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COURT OF APPEALS
STATE OF NEW YORK

HOBISH,

Appellant,

-against-

NO. 124

AXA EQUITABLE LIFE INSURANCE COMPANY,

Respondent.

20 Eagle Street
Albany, New York
November 21, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Chrishanda Sassman-Reynolds
Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Hobish v. AXA.

3 MR. MALONE: Good afternoon, Your Honors. May it
4 please the court. I'm Gary Malone, representing plaintiff-
5 appellants Richard Hobish and the Hobish Trust. May I
6 reserve five minutes for rebuttal?

7 CHIEF JUDGE WILSON: Yes.

8 MR. MALONE: Thank you.

9 Your Honors, the Hobishes allege that defendant-
10 respondent, AXA Insurance Company, victimized the late Ms.
11 Hobish. First, by deceiving her at the age of eighty-two,
12 into obtaining a life insurance policy with false
13 representations of minimal risk of premium increases. And
14 second, by breaching that policy when she was ninety-one,
15 by imposing a gigantic premium increase that targeted the
16 elderly, despite its contractual promise to treat Ms.
17 Hobish equally and equitably with younger policyholders in
18 her given class of non-tobacco user.

19 The Appellate Division affirmed the Supreme
20 Court's summary judgment rulings which held that the
21 Hobishes could not seek actual or punitive damages from AXA
22 for the loss in value in the policy under either a breach
23 of contract or a claim of deceptive business practices in
24 violation of General Business Law section 349.

25 In other words, the Appellate Division held an



1 insurance company - - -

2 CHIEF JUDGE WILSON: Did it actually say - - -

3 MR. MALONE: I'm sorry.

4 CHIEF JUDGE WILSON: I'm sorry. Did it - - - it
5 say you - - - the Appellate Division say you couldn't
6 recover actual damages, or did it say there were particular
7 types of damages you couldn't recover?

8 MR. MALONE: The decision is a bit obscure on
9 that point, Your Honor. The Supreme Court said that we
10 could not recover compensatory or consequential damages.
11 The Appellate Division said it was affirming the Supreme
12 Court but not reaching the issue of what other damages, if
13 any, are available.

14 But the damages that the Hobishes were seeking
15 were actual damages, based on the loss in value of the
16 policy. In other words, basic - - -

17 CHIEF JUDGE WILSON: Well, you were - - - if I
18 understand, you - - -

19 MR. MALONE: Yes, yes.

20 CHIEF JUDGE WILSON: - - - you - - - on the
21 breach. Let's just take the breach first. You were
22 seeking the death benefit under the policy, less the
23 payout; is that right?

24 MR. MALONE: We were seeking the value of the
25 policy, which is calculated by the death benefit, minus the

1 expected premiums over the life expectancy of Ms. Hobish
2 and payments that - - - in her own policy account that the
3 - - -

4 CHIEF JUDGE WILSON: That had been recouped - - -

5 MR. MALONE: - - - that's returned to it.

6 CHIEF JUDGE WILSON: - - - that had been
7 recouped. Yeah.

8 MR. MALONE: Right. And that is just - - -

9 CHIEF JUDGE WILSON: And - - -

10 MR. MALONE: Yeah.

11 CHIEF JUDGE WILSON: - - - and the Appellate
12 Division said you could not recover that?

13 MR. MALONE: Exactly.

14 CHIEF JUDGE WILSON: But did not say you couldn't
15 recover some other measure of damage for the breach?

16 MR. MALONE: That's correct. But it's unclear
17 from the Supreme Court's decision if it was actually
18 leaving anything in because it said it was granting AXA
19 summary judgment on AXA's - - - on - - - excuse me. On the
20 Hobishes' claim for compensatory and consequential damages.

21 So it kind of left us in a murky area here, Your
22 Honor. But the true measure of damages - - -

23 CHIEF JUDGE WILSON: But the - - - but the
24 defendants were not granted summary judgment on liability?

25 MR. MALONE: Exactly.

1 CHIEF JUDGE WILSON: So you still have some sort
2 of claims pending? Both of GBL 349 and a contract claim?

3 MR. MALONE: Yes. Though, again, in that the
4 Supreme Court said that it was granting judgment on
5 compensatory and consequential damages. That certainly
6 sounds like it's not allowing any type of damages. It's
7 unclear what the court meant by that.

8 JUDGE HALLIGAN: Well - - -

9 MR. MALONE: - - - and - - - yes.

10 JUDGE HALLIGAN: Before Supreme Court, did you
11 have a theory of damages in addition to - - - with respect
12 to compensatory and consequential, other than the full
13 value of the policy, minus, I assume, the payout and the -
14 - - and the expected premiums? I think you just referenced
15 the expected premiums.

16 MR. MALONE: Right. That was the only damage
17 theory that the Hobishes put forth under the authority of
18 this court in Conlew the decision for - - - for example,
19 that said that when a policyholder has a breach of contract
20 for a life insurance policy and is uninsurable, the measure
21 of damages is the value of the life insurance policy
22 measured by the face value, minus such things as the
23 premiums over the life expectancy.

24 JUDGE HALLIGAN: And so if we - - - if we were to
25 conclude that you can't get the full value, are there

1 damages that you have sought other than the full value of
2 the policy under the - - - as compensatory and
3 consequential? Setting aside the 349 claim for a minute.

4 MR. MALONE: The - - - the only damages that the
5 Hobishes were asserting were value of the policy. In other
6 words, benefit of the bargain damages.

7 JUDGE HALLIGAN: Right. Right. And with respect
8 to that, are there any cases that you can point us to where
9 a plaintiff was allowed to recover full value of the policy
10 - - - you know, minus whatever is on the other side of the
11 - - - the scale, expected premiums, a payout, et cetera,
12 where there was not a wrongful cancellation?

