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enforcing state created rights.[40] Both cases were decided before the *Erie* case and before *Guaranty Trust v. York.*

The holding in the *McCarroll* case necessitates three final observations. *First,* if the view of this case were to prevail, employer-plaintiffs will understandably always go to a state court for enforcement of collective bargaining agreements in interstate commerce. This is the identical form of forum-shopping which the Supreme Court sought to avoid by the decision in *Erie R.R. v. Tompkins. Second,* uniformity and development of a national labor policy in labor relations affecting interstate commerce will be difficult if each state is free to provide various remedies for the enforcement of labor contracts. *Third,* the practical effect of the *McCarroll* holding is that union-defendants will invariably seek removal to a federal court for the protection of rights afforded them by the Norris-LaGuardia Act.[41]

Glen M. Bendixsen

INSURANCE: THE EFFECT OF MISREPRESENTATION OF MATERIAL FACTS IN INSURANCE APPLICATIONS

Insurance companies were given a bitter pill when the Supreme Court of Louisiana recently handed down its decision in *Gay v. United Benefit Life Insurance Company.*[1] In this case, the court was faced for the first time with the problem of giving construction to the sections of the Louisiana Insurance Code of 1948[2] pertaining to misrepresentations and warranties and deciding what effect this code was to have on insurance law in that state.

Mrs. Gay, the plaintiff in this case, sought to recover the proceeds of an insurance policy issued upon the life of her husband by the defendant insurance company. In his application for the policy, the insured had denied, in answer to questions propounded by the company, that he had ever been afflicted with any heart or circulatory disease. An autopsy revealed, however, that the insured was what is commonly called a "blue baby" and had been born with a serious congenital heart defect. The decedent had been informed as a small child that he had been a "blue baby," but the trial court found no evidence that he had any understanding of the meaning of the term. In the action on the policy in the trial court the plaintiff had judgment, and the defendant appealed to the supreme court of the state. The supreme court affirmed the judgment on the grounds that a misrepresentation, though material to the risk of the insurer, would not vitiate or avoid the policy *unless made with an intent to deceive the insurer.*

This holding, placed on these grounds, is contrary to the common-law and the majority of jurisdictions today.[3] In addition, it appears to be contrary to the intent of the Louisiana Legislature expressed in the 1948 Code.

At common law a warranty was a statement of fact by the insured which was incorporated into the contract and which appeared on the face of the policy.[4] The

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[40] Guffey v. Smith, 237 U.S. 101 (1914); Pussey and Jones Co. v. Hansen, 261 U.S. 491 (1923).

[41] Note, 52 MICH. L. REV. 726 (1954).

[1] 96 So. 2d 497 (La. 1957).

[2] LA. R.S. 22:619 (1950).

[3] PATTERSON, ESSENTIALS OF INSURANCE LAW § 76 (2d ed. 1957).

[4] VANCE, INSURANCE § 71 (3d ed. 1951).

validity of the contract depended upon the literal truth of the warranty.[5] A representation, on the other hand, was not a part of the contract itself, but was a statement preceding the contract of such facts and circumstances as were necessary to be communicated to the insurer to enable him to form a just estimate of the risks.[6] A representation did not have to be literally true. If untrue in a respect which did not affect the insurer's estimate of the risk, it would not constitute grounds for avoiding the policy even if made with fraudulent intent.[7] If, however, a fact was misrepresented which materially affected the risk to be assumed, it would vitiate the policy regardless of the intent with which it was made.[8] Since the insurer made its estimate of the risk based upon the representations of the insured, the insurer could not be held to the contract if this estimate was based on statements which were untrue.

