

CONFLICT OF LAWS TREATMENT OF WARRANTIES AND REPRESENTATIONS IN LIFE INSURANCE POLICIES—PART TWO*

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III. APPLICATION OF CONFLICT OF LAWS RULES — SPECIFIC PROBLEMS

1. Requirement that application be attached to policy.

It was pointed out in the earlier part of this article that a number of states have enacted statutes constituting the policy the entire contract or providing that, unless a copy of the application is attached to the policy, the facts regarding misrepresentations inducing the contract shall not be admitted into evidence. Cases involving statutes of this type have presented the question whether those provisions are substantive or remedial; the diversity of approach is indicated in a subsequent subdivision dealing with procedural and substantive aspects of warranty statutes.

At this point it may be noted that these statutes have been regarded as strong evidence of local policy. In cases where the forum was the place of making of the contract, its courts or federal courts sitting in that state have invariably applied the local statute which was favorable to the claimant.⁶⁹ So, also,

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69. *Stipcich v. Metropolitan L. Ins. Co.* (1928) 277 U. S. 311, reversing (D. C. D. Ore. 1925) 8 F. (2d) 235 (held that, on construction, "entire contract" statute of place of making did not exclude duty of applicant to disclose interim health change but, on facts, notice to agent was imputed to insurer; note that place of making rule is approved); *Provident Sav. L. Assur. Soc. of N. Y. v. Hadley* (C. C. A. 1, 1900) 102 Fed. 856; *Great Southern L. Ins. Co. v. Burwell* (C. C. A. 5, 1926) 12 F. (2d) 244, cert. den. (1926) 271 U. S. 683; *Bukowski v. Security Ben. Assoc. of Topeka, Kan.* (1935) 221 Iowa 416, 261 N. W. 783 (note that carrier was a fraternal); *Schuler v. Metropolitan L. Ins. Co.* (1915) 191 Mo. App. 52, 176 S. W. 274 (policy provided that New York law was to govern but its statute was similar to that of Missouri); *Mees v. Pittsburgh L. & T. Co.* (1915) 169 App. Div. 86, 154 N. Y. S. 660 (rule clearly indicated but inconclusive since on demurrer).

But cf. *Metropolitan L. Ins. Co. v. Lodzinski* (1937) 122 N. J. Eq. 404, 194 Atl. 79.

when the forum was not the place where the policy was received by the applicant, that state has looked to and applied a statute of this type obtaining in the state which was the place of making of the insurance contract.⁷⁰ In several instances where the law of the place where the contract was physically received was not favorable to the claimant, a court of that state has effectuated an express provision in the contract that the law of the state of the insurer's home-office shall govern the contract and, in so doing, has applied a statute of the sister-state requiring the application to be attached to the policy and prescribing consequences for the violation of that provision.⁷¹

2. *Waiver and estoppel regarding health statements.*

Some of the most difficult problems in the general law of insurance involve the scope of waiver. As will be noted, courts have used the term "estoppel" in insurance law to express one form of waiver; but for the purposes of this subdivision the problems will be treated separately. The doctrine of waiver in insurance largely owes its development, in the period before statutes were generally enacted, to the practice by insurance companies of multiplying warranties and providing that the policy would be forfeited for breach of condition. Warranties in insurance are essentially conditions in a specialized type of contract. In other branches of contracts law the rule is clear that breach of a material condition does not forfeit or make void a contract; the failure to perform a condition gives to the non-breaching party an election either to refuse further performance under the contract or to insist upon that performance which remains possible to the breaching party.⁷² In early insurance cases the courts treated all express warranties as material conditions, instead of noticing that many warranties actually related to immaterial points. That is, many statements in the policy which were there declared to be warranties did not induce the insurer to enter into the contract and did not relate, actually or

70. *Rauen v. Prudential Ins. Co.* (1906) 129 Iowa 725, 106 N. W. 198. Cf. *Des Moines L. Assoc. v. Owen* (1897) 10 Colo. App. 131, 50 Pac. 210, in which forum looked to sister-state statute but treated part of its provisions as procedural, as to which local law applied.

71. *Missouri State L. Ins. Co. v. Lovelace* (1907) 1 Ga. App. 446, 58 S. E. 93; *Union Central L. Ins. Co. v. Pollard* (1896) 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715.

72. See 3 Williston, *Contracts* (Rev. ed. 1936) §§683, 688, 746, 1956.

potentially, to the event which would constitute the casualty for which insurance was sought.⁷³

In explaining their decisions in insurance cases courts spoke of automatic forfeiture (voidness) for breaches of warranty (condition). Opinions would have been more understandable in the light of the rule in other contracts cases, and many hardships would have been avoided if the courts had held that breach of warranties upon *material* points merely gave an option or *election* to the insurer to avoid the contract upon notice of the breach, and that statements upon immaterial points did not come within the classification of warranties. In time evils flowing from the initial error became apparent. One of the devices by which the judiciary then attempted to cope with the problem was by formulation of the rule that these conditions, inserted by and on behalf of the carrier, might be waived by it. As the insurers revised their forms and inserted a clause to the effect that no agent had the power to waive either performance of conditions or forfeitures occasioned by their non-performance, the courts rejoined with the rule that the insurer may waive its non-waiver clause in the contract.

Many cases have dealt with the determination of what factors constituted waiver and have distinguished acts of waiver coming after maturity of the claim and waivers contemporaneous with or antecedent to issuance of the contract. These problems of the general law of insurance are beyond the scope of the present study although the ways in which courts have applied principles of waiver in conflict of laws cases have arisen in connection with a number of different policy provisions in addition to those relating to warranties and representations. It may be pointed out, however, that this portion of the law has been marked by a general failure to recognize that the term "waiver" is one of multiple meanings. Williston,⁷⁴ for example, assigns

73. An example is the statement by an applicant that he had three living sisters, whose ages were 52, 47, and 36 years, whereas their actual ages were 49, 44, and 33 years. Insurance is not based upon recital of ages of one's living sisters and hence the statements did not induce the contract by misleading the insurer upon a material point; the ages of applicant's sisters will not cause his death or bear upon the time of its occurrence. Yet in a case on similar facts it has been held that the breach of warranty constituted a defense to the insurer. See *Kansas Mut. L. Ins. Co. v. Pinson* (1901) 94 Tex. 553, 63 S. W. 531 (not conflicts case).

74. 3 Williston, *Contracts* (Rev. ed. 1936) §679.

to it nine distinct denotations. Lack of careful exposition of the sense in which the term is employed has been the general rule. An outstanding exception is the treatment by Ewart⁷⁵ who contends that in insurance law the term "waiver" may be confined to three meanings: a new contract, supported by consideration, modifying an old one; an election by the insurer between inconsistent courses of conduct; and estoppel. Some problems in conflict of laws cases relating to waiver will be considered before examining the concept of estoppel and the cases bearing upon it.

