

*BREACH OF WARRANTY AS AFFECTING
CONTRACTS OF INSURANCE.

No branch of insurance law has undergone more radical modification in the last quarter of a century than that dealing with the effect of false statements made by an insured in the application for the policy. These statements which determine the mutuality of consent, so essential to the validity of every contract, are equally determinative of the validity of a policy of insurance.

It is obvious that an insurer's action in issuing a policy is governed to a large degree by a reliance in the truth of the statements made by the applicant. That the apparent mutual consent of the parties evidenced by the issuance of the policy is oft-times unreal, because of fraud practiced in its procurement, is attested by the countless volumes of judicial opinion that have been written on the subject.

The effect of such statement, if false, on the validity of the contract of insurance is the ever-existing problem of the claim department.

The common law left the parties free to make their own terms. If the insured warranted a statement to be true as a condition precedent to validity of the policy, he was bound by the warranty, and if it failed the policy also failed. "Parties have a right to contract in this wise if they will," said the court in *Society v. Llewellyn*,¹ expressing the attitude of the common law courts on the subject.

Such mis-statements were divided in the two familiar classes of *Warranties* and *Representations*.

1. 58 Fed. 940.

A warranty of a fact occurred wherever the insured expressly agreed that the validity of the contract depended on the truth of the particular statement in the application. The language of the policy was controlling and was the sole guide in determining the effect of such statement. The problem was entirely one of construction. If it clearly appeared from a reading of the policy that the insured intended the actual truth of his statement, regardless of how immaterial or remote to the risk, to be a condition precedent to a binding contract, the falsity of the statement, however innocent and slight voided the policy. The burden was always on the company to prove that the answer constituted a warranty, but where the language of the policy left no reasonable doubt as to the intention of the parties, the courts did not hesitate to deny a recovery where the falsity of any such statement was shown.

On the other hand, if the language of the policy did not clearly indicate the intention of the parties in this respect, but left some doubt as to whether the validity of the policy turned on the truth of the answers in the application, the answers were construed as representations, in which event the policy was voided only when the statement was made as to a material matter and with intent to defraud.

Such was the common law distinction between warranties and misrepresentations. In short, it said, "Make your own contract and it will be given effect accordingly to the language in which it is couched." This common law distinction has now been abrogated by statutory enactment in practically every state. The legislatures acting on what was deemed grounds of public policy felt a necessity to impose the conditions under which payment might be avoided despite the plain terms of

the contract. These statutes are varied in scope and language and reference must invariably be had to them before any intelligent solution of a given case can be reached.

Missouri has adopted a statute which typifies the most drastic modification of the common law. In this state, it is provided² that the misrepresentation shall not render the policy void unless it shall have actually contributed to the contingency on which the policy became payable, and whether it so contributed is always a question for the jury. Kansas³ and Arizona⁴ have adopted statutes almost identical with that in force in Missouri. Under this type of statute, no misstatement is available as a defense unless the mater misstated has a material bearing on the event that makes the policy payable. Illustrating this point, it was held in Missouri that a misrepresentation as to habits of sobriety does not bar a recovery under the policy unless the insured's lack of sobriety causes or contributes to cause the loss suffered under the policy.⁵ The unfairness of this type of statute is at once apparent. The applicant may intentionally falsify the answer to every question in the application and yet the beneficiary may recover if none of the false answers touched upon the actual cause of the loss. If such statutes do not, indeed, place a premium on falsification, they at least give all the odds to the falsifier.

In other jurisdictions of which New York is typical, it is incumbent that the misstatement relate to a matter material to the risk; otherwise, it shall not be available as a defense.

2. R. S. Mo. 1919, Sec. 6142.

3. Laws 1907, Chapter 226.

4. Laws 1907, Chapter 46.

5. *Harms v. Fidelity Ins. Co.*, 57 S. W. 1046.

California is typical of those jurisdictions in which the statutory enactment provides that the misstatement must be as to a fact material to the risk. Where this is shown to the satisfaction of the jury, a recovery will be denied on the policy.⁶ The Tennessee statute⁷ is similar in substance and effect, as is also the Pennsylvania statute,⁸ while the Kentucky act⁹ is along the same lines. In every jurisdiction the question of whether the misstatement comes within the statute is for the jury. Maryland's statute¹⁰ is also typical of this type of common law modification.¹¹

In Louisiana it is provided that the answers of the applicant shall be construed as misrepresentation unless fraudulently made with intention to deceive the company upon a matter which would have prevented the issuance of the policy, if the company would have known the facts.¹²

In Massachusetts the statute provides that breach of warranty shall not defeat a recovery unless the warranty was made with actual intent to deceive or unless it increased the risk. Under such circumstances, the burden of proof that the warranty increases the risk is on the Company.¹³

The Minnesota statute also¹⁴ provides that the misstatement in question shall not void the policy unless made with intent to defraud or unless the matter misrepresented in-

6. *Porter v. Ins. Co.*, 157 Pac. 825.