A majority of jurisdictions today have adopted statutes to the effect that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties.[9] The effect of such a statute is to relieve the insured of the risk that the policy will be voided by an immaterial false statement made by him in the contract. California insurance code sections achieve substantially the same result.[10] These statutes do not change the common-law as to the effect of a misrepresentation, and in California and the majority of jurisdictions today a misrepresentation has the same effect as it did under the common-law. Once a statement has been determined to be a representation, if it is untrue in a respect materially affecting the insurer's risk, it will vitiate the policy regardless of the intent with which it was made.[11]

National Life and Accident Insurance Company v. Gorey,[12] a 1957 case decided under California law in the United States Court of Appeals Ninth Circuit, illustrates the majority view. There the insurer denied liability because of misrepresentations made by the insured in the application. After reviewing the California decisions, the court said:

> "Where false representations as to material matters have been made, the existence of a fraudulent intent to deceive is not essential. . . . If we assume . . . that there was no intent on the part of the decedent to deceive or defraud the insurance company, and that his answers were innocently, though carelessly, given, his lack of intent to defraud is not controlling. The misstatement . . . was relied on by the defendant, and did materially affect the defendant's willingness to accept the risk."[13]

A representation of fact must be distinguished from a representation of opinion or belief. The latter class of representations are those which concern future conduct and events, or other things not susceptible of present actual knowledge.[14] An example would be the insured's answer to the question, "Are you in good health?"

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[5] Braddock v. Pacific Woodmen Life Ass'n, 89 Utah 75, 54 P.2d 1189 (1936).

[6] Myers v. Mutual Life Ins. Co., 83 W.Va. 390, 98 S.E. 424 (1919).

[7] PATTERSON, *op. cit. supra* note 3, § 84.

[8] VANCE, *op. cit. supra* note 4, § 67.

[9] PATTERSON, *op. cit. supra* note 3, § 71.

[10] CAL. INS. CODE §§ 447, 448 (Deering, 1935): § 447 states that the breach of a material warranty entitles either party to rescind; § 448 adds that unless the policy declares that a violation of specified provisions shall avoid it, the breach of an immaterial provision will not avoid the policy.

[11] PATTERSON, *op. cit. supra* note 3, § 83.

[12] 249 F.2d 388 (9th Cir. 1957).

[13] 249 F.2d at 393, 394.

[14] VANCE, *op. cit. supra* note 4, § 68.

Since the answer must depend on the meaning the insured attaches to the term "good health," in most instances it can only be construed as an opinion and the most that can be asked by the insurer is that the opinion is honestly entertained. Such a question asks only for an honest opinion of the insured, and if his reply is what he honestly believes to be true, it is not a false answer even if it does not conform with the facts, and it will not be grounds for avoiding the policy. If, on the other hand, the insured misrepresents his opinion, and this misrepresentation is material to the risk, the policy may be avoided whether or not the insured intended to defraud the insurer.[15]

Another distinction which occasionally causes confusion is that between misrepresentation and concealment. Concealment occurs where the insured, though not questioned on a point, remains silent when there is a duty to speak. Although California holds that a concealment entitles the injured party to rescind whether intentional or unintentional,[16] the great majority of states hold that a concealment must have been made with fraudulent intent before it will be grounds for rescision.[17]

Since in the principal case, the court admitted that the presence of the insured's heart defect materially affected the risk of the insurer, it is clear that in California and the majority of jurisdictions the insurer would have been allowed to avoid liability unless the insured's denial that he had such a defect could be taken as a statement of opinion. Decisions have gone both ways as to whether such a statement is one of opinion or fact,[18] so the decision in the *Gay* case would have been justified had it been placed on the ground that the representation was only one of opinion. This possibility was not discussed, however.

The court justified its holding on grounds that prior to the adoption of the 1948 Code, it had held that "... incorrect statements in an application would not vitiate the policy unless they were wilfully made with an intent to deceive *and* were material to the risk,"[19] and that, since the code is ambiguous, it should be "... construed as expressing the law as it was prior to the revision, unless the court finds a clear intention to alter the old law."[20]

There is a question as to whether the requirement of intent to deceive was as firmly established by the Louisiana decisions before the 1948 enactment as the court supposed. The court cited five cases as supporting such a rule, but of these only *Valesi v. Mutual Life Insurance Company*,[21] decided in 1922, expressly required that a misrepresentation be not only false, but fraudulent as well. In the other four cases cited the rule propounded seems to be that a misrepresentation will not vitiate a policy unless fraudulent *or material* to the risk of the insurer. Two of these cases, *Cunningham v. Pennsylvania Mutual Life Insurance Co.*[22] and *Carroll v. Mutual Life Insurance Co.*,[23] were decided subsequent to the *Valesi* case, and in neither of these was the *Valesi* decision mentioned.