A few states have statutes to the effect that when an application is made within the state, any resulting policy of insurance shall be taken as a contract made within the state and governed by its laws. These statutes have been used in conflict of laws cases as a means for localizing the contract with the end in view of then applying internal common law rules of waiver so designated.⁷⁶ This rule was also recognized in a federal court case⁷⁷ which, however, declined to apply the state law under the doctrine of *Swift v. Tyson*,⁷⁸ now overruled by the decision in *Erie R. R. Co. v. Tompkins*.⁷⁹

A substantial number of states have also enacted statutes providing, in substance, that the solicitor shall be considered and taken to be the agent of the insurance company. It is believed obvious that the descriptive phrases "agent" or "agency" are meaningless, unless the particular powers of the agent or the purpose with reference to which they are used is made clear. For example, in problems of delivery in the internal law of insurance, the transmission of a policy to the insurance solicitor may constitute him an agent of the insured for the purpose of determining the *time* at which the contract had its inception. In contrast, courts in conflict of laws cases have generally not

75. Ewart, *Waiver Distributed* (1917) *passim*.

76. *State Life Ins. Co. of Indianapolis v. Westcott* (1910) 166 Ala. 192, 52 So. 344—statute used to bring contract within general misrepresentation rule which was then held to supersede policy clause calling for construction by law of insurer's home-state; *Fidelity Mut. L. Ins. Co. v. Miazza* (1908) 98 Miss. 18, 46 So. 817, 136 Am. St. Rep. 534—death within two months, insured suffering from deranged mind; judgment for plaintiff reversed and case remanded.

77. *Fountain & Herrington v. Mutual L. Ins. Co. of N. Y.* (C. C. A. 4, 1932) 55 F. (2d) 120.

78. (U. S. 1842) 16 Pet. 1.

79. (1938) 304 U. S. 64.

treated the solicitor to whom the policy was mailed an agent of the applicant for purposes of determining that the insurance had its inception at the *place* where the policy was deposited with postal authorities. In these cases a declaration that the solicitor is the agent of the applicant would be beneficial to the insured in the first situation, but would be inimical to the purpose of protecting the applicant in the latter instance. In waiver cases, on the other hand, consideration of the solicitor as agent of the company best achieves the same protective function. Opinions by courts in states having agency statutes of the type referred to do not notice the shift in function of the terms, or consider application of the statutes to problems of delivery. In relation to health conditions, utilization of the statute for the purpose of designating the solicitor as agent of the carrier, followed by employment of the fiction that disclosure to an agent within the scope of his employment is notice to the principal, operates (according to the terminology of various courts) as either waiver by, estoppel against, or election on the part of the principal not to "forfeit" the policy because of breach of condition. Judicial employment of terminology more accurately expressing the legal relations would go far to clarify internal law problems and conflict of laws cases arising under statutes of this type.

There have been relatively few cases arising under the agency statutes in which notice was taken of the conflict of laws problem. With one exception, those cases have all been decided in federal courts and in them the statute of the place of making of the contract has been applied. In these instances the state in which the district court was sitting was the place where the policy was received by the applicant,⁸⁰ but a statute of the place of making *preventing* a waiver has also been applied by a court sitting in another state.⁸¹

The importance in these cases of properly pleading and prov-

80. *Continental L. Ins. Co. of Hartford, Conn. v. Chamberlain* (1889) 132 U. S. 304—solicitor said that certificates in cooperative societies did not constitute "other insurance"; *Stipcich v. Metropolitan L. Ins. Co.* (1928) 277 U. S. 311—interim disclosure of discovery of duodenal ulcer; *New York L. Ins. Co. v. Russell* (C. C. A. 8, 1896) 77 Fed. 94—removal case; applicant said he had been treated for diabetes; examiner said he did not have it and wrote "No"; *Bank Sav. L. Ins. Co. v. Butler* (C. C. A. 8, 1930) 38 F. (2d) 972—application for reinstatement and answers correctly given but not transcribed by the agent who believed that reinstatement was based upon health conditions at the time the policy lapsed.

81. *New York L. Ins. Co. v. Rigas* (1933) 117 Conn. 437, 168 Atl. 22.

ing foreign law, when the forum is not the place of making of the contract, is indicated by *Moak v. Continental Casualty Company*⁸² which involved a disability contract. The policy had been issued in New York and the disability arose there; the agent had incorrectly written answers in respect to the age of the applicant. By the local rule of Tennessee, the forum, the facts would establish a waiver and, although New York law was not proved, the court stated that it found the New York rule to be of the same effect. Apparently the forum applied local rules as such. The case would be more extreme if it had been shown that New York law had established, as was very clearly expressed, for example, in *Minsker v. John Hancock Mutual Life Insurance Company*,⁸³ a duty upon the applicant to read over the completed application. It will be recalled that it was a failure to apply the New York rule, when correctly pleaded, which constituted the basis of reversal by the Supreme Court of the United States in *John Hancock Mutual Life Insurance Company v. Yates*.⁸⁴

There have been several other cases raising questions of waiver as a matter of common law. In them the issue has generally been resolved by determination of the place of making of the contract and application of its rule; in most instances it was found that the state of the forum was the place of making of the agreement.⁸⁵

The term "estoppel," like that of "waiver," has several possible meanings. The common law estoppel by representation—called also equitable estoppel, and estoppel *in pais*⁸⁶—required a misrepresentation of a past or present material fact, followed by reliance on the part of the one to whom the representation was made, by which he suffered detriment.⁸⁷ But this rule did

82. (1927) 4 Tenn. App. 287.

83. (1930) 254 N. Y. 333, 173 N. E. 4, 81 A. L. R. 829.

84. (1936) 299 U. S. 178.

85. *Fletcher v. New York L. Ins. Co.* (C. C. Mo. 1882) 13 Fed. 526—it was claimed that correct answers were given but fraudulently transcribed differently and were not read by the applicant; *Coverdale v. Royal Arcanum* (1901) 193 Ill. 91, 61 N. E. 915—whether there was power in the subordinate lodge to waive a by-law of the association forbidding admission to membership of one dealing in liquor is to be determined by the law of the forum as place of making; *Schuler v. Metropolitan L. Ins. Co.* (1915) 191 Mo. App. 52, 176 S. W. 274—instruction that if the jury found that the applicant or anyone for her made known her condition to the agent or examining physician, or he knew the condition, his knowledge would be considered that of the company and constitute a waiver, was not erroneous.

86. See 3 Williston, *Contracts* (Rev. ed. 1936) §692.

87. See Ewart, *Estoppel* (1900) 10, 222 et seq. At page 10, Ewart lists eleven requisites for estoppel by misrepresentations.

not meet the thought necessity of precluding recovery by one who had made misleading statements based upon expectation or promises concerning conditions to arise in the future. Estoppel was extended to include these circumstances and the distinction was then indicated by use of the term "promissory estoppel."⁸⁸ It will be noted that in each of these instances an estoppel does not exist unless there is a misrepresentation of a fact, or non-performance of a promise, coupled with prejudicial reliance thereon. Coupled with the confusion inherent in use of the broad term "waiver," use of the terminology of "estoppel" has resulted in a great amount of flexibility in favor of claimants against insurance companies.

A few states have undertaken to deal partially with the problems of warranties and representations by statutes⁸⁹ providing in effect that where a medical examiner for an insurance company declares an applicant a fit subject for insurance, except in case of fraud or deceit on the part of the insured, the company shall be estopped from alleging as a defense, in an action on the policy, that the applicant was not in the required state of health when the policy was issued. Under a statute of this type a jury is not likely, except in unusually flagrant cases, to deny recovery to a beneficiary because of fraud or deceit on the part of the deceased insured.⁹⁰

One of the earliest decisions applying an estoppel statute of the latter type was by the Iowa court in *Nelson v. Nederland Life Insurance Company*.⁹¹ A policy had been issued by a Dutch corporation maintaining an office in New York City; the contract was issued on January 18th and death occurred the following April 27th. There had been concealment of nephritis. While it did not expressly appear, the insured was probably a resident of Iowa; whether the place of making of the contract was in Iowa or whether the company was engaged in business there at that time is likewise problematical.⁹² The court not only

88. See 1 Williston, *Contracts* (Rev. ed. 1936) §139.

89. For statutes see note 19, Part One, *supra*.

90. It should be noted that these statutes may be in addition to others in the same state dealing with incontestability generally.