13 MR. MALONE: We do have a case in the - - - I
14 believe it's the Western District of Washington. And the -
15 - - in respect to - - -

16 JUDGE HALLIGAN: But nothing in this - - -
17 nothing in New York?

18 MR. MALONE: Nothing in New York. But I'll point
19 out the cases in New York, they state as a general
20 principle that when there's a breach of contract that the
21 policyholder is suing on - - - and in most of these cases,
22 it's a case where the insurer has breached by, let's say,
23 terminating the contract. But these cases don't say, okay,
24 this measure of damage is based on the fact that the
25 insurer has terminated the contract. What these cases say,

1 is that the measure of damages is based on the fact that
2 there has been a breach of the contract. And when there's
3 a breach of a contract - - - a contract - - - the - - - the
4 nonbreaching party has the right to terminate the contract
5 and sue for full benefit of the bargain damages.

6 JUDGE HALLIGAN: Okay. So - - - so to be clear,
7 are you alleging - - - I thought you were alleging that
8 there was a wrongful termination here?

9 MR. MALONE: Well, we're alleging that there was
10 a substantial breach by AXA, which gave the Hobishes the
11 right to terminate the contract under basic contract
12 principles that we - - -

13 JUDGE CANNATARO: So you do concede - - -

14 MR. MALONE: Yes.

15 JUDGE CANNATARO: - - - though, that you
16 terminated the - - - the contract?

17 MR. MALONE: Certainly.

18 JUDGE CANNATARO: There was a cancellation?

19 MR. MALONE: Yes.

20 JUDGE CANNATARO: And - - - and what would get
21 you - - - what would get you the - - - I would assume that
22 whatever the measure of damages is, it's - - - it - - - it
23 - - - or whatever the right type of damages are, it's
24 measured from the - - - from the point of the breach,
25 correct?

1 MR. MALONE: Yes. But it's measured by what the
2 value of the policy was at the time of the breach.

3 JUDGE CANNATARO: Why is that? Because my
4 thinking is if you canceled the policy, the - - - the face
5 value of the policy is no longer relevant because you're
6 not going to be able to recover that face value because the
7 policy's canceled.

8 MR. MALONE: Well, the question is, what was the
9 policy valued at before the breach? What was the policy
10 valued at after the breach? And as a result of the breach,
11 the contract lost more than a million dollars in value.
12 And we estimated it was 1.5 million dollars. The
13 defendant's expert estimated that - - - if you accept that
14 measure of damages, it could be up to 1.2 million dollars
15 in loss in value. And - - -

16 JUDGE CANNATARO: So is that your measure of
17 damages? The loss in value at the time of the
18 cancellation?

19 MR. MALONE: Yes. And we say that the measure of
20 the loss of value at the time of the termination of the
21 contract is the face value minus the amounts received and
22 the premiums that you would expect during the life of the
23 policy.

24 CHIEF JUDGE WILSON: Why wouldn't - - -

25 JUDGE HALLIGAN: Can I ask?

1 CHIEF JUDGE WILSON: - - - why wouldn't - - - I'm
2 sorry. Go ahead.

3 JUDGE HALLIGAN: Yeah. With respect to the
4 emails among the family members, why should that not lead
5 us to conclude that what happened here was that the family
6 members decided to take the cash value? If I'm using the
7 wrong terminology, you'll tell me. But - - - you know, to
8 - - - to essentially cash out the - - - the value of the
9 policy for their own family economic reasons, as opposed to
10 because there had been, as you say - - - you know, a
11 substantial breach by the insurer?

12 MR. MALONE: Well, Your Honor, what you're - - -
13 I think what you're talking about is the same thing.
14 Because what the family members decided was, my God,
15 they're increasing our premiums by a huge amount. This is
16 - - - financially injurious. We can't take this. So yes,
17 as a financial matter, because we can't take this financial
18 burden that the company is trying to impose on us. Yes.

19 JUDGE HALLIGAN: They could have - - - they could
20 have continued to pay the premiums, presumably. They also,
21 presumably - - - and I realize this is expensive and - - -
22 and perhaps arduous, but they probably could have sought
23 some kind of injunctive relief as well. So there were
24 arguably options available to them. So what are we to make
25 of their decision to take the course of action that they

1 did, given what they say about why they did it in their own
2 - - - you know, emails?

3 MR. MALONE: Because, Your Honor, when a party is
4 - - - is faced with a substantial breach that is composed
5 of substantial financial penalties, the party has a right
6 to say, okay, I don't want to incur these penalties. I'm
7 going to cancel the contract. The - - - the - - - the
8 courts don't say to people, okay, you have to keep on
9 paying these premiums and go bankrupt, otherwise you have
10 no remedy.

11 CHIEF JUDGE WILSON: But - - - but there's a - -
12 -

13 MR. MALONE: Yes.

14 CHIEF JUDGE WILSON: Sorry.

15 MR. MALONE: Yeah. Yes.

16 CHIEF JUDGE WILSON: The - - - the - - - if I
17 understand the way the contract works, there's a couple of
18 things, I guess. One is that they did cancel - - -
19 terminate the contract but they also, at the same time,
20 sort of enforced it. In that the return of the cash was
21 pursuant to a provision in the policy that allowed them to
22 do that. It was only because they were standing on that
23 provision of the contract to be able to get the money back.
24 So they were - - - yes, they were terminating under
25 protest, but they were also relying on it.

1 The other thing is - - - at least, if I
2 understand the way the contract works properly - - - if I
3 properly understand the way the contract works. Sorry.
4 Adjective in the wrong place. There was about a half a - -
5 - little more than half a million dollars of cash value,
6 and the policy would have allowed the premium payments or
7 more appropriately, the difference - - - the increase that
8 you're complaining about - - - to be paid out of the cash
9 value for some period of time, while you could have either
10 brought a declaratory judgment action or injunction or
11 something like this and avoided the consequence you face
12 now.

