Misstatements in Applications for Life and Health and Accident Insurance Under the Louisiana Insurance Code

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Since the likelihood of illness or untimely death varies with the individual, applicants for life or health and accident insurance present risks of varying magnitude to the insurer. To conduct a successful business, insurance underwriters must determine which risks to reject and set adequate premiums for the risks assumed. Consequently, insurance companies strive to acquire sufficient information pertaining to each applicant to enable a skillful estimation of each risk proffered. One source of information available to insurers consists of the statements made by prospective policyholders in answer to questions contained in applications for insurance. This Comment presents an analysis and evaluation of the Louisiana law governing the effect of inaccuracies in such statements in applications for life or health and accident policies.

The General Law Unaltered By Legislation

Statements made by the insured as inducement for the insurer to issue the policy are called representations. If the insurance contract is entered, the insurer is entitled to rely upon these statements as a description of the risk assumed, although they are not considered to be part of the contract. Thus, if one of these statements is materially incorrect, the insurer may avoid the policy since the risk actually presented by the insured is not the same risk that is covered by the policy. However, to be material the statement must have been of the nature that, had it been correct, the insurer either would not have contracted or would not have agreed upon the same terms. The question of

1. In order to avoid confusion the customary term "misrepresentation" has not been used in this Comment. This term has not been employed with any consistency by the courts or legal writers. It has been used to denote both intentionally and unintentionally incorrect statements; both false warranties and inaccurate representations; and all of these types of misstatements collectively.

2. 1 APPLEMAN, INSURANCE 390 (1941); PATTERSON, INSURANCE 332 (1935); VANCE, INSURANCE 386 (3d ed. 1951); Harnett, Misrepresentations in Life Insurance Applications, 17 Kan. B.A.J. 214 (1948); Patterson, Misrepresentation by Insured Under New York Insurance Law, 44 Colum. L. Rev. 241 (1944); Note, 8 Mo. L. Rev. 137 (1943).


4. 1 APPLEMAN, INSURANCE 394 (1941); PATTERSON, INSURANCE 333 (1935); VANCE, INSURANCE 386 (3d ed. 1951). Cf. PROSSER, TORTS § 532 (1955); WILLISTON, CONTRACTS 4189, § 1500 (1937); Note, 23 Colum. L. Rev. 78 (1923).

5. 1 APPLEMAN, INSURANCE 398 (1941); PATTERSON, INSURANCE 336 (1935);
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whether or not the insured had knowledge of the inaccuracy is irrelevant where his statement constitutes a representation of fact.⁶ But where the statement is a representation of opinion only, no power to avoid arises if the statement correctly represents the insured’s opinion, despite any inconsistency with concrete fact.⁷ This may be justified on the notion that the insurer cannot expect to rely on an applicant’s opinion as descriptive of the actual risk assumed, but merely as an indication of what the risk might be.

The representation is to be distinguished from the warranty, which is a term of the insurance contract designed to delimit precisely the risk assumed.⁸ The warranty requires the existence of a stipulated circumstance as a condition to recovery under the policy and gives the insurer the power to rescind the contract if the condition is not fulfilled.⁹ Thus, if it is warranted that the insured has undergone a physical examination within the preceding year, coverage will be restricted to a person benefitted by such an examination.¹⁰ The insurer’s power to avoid the contract for breach of warranty does not depend upon the material-


8. 1 APPLEMAN, INSURANCE 440 (1941); PATTERSON, INSURANCE 236, 244 (1935); VANCE, INSURANCE, 366, 408 (3d ed. 1951); Patterson, Warranties in Insurance Law, 34 COLUM. L. REV. 595 (1934).


10. Warranties are affirmative or promissory according to whether they are made concerning the existing fact or relate to the existence of circumstances in the future. This warranty would have been a promissory warranty had the insured warranted to undergo physical examinations in the future. The untruth of an affirmative warranty renders the policy voidable from its inception. A promissory warranty renders the policy voidable from the time of its breach. VANCE, INSURANCE 410 (3d ed. 1951).
ity of the circumstance warranted; breach of any warranty gives
the insurer the right to rescind.\textsuperscript{11}

The warranty was conceived during the infancy of the insurance business which was then concerned primarily with the coverage of marine risks. This severe method of controlling risks was deemed necessary because of the general inaccessibility of the objects insured and the lack of expertness on the part of underwriters.\textsuperscript{12} Unfortunately, the concept was retained even after the insurance industry had gained in maturity and the underwriting of non-marine risks had become commonplace.\textsuperscript{13} The unscrupulous among insurers seized upon the warranty as a device for avoiding contracts with unwary policyholders by including in each policy a number of obscure and easily infringed warranties.\textsuperscript{14} Despite a vigorous reaction against this practice, the courts were unable to avert frequent inequitable results in litigation involving warranties.\textsuperscript{15} As a consequence, most states enacted statutes designed to counteract the harsh effects of the warranty provision in insurance contracts. Many of these statutes sought to accomplish this result by providing that in the absence of fraud the false warranty will have the same effect as an inaccurate representation.\textsuperscript{16}

\textbf{The Louisiana Law Prior To Adoption of the Insurance Code}

There appears to be no argument with the proposition that in absence of legislation the law of insurance which prevails in