91. (1900) 110 Iowa 600, 81 N. W. 807, relying upon *Weimer v. Economic L. Assoc.* (1899) 108 Iowa 451, 79 N. W. 123, and *Stewart v. Equitable Mut. L. Assoc.* (1900) 110 Iowa 528, 81 N. W. 782.

92. The court did, however, use the following language: "Whether the policy is a New York contract or not, the laws of this state relating to

held that its estoppel statute was applicable to the facts but, on a question of fraud, also held that another Iowa statute prevented admission of evidence by insured's physician, disclosing a confidential communication. Recovery by the beneficiary followed, of course. If it were made to appear that Iowa was the place of making of the contract of insurance, it is believed that the *Nelson* case would represent a typical method by which states handle cases of this type.⁹³

3. The "delivery-in-good-health" clause.

In earlier days and in the absence of statutes, insurance companies formerly had the benefit of warranties in the application and also of the common law rule imposing a duty upon an applicant to disclose changes in health occurring in the interim between application and "delivery" of the policy by the carrier. In passing upon various problems of representations and concealment the courts showed a marked tendency in internal law cases to deal with the policy in such way that the contract had its inception at the earliest possible time.⁹⁴ In order to give protection to the applicant, courts frequently looked to some significant act, such as approval of the application or mailing of the policy, occurring at the insurer's home-office, as being the dominant factor in establishment of the insurance relationship; this may be termed "constructive delivery." Because of the judicial tendency to apply a connotation of delivery other than that of manual receipt of the document and because of the general adoption of statutes converting most statements of health from warranties into representations, the insurers sought to regain a measure of protection by insertion into the contracts of a clause requiring delivery of the policy while the applicant was in good health,⁹⁵ thus attempting to postpone inception of the risk to

procedure control. Foreign insurance companies are not compelled to do business in this state. If they voluntarily choose to do so, however, they must submit to such conditions and restrictions as the legislature may see fit to impose." (1900) 110 Iowa 600, 604, 81 N. W. 807.

93. Similar treatment of the general problem, although not under estoppel statutes, is represented by *Connecticut Gen. L. Ins. Co. v. Richardson* (1919) 11 Ohio App. 405, and *Massachusetts Ben. L. Assoc. v. Robinson* (1898) 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261.

94. See, generally, Patterson, *The Delivery of a Life-Insurance Policy* (1919) 33 Harv. L. Rev. 198; Note, *The Delivery-in-Good-Health Clause in Life Insurance Policies* (1934) 34 Colum. L. Rev. 1508.

95. A study by Fouse, *Policy Contracts in Life Insurance*, appearing in September, 1905, 26 Annals Amer. Acad. Pol. & Soc. Science 209, 220, re-

the latest possible time. This clause is usually worded as a condition precedent. In internal law cases the effect of the decisions has been to treat the clause as if it were a condition precedent-to-performance, rather than precedent-to-formation, as was the apparent intention of the insurers,⁹⁶ and the burden of proof of non-performance has been allocated to the carriers.⁹⁷ A number of courts in internal law situations, influenced by the doctrine of freedom of contract, have been willing to interpret clauses relating to delivery quite strictly.⁹⁸ Other courts have said that the duty to perform may arise before manual transfer to the applicant, and hence the cases holding that constructive delivery is sufficient are controlling even in the face of the delivery-in-good-health clause.⁹⁹

In internal law cases involving this clause the question is as to whether the insurance was in force at a particular *time*; in conflict of laws cases, on the other hand, the question is as to the *place* at which the contract had its inception in order to designate the choice-of-laws rule to govern various problems. There are a number of conflict of laws cases, dealing with problems other than warranties, which emphasize the presence of this clause, interpreting it quite strictly, and which regard the policy as requiring manual transfer of the document. But treatment of the clause in that way does not necessarily dispose of other problems raised by use of this provision. Two of the questions relat-

ported that of fifty-one companies whose forms were examined all had a provision in the policy that it shall not become effective and binding until delivered during the lifetime and good health of the insured and after the required premium is actually paid.

A later study by Coke, *The Commencement of the Risk in the Case of a Life Insurance Policy* (1921) Paper 51, *Assoc. of Life Ins. Counsel* 2, 3, reported that the clause appeared in one hundred twelve out of one hundred twenty-five policies examined. See Note, *The Delivery-in-Good-Health Clause in Life Insurance Policies* (1934) 34 *Colum. L. Rev.* 1508.

The present writer has found that in forms examined of one hundred thirteen companies writing in 1938, ninety-one carried the delivery-in-good-health clause; in these further provision was found that the policy must also be delivered within a limited time or the application be considered rejected: within sixty days (thirteen companies); within forty-five days (one company); within thirty days (three companies).

96. Patterson, *The Delivery of a Life-Insurance Policy* (1919) 33 *Harv. L. Rev.* 198, 220.

97. Note, *The Delivery-in-Good-Health Clause in Life Insurance Policies* (1934) 34 *Colum. L. Rev.* 1508, 1515.

98. See Patterson, *The Delivery of a Life-Insurance Policy* (1919) 33 *Harv. L. Rev.* 198, 221.

99. Note, *The Delivery-in-Good-Health Clause in Life Insurance Policies* (1934) 34 *Colum. L. Rev.* 1508, 1510.

ing to warranties and representations may be stated in this way: First, shall this clause be given the effect of constituting a condition precedent to inception of the contract? Or, second, shall this clause be held to have the effect of an independent warranty that the applicant shall be in good health at the time of manual receipt of the document by him?

If the first point of view is adopted, then it is more than conceivable that a court may confuse the fact that warranties in insurance law are essentially conditions, and may overlook the fact that in both contract and insurance law broken conditions do not "void" the contract but only constitute the basis for an election by the non-breaching party (here the insurer) to avoid it. A court confusing these issues may hold that non-occurrence of the event—continued good health down to receipt of the document—prevented the insurance from ever coming into existence;¹⁰⁰ that is, that the condition is one precedent-to-formation of the contract. In that view the misrepresentation and warranty statutes are not likely to be applied since the clause is not being treated as a warranty-condition.

On the other hand, if the second and correct view of warranties as conditions is recognized, then the delivery-in-good-health clause is essentially a warranty, since it is a condition regarding the applicant's health. But there are still two other questions which the courts need to consider regarding the scope of this clause. A court may focus attention upon health conditions at the time of the application and say that the health of the applicant shall remain good (*i. e.*, in the *same* state) from the time of application until physical transfer of the policy; this is obviously not what the insurer intended. Then, as to adverse interim changes in health, a court may declare that the common law doctrine of concealment would be applicable; this rule would give the carrier insufficient protection since, under that doctrine, an applicant is excused if non-disclosures resulted while he was exercising good faith. On the other hand, the clause may be viewed as an independent warranty that the applicant shall be in good health at the time of transfer of the document (whatever may have been his health at the time of the application); in the latter view, the doctrine of concealment would be inap-

100. This confusion is apparent in *Fondi v. Boston Mut. L. Ins. Co.* (1916) 224 Mass. 6, 112 N. E. 612.

plicable. This appears to be the correct view. But in either view the essential characteristic of the clause as a warranty should bring it within the scope of the general warranty statutes. Any other construction, it is believed, would open the door to the possibility of insurers' avoiding the purpose of warranty legislation by the very common addition of this extra clause.¹⁰¹

A few conflict of laws cases have properly applied restrictions of warranty statutes to policies containing the good-health clause.¹⁰² But a recent federal case¹⁰³ serves as a warning that this rule is far from completely accepted. In that case an Illinois insurer brought a bill in the district court in New York for cancellation of a life insurance policy. The application had been made in Massachusetts and the policy had been mailed by the carrier to one of its agents in Massachusetts and by him to the insured in New York. The application contained this clause: "The insurance hereby applied for, or any policy issued in reliance upon this application, shall not take effect unless and until the first premium or instalment thereof is paid and the policy delivered to and accepted by me while my health, habits and occupation are the same as described in this application." Before delivery of the policy the applicant changed his business and shortly after delivery sustained an attack which was diagnosed as due to coronary thrombosis existing for a period antecedent to delivery of the policy. It was found that the insured was ignorant of the real condition of his health at the time the policy was delivered. The court allowed cancellation and the decree was affirmed. In the appellate court it was said:¹⁰⁴

In the view we take, whether he knew or did not know of his condition is immaterial. His application stated that he did not have any disease of the heart or blood vessels, and the existence of the same state of health when the policy was delivered was expressly agreed to be a condition precedent to the insurance becoming effective. This condition was not performed.

