Commercial Law: Insurance

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In the law of insurance unmodified by legislation a warranty is contractual in nature, it must be literally fulfilled, and its materiality is not open to question. The untruth or nonfulfillment of a warranty in any respect, without regard to whether the insurer is prejudiced thereby, will render the policy voidable. A representation, on the other hand, is not part of the contract but is a statement made by way of inducement to contract. A false representation, whether innocent or fraudulent, will render a policy voidable, provided it is material. Immaterial representations are without effect. If the insurer, being truly advised of the fact misrepresented, would not have contracted or would have contracted but only at a higher rate, the representation will be deemed material, otherwise not. With reference to the requirement of falsity, a question calling for an expression of opinion must be answered only to the best of the applicant’s knowledge or belief. Questions concerning the state of the applicant’s health or asking whether he has had some specific disorder fall into this category. For example, if the insured gives a negative answer to the question, “Have you ever had any disease of the heart?” and his answer is true on the basis of his knowledge, then, of course, the insurer cannot complain if the insured was then suffering from an unknown but fatal heart ailment. With reference to the requirement of materiality, the failure on the part of an insured to disclose minor ailments or illnesses of a temporary character, as, for example, malaria, or indigestion, is counted generally as immaterial. The theory is that an insurer being advised of such ailments would not be thereby influenced in determining to accept the risk or in fixing the premium. On the other hand, a true warranty by the insured that he had never had any disease of the heart, or malaria, for that matter, would be entirely different. To protect insureds against the often unconscionably harsh operation of warranties, most state legislatures, including Louisiana’s, have adopted statutes converting all warranties into representations in the absence of an intent to deceive on the part of the insured. This legisla-
tion purports to provide that a warranty as such will remain a warranty only when there is an intent to deceive. Otherwise, it will amount to a representation. Presumably the law relating to representations was not being changed. Thus, Act 52 of 1906, Louisiana's original statute on the subject, provided in part that "all statements...made by the insured shall, in the absence of fraud, be deemed representations and not warranties." In the first place, although this language might be taken as providing that in the presence of fraud, all statements will be warranties, this point of view has never prevailed. That is, such a statute does not convert representations into contractual terms merely because fraud is present. When Louisiana adopted its Insurance Code, the language of the 1906 act was retained, as it had been retained in an earlier amendment, but to it was added: "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." Although this seems to say that a false statement made with actual intent to deceive will render the contract voidable without regard to its materiality, there is no basis for believing that the Legislature had any such purpose in mind. Error is an essential part of invalidating fraud. On the other hand, this language seems clearly to say that a false and material statement will bar the right to recovery irrespective of an intent to deceive. Such a rule states the generally accepted law relating to representations. There have been some expressions in the cases indicating that a representation must be fraudulent in order to give rise to a power of avoidance but subject to the holdings involving expressions of opinion or the failure to disclose minor ailments, the cases have indicated that a false representation of a material fact is all that is required to render a policy voidable. An opinion rendered during the last term, however, casts some doubt on this position. In Gay v. United Benefit Life Ins. Co., the insured, in answering certain questions, denied that he had ever been afflicted with any heart or circulatory disease. The evidence showed that he had been informed as a child that he was a "blue baby." Under the questioning of a physician after he had been stricken fatally he seems to have given a factually ac-

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1. L.A. Civil Code art. 1847 (1870).
2. 96 So.2d 497 (La. 1957).
curate account of his medical history. The court observed, however, that there was no showing that he ever understood the meaning of his condition. There was also some evidence that he might not have believed what he had been told. He lived to be thirty-five and made his living as a truck driver. At any rate, the court held against the insurer. In construing the provisions of R.S. 22:619B, it was concluded that in the adoption of the Insurance Code there was no intent to change the existing law which was to the effect that a "misstatement must have been made fraudulently or with the intent to deceive, — that is [or] knowing it to be untrue and believing it to be material to the risk [or of such nature that it would be only reasonable to assume that he must have believed that it was material]." The case that seems to have been principally relied on for this view was *Carroll v. Mutual Life Ins. Co.* An examination of it shows that the insured failed to disclose that he had consulted a physician friend, more or less informally, for an ailment that they both thought was simple indigestion. The court held against the insurer and stated the controlling principle to be that "a false statement . . . will not vitiate a policy, unless the false statement is fraudulent or material." The indication was that the statement was neither fraudulent nor material. That is, if the insurer had been advised that the insured had consulted a physician for a simple case of indigestion this information would not have influenced its conduct with respect to the issuance of the policy. In the instant case, the fact that the insured had been a "blue baby" was clearly material. But, since the view of the court was that it had to be fraudulent as well, or more particularly, that the insured had to have an intent to deceive the insurer concerning a fact that he knew or must have known to be material, judgment was rendered against the company. On the basis of this construction, the legislation in question, instead of merely converting a warranty into a representation in the absence of fraud, imposes the additional requirement that a representation, beyond being false and material, must also be made with an intent to deceive. This, of course, rests the test of materiality not only on the influence of the fact on the insurer, but also on the knowledge or belief of the insured. It is arguable that the reason why an applicant for insurance is not required to disclose the existence of minor ailments or consultations with physicians concerning them is that he is not supposed to know

