1) of the Ghanaian Insurance Act, 2006, an insurance agent or sub-agent who completes an insurance form or a similar document on behalf of a proposer is deemed to have done so as the agent of the insurer and not that of the former on whose behalf the agent completes the proposal form. The section further imputes any knowledge acquired by such an insurance agent or a sub-agent, in the course of completing such form or other document, to the insurer and nothing contained in the contract of insurance is to absolve the insurer from any liability in respect of knowledge so acquired by the insurance agent or sub-agent.

Also, in respect of the duty of utmost good faith, there is the need to expand the duty of the insurer, as contained in section 54 of the Insurance Act, to include notification to the insured of the importance of giving accurate information when filling the proposal form for a new contract as well as renewal of existing contracts. In this respect, some common law jurisdictions, including Australia, have made it a binding duty of the insurer to inform the insured, by notice, conspicuously stated in the proposal form, or in writing, in the case of renewal, of the importance of the duty of utmost good faith and

[86]Sec. 3(1) &(2) and Sch. 2, para. 3 of CIDRA, 2012.

the consequences of the breach thereof.[87] Thus, an insurer can no longer exercise its right to repudiate the contract where it has failed to comply with the statutory duty.

Furthermore, the provisions of section 84 of the Insurance Act 2003, which empower the Commission to suspend an insurer, who fails to pay any fine imposed for an offence under the Act within 30 days from the imposition thereof, for a minimum period of 12 months, from writing a new insurance business, or to cancel the certificate of registration where the erring insurer fails to pay the fine within the period of suspension, are commendable. Nevertheless, there is still the need to have an omnibus provision prescribing penalties for contraventions of any of the provisions of the law wherein no specific penalty has been prescribed.[88] In addition, the fines imposed as penalties, in case of the contravention of the provisions of the various laws, particularly the Insurance Act 2003, are too little to serve as deterrent and need to be reviewed. In all, the due enforcement of the provisions of the relevant laws by all concerned stakeholders is crucial to ensuring that the insurers abide by the rules.

[87] Sec 22 of the Insurance Contracts Act 1984 (as amended) (Australia) . See also sec 3(1)&(2) CIDRA. Also, sec 22 of the Canberra Insurance Contracts Act 1984 (Act No 8) (as amended) imposes a duty on the insurer to clearly inform the insured in writing, before the contract of insurance is entered into, of the general nature and effect of the duty of disclosure. Any insurer who fails to discharge this duty may not exercise a right, in respect of a failure by the insured to comply with the duty of disclosure, unless that failure has been fraudulent..

[88] See e.g. sec. 51 of the Banks and Other Financial Institutions Act, 1991 (As amended) Cap B2 LFN, 2004