13 I mean, I realize in retrospect it would have
14 turned out to be a great decision to do that, but you
15 didn't have the benefit of foresight.

16 MR. MALONE: Right. Well, first, Your Honor, the
17 Hobishes did not enforce the contract by terminating it.
18 And - - -

19 CHIEF JUDGE WILSON: They enforced it by
20 demanding, then, half a million back.

21 MR. MALONE: It was not so much demanding. AXA
22 they had no right to the money. This is like if - - - if -
23 - -

24 CHIEF JUDGE WILSON: Under the contract?

25 MR. MALONE: Well, Your Honor. If I'm - - - if I

1 have my money in a bank, and the bank engages in
2 embezzling, I find that the bank is defrauding people. If
3 I ask for the return of my money in my bank account, that
4 doesn't mean that I'm now reaffirming my relationship with
5 the bank. AXA had no right to that money, and AXA's own
6 executives admitted that. I'll point out that - - -

7 CHIEF JUDGE WILSON: Well, except they actually
8 took something like a - - - I've forgotten the number - - -
9 30- or 40,000-dollar deduction, which is different from the
10 bank, I think, because that's what the contract provided.

11 MR. MALONE: Right. But I'll - - - I'll just
12 quote some testimony, Your Honor. Mr. Tassoni with whom we
13 deposed, an AXA executive, said that he was describing what
14 a surrender of a contract is. He says, "A surrender is
15 when someone has positive value in the contract, and they
16 choose to end the contract. Get the value paid out to
17 them." And - - -

18 JUDGE CANNATARO: This contract had a surrender -
19 - - over here. This contract had a surrender value
20 separate and distinct from the death benefit amount; did it
21 not?

22 MR. MALONE: Yes, but that's because the Hobishes
23 had put in money into an account. It was essentially - - -
24 they were treating it essentially as a savings account as
25 well. And - - -

1 JUDGE HALLIGAN: But isn't that - - -

2 MR. MALONE: Yes.

3 JUDGE HALLIGAN: - - - exactly why they were
4 enforcing the contract? They were taking that money out?

5 MR. MALONE: No. Because what the contract
6 provides is that when you end the contract - - -

7 JUDGE HALLIGAN: Right.

8 MR. MALONE: - - - and it's over, AXA has to
9 give you your money back because it has no right to it.
10 And the testimony I just quoted from Mr. Tassoni - - -
11 that's at A2931 of the record and at A2993 of the record -
12 - - he says that when a surrender - - - when a policy is
13 surrendered, AXA is giving the client their money back.

14 JUDGE CANNATARO: So why wouldn't you have been -
15 - -

16 MR. MALONE: The contract is ended.

17 JUDGE CANNATARO: - - - why wouldn't you have
18 been made whole by getting that surrender, whatever the - -
19 - whatever it was worth, plus, I suppose whatever amounts
20 you were overcharged, for whatever period the overcharge
21 existed for, on the - - - on the premiums or COI - - -
22 whatever it is. And - - - you know, under my understanding
23 of contract damages principle, that would have put you
24 roughly in the position you were in when the breach
25 occurred. Why is it not adequate?

1 MR. MALONE: It wouldn't actually put you in the
2 same position, because the position you were in was that
3 you had a life insurance policy that had a value of
4 something over a million dollars. Both sides agree to
5 that.

6 JUDGE CANNATARO: But we all agree that that - -
7 - that policy was canceled. You could have gone and - - -
8 you could have taken your money from the surrender value
9 plus your overcharged damages and bought another two
10 million dollar policy somewhere else.

11 MR. MALONE: And paid even greater premiums at
12 the age of ninety-one, Your Honor. That's why the Conlew
13 decision of this court said that when there's a breach of a
14 life insurance policy, the insured has the right to cancel
15 the policy and get benefit of the bargain damages measured
16 by the value of the policy, minus - - - I'm sorry - - -
17 measured by the face value of the policy minus the - - -

18 JUDGE CANNATARO: I guess, I'm just struggling -
19 - -

20 MR. MALONE: - - - premiums - - -

21 JUDGE CANNATARO: - - - Counsel - - -

22 MR. MALONE: Yes.

23 JUDGE CANNATARO: - - - because the benefit of
24 the bargain you're talking about requires a death which
25 hadn't occurred. And - - - and that just - - -



1 MR. MALONE: Well - - -

2 JUDGE CANNATARO: I can't get past that logical
3 leap.

4 MR. MALONE: It's not just that, Your Honor. The
5 benefit of the bargain here is that you have a life
6 insurance policy that has a certain value, because you've
7 made all these payments in it over the years. And the - -
8 - and you can calculate that benefit by saying, okay, it's
9 expected that in - - - if your life expectancy is the
10 average life expectancy, you will end up paying this amount
11 in premiums. And by paying this - - - you subtract that
12 amount - - - that's the value of the policy. That is its
13 economic worth.

14 CHIEF JUDGE WILSON: Could I ask you - - -

15 JUDGE HALLIGAN: Can I - - -

16 CHIEF JUDGE WILSON: I'm sorry. The GBL damages
17 - - -

18 MR. MALONE: Yes.

19 CHIEF JUDGE WILSON: - - - because I understand
20 there's two components. One we've essentially talked about
21 with - - - the same as the contract damages, at least, the
22 way the Appellate Division thinks about it. But you also
23 had asked for restitutionary damages, I think, under the
24 GBL claim?