101. See Patterson, *Warranties in Insurance Law* (1934) 34 Colum. L. Rev. 595, 606-608; Note, *The Delivery-in-Good-Health Clause in Life Insurance Policies* (1934) 34 Colum. L. Rev. 1508, 1514.

102. *Coscarella v. Metropolitan L. Ins. Co.* (1913) 175 Mo. App. 130, 157 S. W. 873; *Atlas L. Ins. Co. v. Standfier* (Tex. Civ. App. 1935) 86 S. W. (2d) 852.

103. *Mutual Trust L. Ins. Co. v. Ossen* (C. C. A. 2, 1935) 77 F. (2d) 317, cert. den. (1935) 296 U. S. 616.

104. *Mutual Trust L. Ins. Co. v. Ossen* (C. C. A. 2, 1935) 77 F. (2d) 317, 319.

Honest belief was insufficient. Further:¹⁰⁵

But even if the opposite conclusion were reached, it would not aid the appellants. The stipulation also required his occupation to remain the same as described in the application. Ossen testified definitely that he was not in any business after March, 1930. The testimony that he was out of business on account of his health is very weak and is contradicted. But the reason for leaving the occupation described in his application is immaterial. *The parties stipulated that his continuance in the same occupation should be a condition precedent to the insurance attaching.* There is no ground to read this, as the appellants contend, as meaning that he should not change to a more hazardous occupation. *His change of occupation was alone enough to prevent the policy from going into effect.*

On the conflict of laws point it was argued that a New York statute applied to the policy and avoided the effect of the condition precedent. It was held, however, that the statute was inapplicable because the parties had stipulated that the policy should not take effect until delivery to the insured and payment of the first premium. On the following basis the court selected Massachusetts as the place of making of the contract:¹⁰⁶

The application was signed in Massachusetts and the policy was mailed from Illinois to an agent in Newburyport, Mass. He mailed it to Ossen in New York and received the premium by mail in Newburyport. So far as appears the plaintiff had no office and did no business within the state of New York.

Then, as conclusion, barring recovery under the warranty statutes of both states, the court declared:¹⁰⁷

But even if the (New York) statute were deemed applicable, it would not have the effect contended for. In the absence of an authoritative decision to the contrary, we should not interpret the statute to forbid contracting on conditions precedent. It presupposes that the policy becomes an effective contract, and provides that a false statement in the application therefor "shall not bar the right to recovery thereunder" unless it be of a specified type. A similar statute in Massachusetts has recently been construed not to affect provisions which by agreement are made conditions precedent to liability.

105. Id. at 320—italics are supplied.

106. Ibid.

107. Ibid.

It is submitted that had a court been inclined to be more liberal, it might well have found that the facts indicated most substantial connection with New York, since the policy was to be physically received by the applicant there and since payment of the premium was substantially effectuated by the mailing of his check from that state. The circumstance that the insurance corporation might not otherwise be engaged in business in New York appears no reason for holding that New York law might not apply if the contract was actually made there. Further, even "in the absence of an authoritative decision to the contrary," a liberal court analyzing the clause in question might have recognized its essential characteristic as a warranty and have held that the New York warranty statute was intended to be applied in favor of the insured.

4. Rules applicable to mutual benefit certificates.

In dealing with certificates issued by mutual benefit associations, any tendency of a forum to refer choice-of-laws problems to the internal law of the association's home-state has been accentuated by a few decisions¹⁰⁸ by the Supreme Court of the United States bearing upon the requirement of full faith and credit to the laws governing the corporation.¹⁰⁹ The first of these important cases, *Supreme Council of Royal Arcanum v. Green*,¹¹⁰ was decided in 1915. With that background there will be noted the fraternal cases in which problems of warranties and misrepresentations were presented, nearly all of which, however, arose before the *Green* case. Consequently those opinions do not fully reflect the possible influence of Supreme Court decisions upon choice-of-laws rules in this portion of the field.

In one case when the forum was not the place of making of the contract it has been held that its own liberal statute was

108. *Hartford L. Ins. Co. v. Ibs* (1915) 237 U. S. 662—at the time this case arose the Hartford, although a stock company, was issuing "safety fund certificates" on the assessment plan and, for some purposes, it was treated similar to a fraternal society; *Supreme Council of Royal Arcanum v. Green* (1915) 237 U. S. 531; *Hartford L. Ins. Co. v. Barber* (1917) 245 U. S. 146; *Modern Woodmen of America v. Mixer* (1925) 267 U. S. 544; *Sovereign Camp, Woodmen of World v. Bolin* (1938) 305 U. S. 66.

109. The extent to which the full faith and credit clause requires application of the law obtaining in the fraternal association's home-state is beyond the scope of the present paper; it is believed, however, that the clause does not have the sweeping effect in this connection which is frequently attributed to it.

110. (1915) 237 U. S. 531.

not applicable to the case; the court did not, however, make a clear choice between the law of the place of making and the law of the association's home-state, although it is believed that the court considered the rule of the place of making to be appropriate.¹¹¹

In some instances there is a clear showing that the court of the state where the contract was made considered that the proper rule was the law of the state wherein the association was incorporated.¹¹² Upon examination of these cases, however, it will be noticed that in each instance there existed in the corporation's state a liberal statute dealing with warranties and misrepresentations.¹¹³ On the other hand it has been held in a recent case¹¹⁴ that a statute of the forum as place of making of the contract applied to the contract of a foreign fraternal association, and prevented admission of evidence to show misrepresentations when a copy of the application was not attached to the certificate.

In another instance the court adopted a novel method of avoiding application of the home-state law. The carrier was admittedly qualified as a fraternal association under the laws of the place where it was organized and the forum had so admitted it to do business; statutes of its home-state permitted it to insure in favor of "legal representatives," whereas statutes of the forum prohibited this designation of beneficiary by a fraternal association. It was held¹¹⁵ that its issuance to a resident of the forum

111. *McKnelly v. Brotherhood of American Yeomen* (1915) 160 Wis. 514, 152 N. W. 169.

112. *Grand Fraternity v. Keatley* (1913) 4 Boyce (Del.) 308, 88 Atl. 553; *Supreme Council of American Legion of Honor v. Green* (1889) 71 Md. 263, 17 Atl. 1048, 17 Am. St. Rep. 527; *Supreme Council of Royal Arcanum v. Brashears* (1899) 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244; *Valleroy v. Knights of Columbus* (1909) 135 Mo. App. 574, 116 S. W. 1130.