3. 168 La. 963, 123 So. 638 (1929).
that such information would be of any consequence to the insurer. Yet, basically, the justification for the existence of a power of avoidance in a party who contracts on the basis of a false representation is that, if he had known the truth, he would not have contracted or would have contracted only on a different basis. That is, he is entitled to relief because his consent is given in error. Under the Gay case this test seems to become inapplicable to the life, health, or accident insurer unless there is an actual intent to deceive on the part of the insured. It seems to preclude the possibility of finding that an innocent but material false representation may bar recovery. Error is not enough; it must have been induced by fraud. This may be a reasonable step. Perhaps it is a way of telling insurers to rely on their own investigations and examinations and not on answers given by applicants for insurance. Of course, the view may be taken that the decision is entirely consistent with the cases involving expressions of opinion in that when the insured denied that he had ever been afflicted with any heart or circulatory disease he did so believing in his own mind that this was the fact with the result that, being called upon to express an opinion concerning his condition, he had expressed a truthful one and so discharged the burden resting upon him. The chief difficulty with this explanation is that it tends to tax the credulity to believe that a person, knowing himself to have been a "blue baby," would not know that this indicated some sort of heart or circulatory disease. And if this be the explanation, then the broad statement of the applicable rule would appear to have been unnecessary.

It may or may not be significant that at the same term of court recovery was denied to the beneficiary of a life policy because the insured had failed to disclose in answer to appropriate questions that he had been treated for tuberculosis for about seven years prior to the issuance of the policy. This earlier case, *Roche v. Metropolitan Life Ins. Co.*,1 would not be significant except for the fact that the court carefully reviewed the subject of warranties and representations and seemed fully to support the proposition that a false and material representation will be a bar to recovery, irrespective of the presence of an actual intent to deceive on the part of the insured. It disposed of a case chiefly relied on by the plaintiff by saying that it "applied the

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well settled rule of our jurisprudence that questions to an applicant for insurance concerning diseases or consultations are to be understood as referring to appreciable disorders, and not to inconsequential illnesses of a temporary character, though attended by a physician; so that although the answers may be knowingly untrue, the policy will not be thereby avoided unless the said representations are material to the risk.” This deals with a failure to disclose known ailments on the basis of materiality, not on an intent to deceive. As a result there appears to be some question concerning whether these two cases are entirely consistent in their statement of the applicable principle.

In Christo v. Eagle Star Ins. Co., the court found that the failure of a finance company, in effecting collision insurance coverage for the purchaser of a car, to advise the agent that although the car was being bought in the name of one person it was actually to be used by a minor twenty years of age, was not material. This was based on the proposition that the omnibus clause extended coverage to the actual user as an additional insured. For the same reason the court reached the conclusion that there was no actual intent to deceive the insurer. Although the court seemed to treat the case as involving an application of R.S. 22:619(A) dealing with misrepresentations, the facts seem to present a case of concealment. No difference in result would follow, however, because a fact concealed must be material and withheld in bad faith to render a policy voidable. Here the state of mind of the applicant is controlling. It would be wholly unreasonable to put on him the burden of knowing what information the insurer might want when no questions are asked on the subject.

The case of Nichols v. Iowa Mutual Ins. Co. involved an interpretation of two exclusions under the provisions of a policy covering theft of insured automobiles. Acting under instructions by the Louisiana buyer, the seller in Chicago engaged two men to drive the two insured vehicles to Louisiana. One driver was later apprehended in Miami and the other in Las Vegas. It was held that the purchaser had not voluntarily parted with “possession” of the vehicles within the terms of the exclusion and that the drivers were not in the insured’s “service or employment.” They were found, instead, to be in the category of independent

5. 232 La. 28, 93 So.2d 682 (1957).
6. 232 La. 856, 95 So.2d 338 (1957).
contractors. Although there is no uniformity in the cases dealing with provisions of this kind, the instant holding is considered as being in harmony with their basic purpose. The surrender of possession provision seems designed to exclude cases involving obtaining by false pretenses or other wrongful scheme or device and the exclusion of theft by persons in the insured's service or employment rests on the constant exposure of the vehicle to such theft. It has been held not to cover theft by a service station employee, for example, because the service station is an independent contractor performing a service for, but not in the service of, the insured. The same theory seems properly applicable to the instant facts.

In Hammack v. Resolute Fire Ins. Co., 7 a collision insurer was compelled to pay the insured the value of the car as a total loss plus a twenty-five percent penalty and attorney's fees. The insurer's conduct was extremely questionable and inexcusable. It apparently attempted to rely on a cash settlement evidenced by certain forms the insured had signed and the alleged delivery of a check to its affiliated finance company, as mortgagee, and at the same time to claim that the insured had rejected a delivery of the vehicle after the repairs had been made, some ten months after the loss. The court's conclusion that the only consent ever given by the insured was for the repair of the vehicle was supported by the evidence. The unreasonable delay in discharging this obligation gave full support to the judgment.

A few additional cases under this heading involved nothing of sufficient importance to justify comment.

7. 96 So.2d 612 (La. 1957).