25 MR. MALONE: We asked for both actual damages - -



1 -

2 CHIEF JUDGE WILSON: Yes.

3 MR. MALONE: - - - and restitutionary. And I'll
4 point out, the courts below said, well, because you don't
5 have a breach of contract damages here, you don't have GBL
6 damages. Which, Your Honors - - -

7 JUDGE HALLIGAN: Can I ask you what your - - -

8 MR. MALONE: - - - frankly, makes no sense. Yes.

9 JUDGE HALLIGAN: - - - what your theory of
10 restitutionary damages is?

11 MR. MALONE: The theory of restitutionary
12 damages, essentially based on the forfeiture doctrine that
13 a - - - an agent or an employee who is unfaithful does not
14 have right to keep any of the profits that's made. And we
15 say that you can easily calculate here what should be
16 considered the profits that AXA had - - -

17 JUDGE HALLIGAN: And have the - - -

18 MR. MALONE: - - - and then that portion should
19 be returned. But that's - - -

20 JUDGE HALLIGAN: - - - have the courts - - -

21 MR. MALONE: I'm sorry.

22 JUDGE HALLIGAN: No. I - - - I - - - have the
23 courts decided yet whether or not restitutionary damages
24 are available under 349?

25 MR. MALONE: No, not yet, Your Honor. But the

1 courts have said that the attorney general has the right to
2 essentially seek restitutionary damages under 349.

3 CHIEF JUDGE WILSON: So how easy would it be to
4 calculate AXA's profits? Because they were providing life
5 insurance for a period of time, and there was some
6 mortality risk associated with the insurance they provided.
7 And had - - - you know, Ms. Hobish passed away while the
8 policy was in force, there would have been a recovery. And
9 at least, as I understand their financial analyses, which I
10 don't know if they're true or not, but take for a moment
11 they are true. Their underlying problem here is that they
12 were undercharging people given the mortality risk for this
13 group of people, including Ms. Hobish. So they may
14 actually have suffered a loss rather than made a profit,
15 even for the period of time the policy was in force?

16 MR. MALONE: Well, we say that the - - - the
17 profit that AXA return - - - made on this policy can be
18 calculated by looking at the cost of insurance, which is
19 essentially the minimum payment they were asking for people
20 and subtracting that from the amount of the Hobishes'
21 account balance, which AXA would have been allowed to keep
22 if the Hobishes had not terminated the policy. And if I
23 could just point out, that with respect to the actual
24 damages that we're seeking under 349 - - - even if the
25 court were - - - the courts below were right that the

1 Hobishes should be considered to have waived the right to
2 breach of contract damages, that theory has no application
3 to General Business Law Section 349 which is designed to
4 fill in gaps to make sure that people who are deceived,
5 even if they don't have a breach of contract claim, can
6 say, okay - - -

7 JUDGE HALLIGAN: But is - - -

8 MR. MALONE: - - - these are my actual damages.

9 JUDGE HALLIGAN: - - - is - - - is your theory of
10 what the actual damages are comprised of, any different
11 than the full value of the policy theory under the breach
12 of contract?

13 MR. MALONE: No, it's the same - - - the same
14 value. But it's based on a different theory. Under the
15 349 claim, it's that AXA deceived the Hobishes by saying
16 the minimal risk of damage - - - of a minimal risk of a - -
17 - a rate increase when their own business records said
18 they'd already started planning a rate increase. And the
19 breach of contract, obviously, is based on the fact that
20 there was a contract that said we're going to treat you
21 equitably of all people in your given class, and they fail
22 to do that.

23 And I'll - - - and I'll point out that the court
24 below also erred by not giving a summary judgment on the
25 breach of - - - on the liability for breach of contract.

1 Because the contract plainly says you're going to be
2 treated equitably - - -

3 CHIEF JUDGE WILSON: But the federal court - - -
4 the federal court actually thinks that there's an issue of
5 fact on that, right? As to the class?

6 MR. MALONE: Yes. But its basis of doing that is
7 saying, well, both sides had reasonable interpretations of
8 the contract, but AXA - - -

9 CHIEF JUDGE WILSON: Same contract, right?

10 MR. MALONE: The same contract. But AXA's basis
11 of its defining the meaning of given class is based - - -
12 based on an actuarial standard which, obviously, the
13 Hobishes did not have any knowledge of. And this court has
14 many times held, to determine if there's an ambiguity of
15 the contract, you ask what is the reasonable expectation of
16 the average insured person who's not going to have any idea
17 of what actuarial definitions are? Plus, this court has
18 said that if there's two different meanings, you have to go
19 with the meaning of the average insured person, unless
20 that's unreasonable. And the court below said that wasn't
21 unreasonable, Your Honor. Thank you.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. KRANTZ: May it please the court. My name is
24 Larry Krantz, and I represent Equitable Financial Life
25 Insurance Company formerly known as AXA Life Insurance



1 Company.

2 Your Honors, starting with the breach of contract
3 damages. I think the questions that the court posed
4 essentially summarized our argument.

5 JUDGE HALLIGAN: Counsel, under the Appellate
6 Division's decision, if - - - if we look at that, what
7 damages remain? Liability clearly has not been decided.
8 So if it went back under the Appellate Division's
9 determinations, what measures of damages would remain
10 available to the plaintiff?

11 MR. KRANTZ: Yes. So the reason that that's a
12 difficult question to answer is because the plaintiffs have
13 only put forth one damages theory, which makes no sense.

14 JUDGE HALLIGAN: But - - - but they - - -

15 MR. KRANTZ: - - - they have - - - that's all
16 they've asked for.

17 JUDGE HALLIGAN: I take it you mean the full
18 value theory? The death value?

19 MR. KRANTZ: The death benefit, minus some
20 adjustments. So - - -

21 JUDGE HALLIGAN: Right. Right. Could they put
22 back - - - could they put forth - - - I'm sure you're much
23 more familiar with the procedural intricacies of the case
24 than I am. Could they - - - could they put forth other
25 theories of damages, if it - - - if it went back and

1 there's a determination of liability?

2 MR. KRANTZ: They can certainly try. We would
3 have to see what they put forth and whether we opposed it
4 or not. But - - -

5 JUDGE HALLIGAN: Of course.

6 CHIEF JUDGE WILSON: I guess Judge Halligan's
7 question may be - - - and I don't want to put - - - let me
8 just - - - my question is, would you oppose that on
9 procedural grounds or just substantive grounds?