113. In *Grand Fraternity v. Keatley* (1913) 4 Boyce (Del.) 308, 88 Atl. 553, the applicant represented that he had not consulted a physician since an attack of mumps in childhood; evidence was offered by the association that the insured had since had an operation, had consulted doctors repeatedly for kidney ailment and had been advised that he was suffering from diabetes; it was held that the misrepresentation was material.

Accord: *Valleroy v. Knights of Columbus* (1909) 135 Mo. App. 574, 116 S. W. 1130.

114. *Bukowski v. Security Ben. Assoc. of Topeka, Kan.* (1935) 221 Iowa 416, 261 N. W. 783.

See also *Coverdale v. Royal Arcanum* (1901) 193 Ill. 91, 61 N. E. 915, holding that certificate was a local contract (by place of making rule) and governed by internal law principles of waiver.

115. *Herzberg v. Modern Brotherhood of America* (1905) 110 Mo. App. 328, 85 S. W. 986.

of a certificate naming a legal representative took this insurer out of protective rules governing fraternal associations and brought it under the broad, liberal misrepresentation statute of the forum applicable to legal reserve companies.

In another opinion involving a foreign fraternal association¹¹⁶ the Missouri court applied a local rule in a less direct fashion. A certificate was issued by a fraternal association admitted to do business in Missouri, the place of making of the contract and the place of residence of the member not being shown in the opinion. The court held that while the contract was not to be determined by reference to the local statute relating to warranties and misrepresentations, nevertheless "under the established rule of decision in this state, defendant should have returned the assessment promptly or within a reasonable time at least, or it will be treated as having waived the forfeiture" based upon the misrepresentations. The effect of this is, of course, to declare that the law of the association's home-office applies to warranties and misrepresentations, and then to nullify normal consequences of forfeiture by applying an internal law rule of the forum that waiver results from failure to return an assessment promptly. What amounts to a waiver of forfeiture for false statements should be determined by the same law which declares the existence and effect of misrepresentations.

The fact that reference by a court of the forum to rules obtaining at the association's home-state may not always be advantageous to the fraternal order is indicated by *Valleroy v. Knights of Columbus*.¹¹⁷ The court of the forum and place of making there ruled that neither domestic nor foreign fraternal associations were governed by its own liberal statute and, consequently, that health statements may be warranties which will avoid the contract if untrue. The opinion then stated that, in reference to contracts of foreign fraternal associations, a court will look to laws of their home-states to determine the effect to be given to their contracts. The case was remanded because of erroneous application of the local statute. As the law of the corporation's home-state was not shown, possible evidence at a new trial might prove a liberal statute there in force abrogating the effect of the

116. *Francis v. Supreme Lodge, Ancient Order of United Workmen* (1910) 150 Mo. App. 347, 130 S. W. 500.

117. (1909) 135 Mo. App. 574, 116 S. W. 1130.

strict warranty doctrine which the court indicated would otherwise be applied by the forum because its own statute did not extend to contracts of any fraternal associations.

The available cases involving fraternal certificates which relate to problems of warranties and representations do not indicate a definite adoption of the law of the association's home-state as appropriate to govern these problems. It appears that in these cases, also, a court at the place of making has applied either its local rule or the rule of the place of incorporation, whichever it felt would be more favorable to the beneficiary in meeting problems presented by the strict doctrines governing warranties.

5. Procedural and substantive aspects of warranty statutes.

The very title to this subdivision raises a difficult question—the dividing line between substance and procedure. The abundance of legal literature,¹¹⁸ presenting argument from various angles and suggesting criteria for differentiation, is justification for not attempting to answer that question in this article dealing with only a limited portion of the conflict of laws field. Some general considerations bearing upon substance and procedure in warranty and misrepresentation cases may, however, be suggested.

One of the chief ends of the body of conflict of laws rules is that the rights and duties of parties arising out of a foreign-based transaction shall not materially be changed by reason of the choice of a forum for trial of the case. When a court considers such a case it would be possible to view all the necessary fact-circumstances, including the foreign rule of law, as simply substantive, in the sense that without them there can be no recovery and that all bear upon the right of the plaintiff; no court does this. Or a court might adopt the opposite view that all

118. See, in general, the following: Ailes, Substance and Procedure in the Conflict of Laws (1941) 39 Mich. L. Rev. 392; Tunks, Categorization and Federalism: "Substance" and "Procedure" after *Erie Railroad v. Tompkins* (1939) 34 Ill. L. Rev. 271; Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 Yale L. J. 333; Arnold, The Rôle of Substantive Law and Procedure in the Legal Process (1932) 45 Harv. L. Rev. 617; McClintock, Distinguishing Substance and Procedure in the Conflict of Laws (1930) 78 U. Pa. L. Rev. 933; Minor, Conflict of Laws—Substance or Obligation of Contract Distinguished from Remedy (1903) 16 Harv. L. Rev. 262; Note, Conflict of Laws—Law Governing the Determination of Whether Question is one of Remedy or of Right (1926) 11 Minn. L. Rev. 44.

matters in the gamut through pleadings and evidence to judgment are procedural, in the sense that they all bear upon the mode in which the plaintiff establishes his claim, and that foreign law had nothing to do with the case whatsoever; neither does any court do this. The latter method of treatment would violate the fundamental conceptions of fairness which underlie the principles of conflict of laws; the former would disregard all possible factors of interest, administrative convenience and social policy of the forum.¹¹⁹

Whether a question is one of substance or of procedure—that is, determination of the way in which the court will proceed—is decided according to the conflict of laws rules of the forum, and all matters classified as procedure are governed by the law of the forum.¹²⁰ When a court decides that a point should be treated as procedure, it may affect the rights of the parties, since a different result might have been reached had suit been brought in another state; the selection is limited because of reasons of convenience and local policy.¹²¹ These facts indicate that the line between the two categories is not fixed and arbitrary but varies according to the purpose for which the selection is made. Some points are clear. It is clear that in conflict of laws cases courts have found it useful to distinguish between “procedural” and “substantive” matters for some purposes; that on many propositions there is general agreement regarding the category into which the issue shall be placed; that the line between the two divisions may shift according to the purpose for which determination is made; and that decisions in concrete cases are based upon factors of administrative convenience and social policy of the forum.

But difficulty and doubt arise in determining when a court will find the scales tipped by administrative convenience or social policy and what considerations give content to those phrases. It is suggested that the “social policy” behind the determination

119. See Restatement, *Conflict of Laws* (1934) c. 12, Introductory Note preceding §584: “A limitation upon the scope of the reference to the foreign law is thus necessary. Such limitation excludes those phases of the case which make administration of the foreign law by the local tribunal impracticable, inconvenient, or violative of local policy. In these instances, the local rules of the forum are applied and are classified as matters of procedure * * * .”

120. Restatement, *Conflict of Laws* (1934) §§584, 585.

121. Restatement, *Conflict of Laws* (1934) §584, comment b.

that certain matters relating to warranties and representations are "procedural," and hence to be governed by the law of the forum, lies in the harshness of the warranty doctrine itself. When their own legislatures have announced a liberal rule for dealing with these problems, some courts which are confronted with a stringent rule obtaining in a sister-state may seek to apply their local rule to ameliorate hardship in even a foreign-based transaction, especially if the contract has any important contacts with the forum. But opinions in conflict of laws in this portion of the insurance field are notable for lack of explanation why particular provisions were considered by the court as substantive or as procedural. Judging from the language in the opinions, it appears that the courts have been applying rules of thumb, nor do the opinions reflect any consistent tendency by the courts to inquire into substantive or procedural classification of statutory or common law rules of the sister-state wherein those rules obtained.