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[15] *Id.* § 68.

[16] CAL. INS. CODE § 331 (Deering 1935).

[17] PATTERSON, *op. cit. supra* note 3, § 87; VANCE, *op. cit. supra* note 4, § 68.

[18] See Nat'l Life and Acc. Ins. Co. v. Nagel, 269 Mich. 635, 245 N.W. 540 (1953) (fact); Metropolitan Life Ins. Co. v. Burno, 309 Mass. 7, 33 N.E.2d 519 (1941) (opinion).

[19] 96 So.2d at 498.

[20] 96 So.2d at 499.

[21] 151 La. 405, 91 So. 818 (1922).

[22] 152 La. 1023, 95 So. 110 (1922).

[23] 168 La. 953, 123 So. 638 (1929).

In the *Cunningham* case, the insured had stated that he had not consulted a physician, when in fact he had done so on one occasion. While the court found that there was no intent to deceive, their basis for allowing the insured to recover was that the misrepresentation was not material to the risk of the insurer due to the minor nature of the consultation.

The *Cunningham* holding was approved in the *Carroll* case where the court expressly stated:

> "A false statement in that respect will not vitiate a policy, unless the false statement is fraudulent *or* material."[24] (Emphasis added.)

Of the two other cases cited by the court, one[25] follows the identical reasoning of the *Cunningham* case, and the other[26] is no more than a statement of the common-law on misrepresentation.

With only one case expressly supporting its contention that a misrepresentation must be fraudulent and material, it is surprising that the court did not deem it necessary to closely analyze the wording of the 1948 Code.

The pertinent section which governs this case is as follows:

> "B. In any application for life or health and accident insurance made in writing by the insured, all statements therein made by the insured, shall, in the absence of fraud, be deemed representations and not warranties. The falsity of any such statement shall not bar the right to recovery under the contract unless such false statement was made with actual intent to deceive *or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer.*"[27] (Emphasis added.)

It does not appear, from a reading of this section, that the legislature intended to require intent to deceive in all situations before recovery would be barred. A false statement material to the risk of the insurer is clearly an alternative to "actual intent to deceive" and should bar recovery regardless of the intent with which it was made.

Such an interpretation was adopted by one Louisiana case decided since the 1948 Code went into effect. In 1954, *Flint v. Prudential Insurance Co. of America*[28] came before the Court of Appeals of Louisiana. There the court, after quoting the rule of the *Valesi* decision, said:

> ". . . the case at bar does not necessarily have to involve fraud as was the requirement prior to 1948. . . . It is sufficient, if admitting the good faith of the insured, the evidence established misrepresentation of a material fact of such import that had the truth been revealed the policy would not have been issued."[29]

This decision is in line with the weight of authority in the United States, and is in accord with the construction given similar statutes in other states.[30]

Some other states besides Louisiana have recently required that a misrepresentation be made with intent to deceive before it would constitute a defense to the policy.[31] These decisions have met with criticism from insurance law text writers. The view of Professor Vance is typical:

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[24] 123 So. at 638.

[25] Cole v. Mutual Life Ins. Co. of N.Y., 129 La. 704, 56 So. 645 (1911).

[26] Goff v. Mutual Life Ins. Co., 131 La. 98, 59 So. 28 (1912).

[27] LA. R.S. 22:619(B) (1950).

[28] 70 So.2d 161 (La. Ct. App. 1954).

[29] 70 So.2d at 167, 169; *approved,* 15 LA. L. REV. 227 (1954).

[30] Johnson v. Nat'l Life Ins. Co., 123 Minn. 453, 144 N.W. 218 (1913); Davis v. Aetna Mutual Fire Ins. Co., 67 N.H. 335, 39 Atl. 902 (1893).

[31] See Service Life Ins. Co. of Omaha v. McCullough, 13 N.W.2d 440 (Iowa 1944); De Valpine v. N.Y. Life Ins. Co., 105 S.W.2d 977 (Mo. App. 1937); Sirgany v. Equitable Life Assur.