10 MR. KRANTZ: Truthfully, it's hard to answer
11 until we know what it is that they attempt to do, and
12 perhaps they attempt to amend the complaint. The complaint
13 only alleges one theory of damages. Throughout the case
14 they litigated one theory of damages. We thought that - -
15 -

16 JUDGE TROUTMAN: Is there ever - - -

17 MR. KRANTZ: - - - theory was wrong, so we moved
18 for - - -

19 JUDGE TROUTMAN: Counsel - - -

20 MR. KRANTZ: - - - summary judgment.

21 JUDGE TROUTMAN: - - - counselor - - -

22 MR. KRANTZ: - - - striking it. I'm sorry.

23 JUDGE TROUTMAN: Is there - - - is there ever an
24 instance where, when the insured cancels the policy that
25 they could potentially get the face of the policy? Or is



1 it only when it's the opposite? That is, the company
2 cancels?

3 MR. KRANTZ: You know, it's hard to eliminate all
4 possibilities. I can't think of one standing here now.
5 Perhaps there's a bizarre - - -

6 JUDGE TROUTMAN: So is your - - -

7 MR. KRANTZ: - - - bizarre fact-pattern that
8 could arise.

9 JUDGE TROUTMAN: So is your view never or maybe?

10 MR. KRANTZ: Well, it would have to be a
11 completely different case. And I can't fathom what - - -

12 JUDGE TROUTMAN: Just not here?

13 MR. KRANTZ: Certainly not here. Here, we have a
14 voluntary surrender of the policy for financial reasons of
15 the plaintiff. An invocation of the surrender terms of the
16 policy. This money, contrary to my adversary, did not - -
17 -

18 JUDGE RIVERA: They - - - they claim - - - over
19 here. They - - - they claim that the insurance company
20 created the circumstances that forced their hand to
21 surrender the policy. So it's not truly - - - you may
22 disagree with it - - -

23 MR. KRANTZ: Yes.

24 JUDGE RIVERA: - - - this is just the theory,
25 right? That therefore it was not a voluntary surrender.



1 Under - - - under her own choice, she would never have done
2 that. But that's the argument, but for the breach. What
3 they have - - - what they allege is a breach?

4 MR. KRANTZ: And, of course, we disagree with the
5 factual predicate.

6 JUDGE RIVERA: I understand.

7 MR. KRANTZ: But under any circumstance, you
8 still have to analyze what are the damages that flow from a
9 breach.

10 CHIEF JUDGE WILSON: So let me give you - - -

11 MR. KRANTZ: In this case - - -

12 CHIEF JUDGE WILSON: - - - let me give you a
13 hypothetical that is not this case, okay? Twenty-year
14 level term life policy, right? 10,000 dollar annual
15 premium for whatever the face value, whatever that will buy
16 me at age - - - well, I don't want to say what age I am.
17 But you've got my hypothetical so far?

18 MR. KRANTZ: I do.

19 CHIEF JUDGE WILSON: Okay.

20 MR. KRANTZ: Forgive me, Your Honor. I have a
21 little hearing - - -

22 CHIEF JUDGE WILSON: Sorry. I'll - - - and I've
23 - - - I have a little voice problem. But I'll go louder.
24 Twenty-year level term - - - level payment term policy.
25 Right? Premium payment is 10,000 dollars a year. Death

1 benefit is whatever it is. Year three - - - and purchaser
2 makes the - - - insured makes the payments for the first
3 couple of years. Insurance company breaches the contract
4 by saying the premium now is 100,000 dollars a year.
5 Right? Clear breach of the - - - of the - - - of the
6 agreement?

7 MR. KRANTZ: Yes.

8 CHIEF JUDGE WILSON: Insured says okay, well,
9 then I'm canceling the policy. It's midway through the
10 year, give me back my 5,000 dollar partial premium, which
11 the insurer does. Right? And the insured dies a year
12 later. And the estate says we would have had this large
13 policy in place, but you breached the contract. Why can't
14 I get back the death benefit?

15 MR. KRANTZ: Well, in - - - in my view, under
16 those facts, which are quite different, as I think Your
17 Honor - - -

18 CHIEF JUDGE WILSON: Yes. They are.

19 MR. KRANTZ: - - - already admitted.

20 CHIEF JUDGE WILSON: They are.

21 MR. KRANTZ: The proper course for the aggrieved
22 policyholder would be to immediately file suit for breach.
23 And if they truly could not continue to pay the premiums
24 under the new crazy increase that everyone agrees was wrong
25 - - -

1 CHIEF JUDGE WILSON: Right.

2 MR. KRANTZ: - - - they would have to get - - -
3 or they could - - - they - - - they would seek injunctive
4 relief that the policy does not lapse. That they are
5 permitted to pay the preexisting agreed-upon premiums of
6 10,000 dollars, and that the insurance carrier may not
7 lapse the policy because they are in breach.

8 JUDGE HALLIGAN: Would that - - - would that be
9 true under 349? And if so, why?

10 MR. KRANTZ: I don't see - - -

11 JUDGE HALLIGAN: Meaning, it would be under the -
12 - - I think - - - the - - - the terms of the Chief's
13 hypothetical, that would be a deceptive business practice.
14 Would probably also be a breach of contract, but it would
15 be a deceptive business practice. And so - - - so if - - -
16 if they did what the Chief suggested and - - - and simply
17 got the pro-rata amount - - - I think that was what he was
18 suggesting - - - paid back, would they not have a 349
19 claim? And the question would just be what the damages
20 might be?