The enactment in some states of legislation of divergent types to deal with warranties and misrepresentations has raised problems of application by the forum of either its own rule or that of a sister-state whose law is chosen as otherwise properly governing the contract. The law of the sister-state may be either common law or statutory. But it should be noticed that predication cannot be predicated merely upon catch-words in a statute; for example, a forum may consider a foreign statute substantive, in the conflict of laws sense, although it uses terminology, such as "introduced into evidence," which is in other instances usually associated with procedure. If a conflict of laws case is brought in a state which was regarded by the court as also being the place of delivery—as most cases have been—there need be no problem of differentiation between substance and procedure, unless the forum adopts a conflict of laws rule which refers to the law of some other state as properly governing the contract; the latter has been done in a few instances.¹²² Thus in a large part of the field here considered courts have been enabled to avoid the problem.

122. This was done in *Missouri State L. Ins. Co. v. Lovelace* (1907) 1 Ga. App. 446, 58 S. E. 93; *Connecticut Gen. L. Ins. Co. v. Richardson* (1919) 11 Ohio App. 405; *Union Central L. Ins. Co. v. Pollard* (1896) 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715. The problem might also arise in connection with certificates of fraternal societies.

The warranty cases in the aggregate contain no clear answer to the question of when a common law or statutory rule of either the forum or of a sister-state will be determined to be substantive and when procedural. The cases which consider the problem in warranty cases and which indicate a clear choice are about equally divided between those which treat as substantive and apply a statutory or common law rule of the place whose law is chosen as properly governing the contract,¹²³ and those cases which reject that rule and apply their own local statutory or common law rules as properly governing a matter there denominated procedural.¹²⁴ The notes below indicate whether rules of the respective states were statutory or common law rules.

123. *Great Southern L. Ins. Co. v. Burwell* (C. C. A. 5, 1926) 12 F. (2d) 244, cert. den. (1926) 271 U. S. 683, held, on removal, that the statute of the place of making was a substantive rule to be applied by a federal court.

Provident Sav. L. Assur. Soc. of N. Y. v. Hadley (C. C. A. 1, 1900) 102 Fed. 856, is in accord with the *Burwell* case without discussing questions of substance and procedure; cf. *Mutual L. Ins. Co. of N. Y. v. Hilton-Green* (C. C. A. 5, 1913) 202 Fed. 113.

Missouri State L. Ins. Co. v. Lovelace (1907) 1 Ga. App. 446, 58 S. E. 93—the law chosen to govern the contract was statutory but no indication is given in the opinion concerning the rule of the forum which may, therefore and for the purpose of that case, be presumed common law; but cf. *Massachusetts Ben. L. Assoc. v. Robinson* (1898) 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261, in which the rule of the state governing the contract was not shown (and hence might be presumed to be the strict doctrine of the common law) and the forum applied its own statute as *procedural*, bolstered by a presumption that the rule of the state governing the contract was the same.

Rauen v. Prudential Ins. Co. (1906) 129 Iowa 725, 106 N. W. 198—foreign statute regarding attaching of application applied by forum without discussing local rule.

Mutual L. Ins. Co. of N. Y. v. Wiegmann (1923) 214 Mo. App. 54, 256 S. W. 505—forum clearly recognized a foreign statutory rule as substantive and, to effectuate it, allowed the unusual remedy of cancellation.

New York L. Ins. Co. v. Rigas (1933) 117 Conn. 437, 168 Atl. 22, is to the same effect as the *Wiegmann* case.

McKnelly v. Brotherhood of American Yeomen (1915) 160 Wis. 514, 152 N. W. 169—rules of the forum and place governing the contract were both statutory.

124. *Des Moines L. Assoc. v. Owen* (1897) 10 Colo. App. 131, 50 Pac. 210—an apparently common law rule of the forum was employed to defeat the statutory provision of the state chosen to govern the contract, under which the insurer would be precluded from pleading or proving falsity of facts in an unattached application.

Massachusetts Ben. L. Assoc. v. Robinson (1898) 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261—see note 123, *supra*, and cf. *Missouri State L. Ins. Co. v. Lovelace* (1907) 1 Ga. App. 446, 58 S. E. 93, note 123, *supra*.

Nelson v. Nederland L. Ins. Co. (1900) 110 Iowa 600, 81 N. W. 807, although the case could have been decided on the basis that forum was the place of making, in applying a local statute regarding estoppel on health

Application of the rule of procedure may be illustrated. In an Ohio case, *Connecticut General Life Insurance Company v. Richardson*,¹²⁵ suit was brought upon an accident policy by the wife as beneficiary, the insured having drowned under circumstances which suggested suicide. The company defended upon the bases of misrepresentations in procuring the policy and suicide of the insured. The applicant had resided in Ohio but the contract had been countersigned in New York and was there delivered to an agent of the insured. The court first said "The validity, nature and effect of a contract are governed by the law of the place with reference to which it is made" but, in answer to the contention that the law of New York properly governed these issues, the court pointed to the Ohio statute¹²⁶ and said:¹²⁷

statements, the court said: "Whether the policy is a New York contract or not, the laws of this state relating to procedure control. * * * The rule of the statute so evidently relates to procedure that discussion of the point is not required." The New York rule was not indicated.

Connecticut Gen. L. Ins. Co. v. Richardson (1919) 11 Ohio App. 405—although forum treated New York as the place of making and did not discuss the rule there obtaining, a local statute which "provides when an application for insurance may be used in evidence and when it will bar a recovery in an action on a policy based on such application" was said to be remedial and was applied.

Moak v. Continental Casualty Co. (1927) 4 Tenn. App. 287—forum, apparently as a matter of local policy, applied a local estoppel statute; the law of the place of making was presumed to be the same as the forum.

Union Central L. Ins. Co. v. Pollard (1896) 94 Va. 146, 26 S. E. 421, 86 L. R. A. 271, 64 Am. St. Rep. 715—the forum was undoubtedly the place of making, but, in deference to a clause referring to the state of the home-office, the court looked to a liberal statute of Ohio dealing with misrepresentations; "this statute was as much a part of every contract of life insurance governed by the laws of the state of Ohio * * * as if incorporated in it"; but as to the admission of evidence: "It is true that a portion of the statute in question provided that no answer to any interrogatory made by an applicant for a policy of insurance shall be used in evidence except under certain circumstances. The admission of evidence and the rules of evidence are matters of procedure, rather than matters touching the rights of the parties under their contracts. * * * That portion of the statute does not affect either the validity, nature, or interpretation of the contract, but applies alone to the remedy, and in the enforcement of the contract in this state will not be regarded, but our mode of procedure will be followed."

125. (1919) 11 Ohio App. 405.

126. Same as Ohio Gen. Code Ann. (Page 1926) §9391: "No answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued thereon, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false, was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and also that the agent of the company had no knowledge of the falsity or fraud of such answer."

127. (1919) 11 Ohio App. 405, 407, 408, 409, 410; italics are added.

There is no question as to the validity of the contract raised in this case. The section under consideration provides what must be established before any answer in the application will bar a recovery, and under what conditions such an application may be used in evidence on a trial to recover on a policy of insurance. * * * *Section 9391, General Code, is remedial. It provides when an application for insurance may be used in evidence and when it will bar a recovery in an action on a policy based on such application.* * * * The fourth ground urged by plaintiff in error, that the policy was void for misrepresentations in the application and error of the trial court in refusing a peremptory instruction on that ground, will not be discussed. The basis of counsel's contention is that this is a New York contract, and that section 9391, General Code, is not applicable. *We have found that the law of Ohio on insurance policies relates to the remedy, and is applicable to injuries resulting in death.*

The court also applied the Ohio rule that when a person is drowned the presumption is against suicide, and ruled that the questions were properly submitted to the jury.