7. *Laws 1895*, Chapter 160, Sec. 22.

8. *Enact. Pa.* June 23, 1885. Sec. 1.

9. *Ky. 1903 Stat.*, Sec. 639.

10. *Laws 1894*, Chapter 662.

11. *Delaney v. Ins. Co.*, 66 Atl. 614.

12. *Valeri v. Mutual Life Ins. Co.*, 91 So. 818.

13. *Collins v. Casualty Co. of Amer.*, 112 N. E. 634.

14. *R. L. 1905*, Sec. 1623.

creased the risk of loss. Under this statute, it was held that representations of the insured to the effect that he had never had fits or hernia or received medical or surgical attention within five years are material under the statute.¹⁵

In North Carolina it is provided by statute¹⁶ that a misrepresentation must be as to a material matter in order to void the policy. There it is held that the misrepresentation need not necessarily contribute to the loss in order to be material and a statement in the application that the insured had not within two years been under the care of a physician, if false, is material to the risk and available as a defense to a suit on the policy.¹⁷ The North Dakota statute¹⁸ is similar in effect. There it is held that inasmuch as the statute is remedial, it must be liberally construed in favor of the insured.¹⁹ It would seem better law that such statutes, being in derogation of common law, ought to be strictly construed against the insured.

In Ohio²⁰ it is incumbent that the false statement be fraudulently made and that the Company relied upon it in issuing the policy. There where the insured warranted in his application that he was a total abstainer and had never used intoxicants, when in fact such warranty was false, the policy might be voided.

In Oklahoma²¹ it is necessary that the misstatement be "wilful, false, fraudulent, or malicious."

I have not attempted to cite or set forth here the statute of every state but have only endeavored to touch briefly on the

15. *Olsson v. Midland Ins. Co.*, 165 N. W. 474.

16. *Laws 1905, Sec. 4308.*

17. *Bryant vs. Ins. Co.*, 60 S. E. 983.

18. *Sec. 5934, Rev. Code 1905.*

19. *Sales v. Brotherhood of American Yeomen*, 120 N. W. 760.

20. *Rev. Stat., Sec. 3625.*

21. *Sec. 3784, Comp. Laws 1909.*

various types of such acts which in one form or another are in force in practically every jurisdiction. They are the starting point in determining the existence or non-existence of a breach of warranty. Such statutes are held to have no application to companies doing business on the assessment plan, and as to them the common law applies.²²

It is further provided by statute in most jurisdictions that failure of the company to attach to the policy a copy of the application precludes a defense based on a misstatement in the application. This statutory provision is strictly enforced and failure to attach the application is a complete answer to a defense of breach of warranty.

The question of waiver is also important and occurs whenever the circumstances surrounding or following the misstatement are such as to estop the company from setting up a misrepresentation in the application. Knowledge of the misrepresentation on the part of the company or its agent is the most frequent ground of estoppel. This occurred where the agent, knowing of other insurance carried by the applicant, told him that "it made no difference"²³; and where the insured gave his occupation as "cashier in freight office" while the company's agent knew his duties included the inspection of freight cars in railroad yards, and it was held that the defense of breach of warranty could not be maintained by the company.²⁴

The foregoing has been an endeavor to set out generally the fundamental factors that are prerequisite to a defense of breach of warranty. No attempt has been made to delve tiringly into the numerous authorities.

22. *Hill v. Business Men's Accident Assn.*, 189 S. W. 587 (Mo. App.)

23. *Wylie v. U. S. Health & Accident Ins. Co.*, 82 S. E. 402 (S. Car.)

24. *Bucknam v. Interstate Bus. Men's Acc. Assn.*, 167 N. W. 594 (Iowa).

A return of premiums received under the policy is sometimes required by statute as a condition precedent to raising the defense of breach of warranty. Missouri and Virginia are among the few jurisdictions where such requirement exists. In the absence of statute the courts are unanimous in holding that the premiums need not be returned as a condition to making the defense.²⁵

25. *Woodward v. Ins. Co.*, 106 N. W. 681 (Wis.) *Austin v. Ins. Co.*, 132 Fed. 555.

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