21 MR. KRANTZ: They might, if they could establish
22 that it was consumer-oriented - - -

23 JUDGE HALLIGAN: Right.

24 MR. KRANTZ: - - - and all the other parts of 349
25 - - -



1 JUDGE HALLIGAN: All the predicates of a 349.

2 MR. KRANTZ: But under 349, the damage issue
3 doesn't change. Under 349, they're entitled to actual
4 damages. Under a breach of contract, you're entitled to
5 compensatory damages. We are not aware of any authority
6 suggesting those are different concepts. And if you look
7 at the 349 - - -

8 JUDGE RIVERA: But what if - - - what if they - -
9 - in the hypothetical and even in this case, they argue we
10 can't get any other insurance? We're now locked out of
11 this particular consumer industry. We - - - we can't get
12 any more.

13 MR. KRANTZ: Yes. So let me - - -

14 JUDGE RIVERA: So we're in a worse place than we
15 were when we first purchased - - -

16 MR. KRANTZ: Yes.

17 JUDGE RIVERA: - - - the policy, but perhaps they
18 could have had options.

19 MR. KRANTZ: I think there is a - - - an
20 important answer to that question. I'm going to bring it
21 back to these facts, because it's easier for me to explain
22 my answer. Ms. Hobish had insurance at the time of the
23 increase. She did not need to go into the market to get a
24 new policy. She was insured. She was not uninsurable.
25 She was the opposite of uninsurable. She was presently

1 insured. All that had to happen is that the policy had to
2 remain in effect. So if she had either - - - she had three
3 years to do nothing.

4 JUDGE RIVERA: Right.

5 MR. KRANTZ: Policy would have just paid itself.

6 JUDGE RIVERA: Yeah.

7 MR. KRANTZ: She could have gone to court and
8 tried to get equitable relief but left the policy in place
9 and have been insured. The whole idea of the - - - in
10 Conlew, the - - - the prong of - - -

11 JUDGE RIVERA: Is the risk there that as money is
12 being taken out to pay for these premiums from - - - from
13 that pool of funds that's available to her under - - -
14 under this arrangement with the insurance company, it's
15 losing value, and the risk is I may lose in that
16 litigation? And now it's I've got less value than if I
17 just - - - I don't know if the numbers - - - you can tell
18 me if the numbers are wrong, than if I just involuntarily
19 surrender now under protest in the hopes of arguing this
20 later?

21 MR. KRANTZ: I think that is true. That is the
22 risk that you will lose, and you'll be wrong that it was a
23 breach of contract, and now you will have lost value. But
24 that is a risk that everyone must determine if faced with
25 what they believe is a breach of contract. Right? Anyone

1 in that position - - -

2 CHIEF JUDGE WILSON: When you say the policy
3 value would have paid for three years - - -

4 MR. KRANTZ: Yes.

5 CHIEF JUDGE WILSON: - - - that's without any
6 payments, not without the - - -

7 MR. KRANTZ: Nothing.

8 CHIEF JUDGE WILSON: - - - not without the
9 payment that she had been making and that she believed she
10 was still entitled to make; is that right?

11 MR. KRANTZ: Correct.

12 CHIEF JUDGE WILSON: So do you know what it would
13 have been had she made the same payments she had been
14 making previously?

15 MR. KRANTZ: It - - -

16 CHIEF JUDGE WILSON: How many years it - - - it
17 would have bought in that circumstance?

18 MR. KRANTZ: The - - - the problem with answering
19 is that her payments were not continuous at a - - - at a
20 given rate.

21 CHIEF JUDGE WILSON: Oh, you mean she hadn't been
22 making them? But the - - -

23 MR. KRANTZ: She missed - - -

24 CHIEF JUDGE WILSON: Right.

25 MR. KRANTZ: - - - when - - - when the Madoff

1 crisis happened to her - - -

2 CHIEF JUDGE WILSON: Yes.

3 MR. KRANTZ: - - - she missed a couple of years
4 of payments.

5 CHIEF JUDGE WILSON: I see.

6 MR. KRANTZ: Then there were sporadic payments.
7 So there's no real continuous - - -

8 CHIEF JUDGE WILSON: The - - - the policy on its
9 face, though, has the planned pay - - - a payment of
10 something like 346, some number like that, I think. Right?

11 MR. KRANTZ: I'm not sure what you're - - - what
12 is it - - -

13 CHIEF JUDGE WILSON: On - - - on the - - - on the
14 face of the - - - right on the front page, I think, it says
15 planned annual payment and there's a number.

16 MR. KRANTZ: Oh, yeah.

17 CHIEF JUDGE WILSON: I think it was something
18 like 30 - - -

19 MR. KRANTZ: So I can explain that to you.

20 CHIEF JUDGE WILSON: No, no. I know what that
21 is. I'm asking. Had she made those payments, what the
22 three years would have been? Would it have been four years
23 or five years, or what would it have been had she made
24 those? Starting at the point where - - - where she alleged
25 a breach?

1 MR. KRANTZ: If she had continued making those
2 payments?

3 CHIEF JUDGE WILSON: Yes.

4 MR. KRANTZ: It would have been extended several
5 years. I can't honestly tell you how many.

6 CHIEF JUDGE WILSON: Okay.

7 MR. KRANTZ: It's a complicated internal
8 actuarial calculation.

9 CHIEF JUDGE WILSON: Okay.

10 MR. KRANTZ: But it would have been extended for
11 several - - -

12 CHIEF JUDGE WILSON: It would have been more than
13 the three, but we don't have - - -

14 MR. KRANTZ: Several years more - - -

15 CHIEF JUDGE WILSON: Okay.

16 MR. KRANTZ: - - - than the - - - than the three.

17 JUDGE RIVERA: But that's because the difference
18 would have been made up between whatever she continued to
19 pay, whatever that amount is, and drawing from the account.
20 Right? That - - - that - - - to make up for the increased
21 payments - - - premiums, excuse me.