There is little reason to believe that the contract in the *Richardson* case had any important connection with Ohio except that it was the forum of the suit. The court did not mention factors appearing in the policy from which a presumed reference to the law of Ohio might possibly be inferred; it did not appear that the company was engaged in business in Ohio at the time of issuance of the policy; and it mentioned that the policy was, in fact, delivered in New York. Application of the Ohio statute as "procedural" may be inferred to have changed the rights of the parties and to have subsumed an essentially foreign-based transaction under rules applicable to strictly domestic contracts. It is probable that the rule here followed would violate the principle of the later decision in *John Hancock Mutual Life Insurance Company v. Yates*.¹²⁸ At any rate, the court's reasoning that the Ohio statute was procedural is clearly wrong.

In the *Yates* case, it will be recalled, the Supreme Court of the United States overturned application by Georgia courts¹²⁹

128. (1936) 299 U. S. 178.

129. *John Hancock Mut. L. Ins. Co. v. Yates* (1936) 182 Ga. 213, 185 S. E. 268, affirming (1935) 50 Ga. App. 713, 179 S. E. 239.

of a local rule, similar to that of Ohio in the *Richardson* case, to the effect that the materiality of false answers constituted a question for the jury. That decision by the Supreme Court clearly shows that in life insurance cases a statutory or common law rule of the forum may not constitutionally be applied in disregard of substantive rights created by the law properly governing the contract. That decision was based upon the full faith and credit clause, as applied to properly pleaded statutes of New York establishing an entirely different rule than that applied by the forum, but there is some indication in the opinion that the Court thought that the due process clause also might be applicable.¹³⁰ In other phases of conflict of laws there are Supreme Court cases reaching similar results on the substance-procedure problem, basing their decisions upon both the full faith and credit clause and the due process of laws clause of the Fourteenth Amendment.¹³¹

An earlier Georgia case,¹³² relied upon by the lower courts in the *Yates* case, and the decision by the Iowa court in *Nelson v. Nederland Life Insurance Company*¹³³ (and perhaps the decision in the *Richardson* case) would hardly come within the ruling of the Supreme Court of the United States on the question of full faith and credit because the insurer failed to plead and prove statutes of the place of making of the contract.

But, particularly in view of the *dictum* by the Supreme Court of the United States in the *Yates* case, it appears that the Supreme Court may review a gross disregard of the law of a state which should be taken as properly governing the life insurance

130. See 299 U. S. 178, 182, where Mr. Justice Brandeis cited *Home Insurance Company v. Dick* (1930) 281 U. S. 397, which was decided under the due process clause, in partial support of a statement of the grounds on which the law of the forum was improperly applied. And see Hilpert & Cooley, *The Constitution and the Choice of Law* (1939) 25 WASHINGTON U. LAW QUARTERLY 27, 39.

The point may here be repeated that details of the scope of the due process and full faith and credit clauses are beyond the compass of this paper; for periodical materials bearing upon these clauses see note 47, Part One, *supra*.

131. See *Broderick v. Rosner* (1935) 294 U. S. 629; *Home Insurance Company v. Dick* (1930) 281 U. S. 397; *Hartford Accid. & Indem. Co. v. Delta & Pine Land Co.* (1934) 292 U. S. 143; cf. *Metropolitan Cas. Ins. Co. v. Brownell* (1935) 294 U. S. 580. See also *Klaxon v. Stentor Electric Mfg. Co.* (1941) 313 U. S. 487.

132. *Massachusetts Ben. L. Assoc. v. Robinson* (1898) 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261.

133. (1900) 110 Iowa 600, 81 N. W. 807, note 91, *supra*.

contract, and that statutes of the state whose law should govern the contract, couched in terminology usually associated with procedural matters, may yet be interpreted as conferring strictly substantive rights. A disregard of those substantive rights by another state as forum, even under the guise of applying its own remedial rules as a matter of policy, will be subject to possible reversal under either the due process clause or the full faith and credit clause, as the occasion may require.

6. Reinstatement.

Various holdings have been made by the few courts dealing with conflict of laws problems involving misrepresentations in securing reinstatement of lapsed policies. In the earlier portion of this article reference was made to *Bottomley v. Metropolitan Life Insurance Company*¹³⁴ in which the Massachusetts court held that its liberal misrepresentation statute did not apply to reinstatement there effected upon what had originally been a Rhode Island contract; it was suggested that the court might well have held that the reinstatement resulted in a new contract, made in Massachusetts, within the terms of the liberal statute there in force.

A different approach was taken in *Lincoln National Life Insurance Company of Fort Wayne v. Hammer*,¹³⁵ wherein suit was brought to cancel a reinstatement procured by misrepresentations. The original contract was probably governed by the law of North Dakota, from which state the application for reinstatement was mailed; it was accepted at the home-office of the insurer in Indiana. A North Dakota statute was favorable to the insured, but the court, applying the test of the "last act necessary to a meeting of the minds," ruled that the reinstatement was an Indiana, and not a North Dakota, contract.

Another case¹³⁶ is not as clear as the foregoing decisions. A policy, apparently taken out in Missouri, had been allowed to lapse and application was there later made for reinstatement. At the time of the lapse the insured was in good health; prior to the application for reinstatement he had been operated upon for peritonitis. The circumstances were disclosed to the solicitor but, in the belief that qualification for reinstatement was deter-

134. (1898) 170 Mass. 274, 49 N. E. 438, note 53, Part One, supra.

135. (C. C. A. 8, 1930) 41 F. (2d) 12.

136. *Bank Sav. L. Ins. Co. v. Butler* (C. C. A. 8, 1930) 38 F. (2d) 972.

mined by the date of lapse, the agent did not report the facts to the home-office. A Missouri statute provided that any person soliciting application for insurance upon the life of another shall, in any controversy between the assured or his beneficiary and the company, be regarded as agent of the company. The court held that the carrier was estopped to deny that the policy was reinstated. The court did not consider what factors might determine the proper law to govern reinstatement. There are several possibilities: (a) the law of the place where the original policy was taken out; (b) the law of the place where application for reinstatement was made; (c) the law of the insurer's home-office, as the place where the application for reinstatement was accepted; (d) the law of the place where the reinstated policy was "delivered" to the applicant although, under current company practices, the insured is merely notified that reinstatement has been effected. The last would almost invariably make the rule the same as that in (b)—the place where application for reinstatement was made.

An illustration of sound results reached under conflict of laws rules is found in two recent cases,¹³⁷ one decided by the Missouri court and the other by a Federal Circuit Court of Appeals. In the Missouri case the contract in suit had been issued by a New York carrier to a resident of Kansas where a misrepresentation statute was in force. The court held that the Kansas law should be applied to the following issues in the case: whether the misrepresentation statute includes misrepresentations in procuring reinstatement; the placing and scope of the burden of proof; and whether the insurer may defend an action on the policy, upon the ground that reinstatement was procured by fraud, notwithstanding that the contestability period for the original policy had expired. On the last point, contest by the carrier was permitted. In the federal case the contract had been made in the state where the federal court was held; it referred to the law of that state but did not elaborate the choice-of-laws question, as it might well have done.