22 MR. KRANTZ: Correct. The - - - the - - -

23 JUDGE RIVERA: That - - - that's how you get to -
24 - - well, it would - - - her money would - - - would - - -
25 would go long - - - would last longer, gain her more time.

1 Right? Because she's still drawing. You're still drawing
2 from - - - from the funds?

3 MR. KRANTZ: Yes. I mean, the fund would be
4 worked down.

5 JUDGE RIVERA: Right.

6 MR. KRANTZ: And if she added money to the fund -
7 - -

8 JUDGE RIVERA: Right?

9 MR. KRANTZ: - - - it would be worked down
10 longer.

11 JUDGE RIVERA: Right.

12 MR. KRANTZ: That's the way the policy worked.

13 JUDGE RIVERA: Yeah.

14 MR. KRANTZ: But to be clear, this is not a bank
15 account. This is not the equivalent of a bank account.
16 This is a contractual right to a surrender payment. There
17 is no account in her name where the money is sitting like a
18 bank. These are general funds of the insurance company.
19 But under the contract, if she makes a proper surrender
20 under the terms of the contract, and in our view thereby
21 affirms the existence of the contract, she gets the
22 surrender payment.

23 JUDGE RIVERA: So just - - - just to be clear.
24 From your position, she had - - - I think you're saying
25 only two options. Well, I guess three. Surrender, get

1 whatever she's going to get from that, which is what she
2 did under protest; file a lawsuit, and pay or not pay.
3 Right? That's kind of why maybe it's three. Pay or not
4 pay, file a lawsuit, seek a PI, whatever she's going to
5 seek there.

6 MR. KRANTZ: She could get three years - - -

7 JUDGE RIVERA: But those are her paths?

8 MR. KRANTZ: - - - before paying.

9 JUDGE RIVERA: Make your own choice with respect
10 to the insurance company or seek judicial relief. Right?
11 That - - - that - - - that's the choice, as you - - - I
12 thought - - -

13 MR. KRANTZ: Yes.

14 JUDGE RIVERA: - - - that's what you're saying?
15 It's a legal matter.

16 MR. KRANTZ: I think that's - - - I think that's
17 probably her choices.

18 JUDGE RIVERA: This is the only way you're going
19 to get damages?

20 MR. KRANTZ: Her choices are to accept the
21 increase or seek legal relief against it.

22 JUDGE RIVERA: On whatever theory she wants to,
23 argue?

24 MR. KRANTZ: Whatever theory she wants. Just as
25 anyone who's facing a perceived breach of contract can do.

1 JUDGE HALLIGAN: On - - - on liability, Counsel.
2 What do you say to your adversary's argument that, in
3 deciding whether the contract is ambiguous, we can't look
4 at evidence? You referenced the actuarial definition of
5 class. That - - - that Ms. Hobish presumably would not
6 have had familiarity with or access to?

7 MR. KRANTZ: So a couple of points there. Number
8 one. Ms. Hobish testified at her deposition that she never
9 read the policy. So we are not dealing here with an actual
10 claimed understanding of what terms meant.

11 JUDGE HALLIGAN: Right. But I think he's making
12 a distinct point, which is that I don't think there's any
13 allegation that she knew about the actuarial definition of
14 class, and - - - and that that's not readily available. So
15 what is your response to that?

16 MR. KRANTZ: Yes. Anyone reading this policy, in
17 our view, would not equate given class and rating class as
18 - - -

19 JUDGE HALLIGAN: But you relied on the actuarial
20 definition, I believe. Did you not?

21 MR. KRANTZ: No. I'm - - - we rely on multiple
22 levels of - - -

23 JUDGE HALLIGAN: That is one thing that you
24 relied on, if I am - - -

25 MR. KRANTZ: Yes. But - - - but our first level

1 argument is, of course, they're not the same. They're two
2 different terms. No one would think two different terms
3 mean the same thing in a contract. They're in different
4 clauses of the contract, several pages apart for different
5 things. So to us, the - - - the face of the contract does
6 not support the argument that they're equivalent.

7 Now, we moved for summary judgment that our view
8 was unassailable. We - - - we lost. Both parties lost on
9 the ambiguity question. And we have not pursued that in
10 this court. We have accepted. There are now seven judges
11 who have read this policy. The trial court judge here,
12 Judge Masley, the five judges in the Appellate Division,
13 and Judge Furman in the Southern District of New York.

14 JUDGE HALLIGAN: And what is the status of the -
15 - - the federal court action?

16 MR. KRANTZ: Settled. But just to conclude my
17 thought. My - - - our - - - our point is, after seven
18 judges have told us it's ambiguous, we have dropped the
19 argument, and we accept that we have to go to trial on that
20 issue because it's ambiguous.

21 If no further questions, I think I'll rest on our
22 papers for the rest. Thank you.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. MALONE: Your Honors, Counsel has said that
25 this was a voluntary termination. Nothing could be further

1 from the truth. As we show in our briefs, AXA manufactured
2 this situation. AXA, for several years, studied how can we
3 improve our finances by getting elderly - - -

4 JUDGE SINGAS: Counsel?

5 MR. MALONE: Yes.

6 JUDGE SINGAS: What weight, if any, should we
7 give to the fact that DFS looked at this and said that
8 these were not exorbitant or inappropriate charges, that
9 they represented a legitimate basis for the increase?

10 MR. MALONE: This actually goes to our section
11 349 claim. Because what AXA did here was deceive DFS. AXA
12 sent DFS a letter saying the only reasons for this increase
13 are because of our changes in estimation of mortality and
14 our finances. But if you look at AXA's records that we
15 cite, they said that one of the primary reasons they did
16 this was because the surrender of policies by elderly
17 people had decreased. They lied to DFS. That's why DFS
18 passed on this and this is part of their deceptive
19 practices.

20 They also told consumers the only reasons we're
21 doing this increase is because changes in mortality,
22 expectations and our finan - - - in investment experience.