Whatever may be the best rule to govern other types of problems raised by reinstatement of lapsed policies, it is suggested

137. *Chambers v. Metropolitan L. Ins. Co.* (Mo. App. 1940) 138 S. W. (2d) 29; *Franklin L. Ins. Co. v. Critz* (C. C. A. 5, 1940) 109 F. (2d) 417, cert. den. (1940) 309 U. S. 684.

that, for purposes of warranties and misrepresentations in securing reinstatement, the proper rule is the law of the state where application for reinstatement was made, treating it as a new contract. The law of the state of the insurer's home-office is likely to be more favorable to the company and therefore unacceptable to the state of the forum if it was also the place of making of the contract of reinstatement; this is especially likely to be true if the forum was also the place where the original contract of insurance was made.

CONCLUSIONS

An examination of the cases dealing with warranties and misrepresentations in the conflict of laws indicates that the courts have not consistently followed any single rule. The judicial approach to these problems has been strongly affected by the complexities arising from the peculiar development of related doctrines in the internal law portion of the insurance field; the variations in statutory modifications of common law rules, also, have been an important factor. Peculiar problems have arisen in which unfairness to the insured could result from deficiencies which were often trivial.

To meet these difficulties it seems that the courts have decided conflict of laws cases as the result of a weighing and balancing of various factors in their relation to the laws of several states. But the opinions in these cases have expressed the results of the judicial evaluation of factors in terms of broad conflict of laws rules which are subject to various meanings and are not self-defining; in addition, courts have not been entirely consistent in following any single one of the accepted "rules" to govern contracts in the conflict of laws. Indeed, in six jurisdictions the opinions dealing only with representations and warranties, and hence not showing additional possible differences in other phases of insurance problems, have stated inconsistent rules.¹³⁸ These

138. *Georgia*: Missouri State L. Ins. Co. v. Lovelace (1907) 1 Ga. App. 446, 58 S. E. 93 (intention test looking to place of performance and express provision for governing law held effectual in forum as place of making); *Massachusetts* Ben. L. Assoc. v. Robinson (1898) 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261 (dictum that intention test looking to place of performance would be a proper rule, but local statute applied as procedural; forum was place of making). Cf. in the federal court, Royal Union Mut. L. Ins. Co. v. Wynn (C. C. N. D. Ga. 1910) 177 Fed. 289 (place of making test).

Maryland: Fidelity Mut. L. Assoc. of Philadelphia v. Ficklin (1891) 74

practices have created uncertainty regarding the rules which were actually being applied. But because most courts have explained their decisions in terms of the rule of the place of making of the contract, some considerations underlying the judicial evaluation of important factors can be reached, and some outline of the degree of consistency in utilization of a single rule can be marked.

The cases reveal that a liberal statutory or decisional rule of the forum will be applied if the court, by adopting that connotation of delivery which relates to physical receipt of the policy by the applicant, finds that the forum was the place of making of the insurance contract. Reference to liberal rules of the forum has been supported by the explanation in the opinion that the choice-of-laws rule adopted is that of the place of making. But when the contract had its inception while the applicant was a

Md. 172, 21 Atl. 680 (rule of place with reference to which contract was made); *Mutual L. Ins. Co. v. Mullen* (1908) 107 Md. 457, 69 Atl. 385 (applied place of making rule and holds that an express provision for governing law is ineffectual in forum as place of making).

Massachusetts: *Bottomley v. Metropolitan L. Ins. Co.* (1898) 170 Mass. 274, 49 N. E. 438 (place of performance rule); *Dolan v. Mut. Res. Fund L. Assoc.* (1899) 173 Mass. 197, 53 N. E. 398 (place of making rule); and cf. *Reagan v. Union Mut. L. Ins. Co.* (1910) 207 Mass. 79, 92 N. E. 1025 (apparently applies internal law rule).

Ohio: *Connecticut General L. Ins. Co. v. Richardson* (1919) 11 Ohio App. 405 (court states that validity of contract is determined by rule of place with reference to which contract was made, but actually applies law of place of forum as a procedural rule); *New York L. Ins. Co. v. Block* (1893) 6 Ohio Cir. Ct. Dec. 166 (court purports to follow the rule-of-reference and actually applies rule of place of making).

Texas: *Seiders v. Merchants' L. Assoc. of U. S.* (1900) 93 Tex. 194, 54 S. W. 753 (place of performance rule); *Atlas L. Ins. Co. v. Standfier* (Tex. Civ. App. 1935) 86 S. W. (2d) 852 (place of making rule); *Pacific Mut. L. Ins. Co. of California v. Hale* (Tex. Civ. App. 1924) 267 S. W. 282 (place of making rule); *Fidelity Mut. L. Assoc. v. Harris* (1900) 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 313 (apparently applying intention test, holds that an express provision in the policy for governing law is effectual in forum as place of making).

Circuit Courts of Appeal: In the 2nd Circuit-*Mutual Trust L. Ins. Co. v. Ossen* (C. C. A. 2, 1935) 77 F. (2d) 317 (making); *Carrollton Furn. Mfg. Co. v. American Credit Indem. Co.* (C. C. A. 2, 1902) 115 Fed. 77 (not life insurance-making test); but cf. *Metropolitan L. Ins. Co. v. Cohen* (C. C. A. 2, 1938) 96 F. (2d) 66 (although consistent with the place of making test, the opinion apparently applies the rule of the place with reference to which the contract was made). In the 6th Circuit-*Penn Mutual L. Ins. Co. v. Mechanics' Sav. Bank & Trust Co.* (C. C. A. 6, 1896) 72 Fed. 413 (applies the rule of the place with reference to which the contract was made). The overwhelming majority of the cases in all Circuit Courts of Appeal applied the place of making test in the period before the rule in *Erie R. R. v. Tompkins* required federal courts to follow the rules of the states in which they are held.

resident of another state, on the whole the conflict of laws cases, as opposed to the internal law cases, indicate little inclination by courts to draw factors within the protection of general insurance principles obtaining in the forum, and the usual reference is to the law of the place where the contract was made. Unusual attempts by a court to attain control over such contracts, through the so-called procedural statutes, will receive a severe check under the rule of the *Yates* case holding that the full faith and credit clause, and indicating that the due process clause of the Fourteenth Amendment also, may be used to review unconstitutional selection of rules governing these contracts.

But the conflict of laws cases also show that when the insured was resident in the forum at the time the contract had its inception, and when the internal law rules of the forum are less favorable to the claimant than rules obtaining in the insurer's home-state, a court may apply the law of the latter place. The circumstance that the policy provided that it was made there, or that it was to be governed by the laws of that place, or that it was to be performed there, may be given effect. That effect may be expressed in the opinion by saying that "the contract was made there," using some connotation of delivery other than that of manual receipt of the policy; or by saying that "the contract was to be performed there," with or without specification of the element of performance which is controlling in the particular case; or by saying that "the parties intended" that law to apply. The peculiar problems raised by various principles operating in different states to govern warranties and misrepresentations have resulted in shifting judicial emphasis upon the various rules which are available in determining conflict of laws issues concerning them.

Confusion is most nearly eliminated if it is recognized that the opinions in these cases generally reflect the principle that neither the place of performance rule nor the rule effectuating an expressed intention of the parties will be operative in violation of other fundamental policy considerations obtaining in the forum. It seems that if the common or statutory rules of the forum are more favorable to the claimant than rules obtaining in the insurer's home-state, and if the insurance contract in question has such substantial relationship to the forum that it may be said to have been "made" there, these circumstances are of

themselves determinative that a strong rule of policy exists in the forum requiring application of its general rules governing these questions; the selection of the local law is then expressed as resulting from the conflict of laws rule that the law of the place where the contract was made governs questions of warranties and misrepresentations. To the extent that rules of the applicant's home-state are most liberal, it may be taken that the courts will tend to determine that the contract was made there and to adhere, with at least verbal consistency, to the rule of the place of making of the contract in representation and warranty cases.

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