23 JUDGE SINGAS: But yet - - -

24 CHIEF JUDGE WILSON: But liability - - -

25 MR. MALONE: Yes.



1 CHIEF JUDGE WILSON: Sorry. Liability is not in
2 front of us now, right?

3 MR. MALONE: I'm sorry?

4 CHIEF JUDGE WILSON: The question of liability -
5 - - you - - - you - - - you still have your claim, right?

6 MR. MALONE: Well, we still have our claim that
7 is more or less - - -

8 CHIEF JUDGE WILSON: This doesn't - - - the DFS -
9 - - what you're telling me about DFS goes to fraud
10 essentially, not to the measure of damages?

11 MR. MALONE: It goes to fraud, Your Honor. But
12 the courts below said there's no claim here for punitive
13 damages. That there was enough evidence of AXA's wrongful
14 conduct, and that should be reversed. We show that at the
15 very time that AXA told its agents, including Mr. Levy, who
16 spoke to Ms. Hobish - - - and the testimony is undisputed
17 that she relied on Mr. Levy. He told her there's minimal
18 risk here of any rate increase, and he said that AXA told
19 him to say that. We showed that AXA's manuals told him to
20 say that.

21 And at the very - - - very same time, AXA's
22 records show that they decided, you know what? We have to
23 increase rates on the elderly because we goofed up. We
24 didn't figure that there would be so many elderly people
25 signing up. This cost is too much money. Their own

1 records say that they decided that definitively - - -

2 CHIEF JUDGE WILSON: Was it - - - is it signing -
3 - - sorry. Is it signing up or is it not canceling? Not -
4 - - not - - - not terminating the policy?

5 MR. MALONE: It was a combination. That too many
6 elderly people had signed up. They were too successful in
7 marketing this to the elderly. But also then not enough
8 elderly were ending up surrendering their policies. And so
9 AXA made it - - - and we - - - we cite business records
10 where they say it's been decided, it's on our books, we are
11 going to be increasing rates on the elderly at some point.

12 And they delayed that. They said we're going to
13 study this further, but they never said we're getting rid
14 of this decision. And that was deceptive to do that and
15 not tell their salespeople, hey - - -

16 CHIEF JUDGE WILSON: And so how does that get
17 you - - -

18 MR. MALONE: Yes.

19 CHIEF JUDGE WILSON: - - - to punitive damages?

20 MR. MALONE: Because it was deceptive, Your
21 Honor. Telling people that, hey, there's minimal risk here
22 - - -

23 CHIEF JUDGE WILSON: Well, do you automatically
24 get punitive damages on a GBL? I mean, to prove a GBL
25 claim, you're going to have to prove deception, right?

1 MR. MALONE: Yes.

2 CHIEF JUDGE WILSON: That's an element. So do
3 you automatically get punitive damages if you prove your
4 claim?

5 MR. MALONE: No, Your Honor. Because we can
6 prove deception without proving actual fraud. We say
7 there's actual fraud here because AXA knew that it was
8 going to be increasing rates, and yet it let its
9 salespeople go out and still say, don't worry, there's
10 minimal risk here.

11 CHIEF JUDGE WILSON: Does the policy have a
12 provision that caps the rate per 1,000 dollars?

13 MR. MALONE: I'm sorry? There's a - - -

14 CHIEF JUDGE WILSON: Does the policy have a
15 provision in it that caps - - - that - - - that sort of
16 guarantees your rate per 1,000 dollars can be not - - - not
17 be more than this ever?

18 MR. MALONE: Yes. That rate - - - that amount
19 was not reached.

20 CHIEF JUDGE WILSON: Never reached?

21 MR. MALONE: Never reached. But the record is
22 undisputed that Mr. Levy told Ms. Hobish don't worry,
23 there's hardly ever any rate increases. We're not aware of
24 any. There's only minimal risk here. And Mr. Levy
25 actually broke down and cried when he actually found out

1 that Ms. Hobish's premiums were being increased from 63,000
2 dollars a year to 164,000 dollars. And he wrote to AXA's
3 top executives saying - - - you know, how can this be
4 happening? And they basically told him, well, we have the
5 right to do it, so we're doing it. Get out of here.

6 And I'll point out, Your Honor, the fact that AXA
7 actually did manufacture this situation and decided it
8 wanted to force people to either give up their policies or
9 pay a greater amount, is allowing AXA to benefit by its own
10 wrongdoing.

11 This court has continuously reaffirmed the
12 principle, no one should be able to permit - - - no one
13 should be permitted to profit by his own wrongdoing. And
14 that's what AXA is being allowed to do here.

15 And with respect to the question of whether or
16 not there's any decisions saying that you can get the value
17 of a policy when it's not been canceled. I'll point out
18 that in our brief, we cite the - - - a case from the
19 Western District of Washington, which said it doesn't
20 matter if the insurer cancels it or not, the question is,
21 you just look at the value of the policy. And that's the
22 principle that this court followed in Conlew.

23 And I'll just point out that in other contract
24 situations, such as the Latham Land case which we cite in
25 the Third Department. There the court said a plaintiff

1 whose property has been decreased in value because of a
2 breach in contract, is entitled to cancel that contract, to
3 terminate that contract, and sue for the loss in value.
4 It's a basic contract principle. And Counsel, when he
5 says, oh, Ms. Hobish should have just been forced to keep
6 paying this until she went bankrupt, that - - - that is
7 totally inequitable, Your Honor. That's not the law in New
8 York. People who - - - people who have experienced a
9 substantial loss in value because of breach in contract
10 should be able to sue that. And there's no principled
11 basis here on which to deny Ms. Hobish that right - - - or
12 the Hobish family at this point. Thank you.

13 CHIEF JUDGE WILSON: Thank you.

14 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Richard Hobish, Et Al., v. Axa Equitable Life Insurance Company, No. 124 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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