\footnotesize{11. See note 9 supra.}
\footnotesize{13. Ibid.}
\footnotesize{14. Ibid.; Note, 6 Mo. L. Rev. 338 (1941). See, \textit{e.g.}, the classic denunciation of Justice Doe of New Hampshire in DeLancey v. Rockingham Farmers Mutual Fire Ins. Co., 52 N.H. 581, 587 (1873): "The principal act of precaution was, to guard the company against liability for losses. Forms . . . of a most complicated and elaborate structure, were prepared, and filled with covenants, exceptions, stipulations, provisos, rules, regulations and conditions, rendering the policy void in a great number of contingencies.—The compound, . . . would, unless he were an extraordinary man, be an inexplicable riddle, a mere flood of darkness and confusion. Some of the most material stipulations were concealed in a mass of rubbish.—Seldom has the art of typography been so successfully diverted from the diffusion of knowledge to the suppression of it.”}
the United States will be applied in Louisiana.\textsuperscript{17} Prior to 1906 this state had no legislation dealing with misstatements in applications for life and health and accident insurance. In that year the legislature enacted the Entire Contract Policy Statute.\textsuperscript{18} As amended,\textsuperscript{19} this act required that applications for life or health and accident insurance be attached to the policies when issued in order to be admissible in evidence; more important to this discussion, the statute also provided that all statements in the applications should “in the absence of fraud be deemed representations and not warranties.”\textsuperscript{20} This language is susceptible of two plausible interpretations. It could be read to mean that, regardless of the intention of the parties in contracting, all fraudulent statements constitute false warranties, which render the contract voidable even though immaterial, and all non-fraudulent statements amount to representations, which must be proven inaccurate and material to avoid the contract.\textsuperscript{21} On the other hand, it may mean that whether or not the statement is a warranty or representation still depends upon the intention of the parties, but, even though a fraudulent warranty will give rise to a power to rescind the contract as traditionally was held, a false non-fraudulent warranty will now be treated as a representation; and the representation need only be proven to have been incorrect and material to avoid the policy.\textsuperscript{22}

Although there is language in several Louisiana Supreme Court decisions suggesting that the former interpretation had been adopted,\textsuperscript{23} it would seem that the results of the cases are

\textsuperscript{17} See Barry v. Louisiana Insurance Co., 12 Mart. (O.S.) 493 (La. 1822); SATUNDEs, REVISED CIVIL CODE OF LOUISIANA xviii (1909); Nabors, Civil Law Influences Upon Law of Insurance in Louisiana, 6 Tul. L. Rev. 515 (1932); Comment, 4 Tul. L. Rev. 267 (1930). But see Brown v. Duplantier, 1 Mart. (N.S.) 312 (La. 1823) (general principles of Civil Code not necessarily inapplicable to commercial transactions).

\textsuperscript{18} La. Acts 1906, No. 52.


\textsuperscript{21} There appears to be no reason to believe that such was the intention of the legislature. See The Work of the Louisiana Supreme Court for the 1956-1957 Term—Insurance, 18 Louisiana Law Review 73, 74 (1957).

\textsuperscript{22} Vance, Insurance 417 (3d ed. 1951).

\textsuperscript{23} Roche v. Metropolitan Life Ins. Co., 232 La. 168, 172, 94 So.2d 20, 21 (1957): “A purpose of this [Act 52 of 1906] and enactments of other states containing similar provisions was to abolish the highly technical doctrine of warranty, the intent of the legislators being to transform a warranty into a representation, thus saving a policy of insurance from forfeiture for false statements contained therein unless they are found to be material or fraudulent,” citing Vance, Insurance 417 (3d ed. 1951).

Carroll v. Mutual Life Ins. Co., 168 La. 953, 955, 123 So. 638, 639 (1929): “Answers to questions . . . are, in absence of fraud, deemed representations and
more consistent with the latter view. There appears to be no case holding for the insurer on the basis of a fraudulent but immaterial misstatement in an application of insurance. In all cases in which the insurer was allowed to avoid the policy for an inaccurate representation, the statement was material. In insurers have been consistently unsuccessful in asserting a defense based upon the applicant's misstatement where the statement was either immaterial or correct.

24. Roche v. Metropolitan Life Ins. Co., 232 La. 168, 94 So. 2d 20 (1957) (insured incorrectly represented that he had not been treated for tuberculosis); Lee v. New York Life Ins. Co., 144 La. 445, 80 So. 652 (1919) (insured denied having consulted doctor when in fact he had undergone medical examinations involving extensive urinalyses); Flint v. Prudential Ins. Co., 70 So. 2d 101 (La. App. 1st Cir. 1954) (misstatements concealing hardening of arteries); Fisette v. The Mutual Life Ins. Co., 4 La. App. 430 (1st Cir. 1928) (representation of no illness since childhood, but, in fact, doctor had informed insured that he would die within the year); Vaughn v. Metropolitan Life Ins. Co., 3 La. App. 614 (1st Cir. 1925) (misstatements concealing tuberculosis); Rhodes v. Metropolitan Life Ins. Co., 172 F.2d 183 (5th Cir. 1949) (inaccurate representation of no diabetes or sugar in blood); Jefferson Standard Life Ins. Co. v. Stevenson, 70 F.2d 72 (5th Cir. 1934), cert. denied, 293 U.S. 585 (1934) (applicant inaccurately represented that he did not have tuberculosis); New York Life Ins. Co. v. Stewart, 69 F.2d 957 (5th Cir. 1934) (insured represented that he had had no operation or stomach trouble; in fact he had had testicle removed and had cancer of the stomach); New York Life Ins. Co. v. Wilkinson Veneer Co., 86 F. Supp. 863 (E.D. La. 1949) (inaccurate representation that insured had never raised or spat blood); Warren v. New York Life Ins. Co., 37 F. Supp. 358 (W.D. La. 1941) (student pilot represented that he had never flown and did not contemplate participation in aeronautics).


26. Mutual Life Ins. Co. v. Rachal, 184 La. 430, 160 So. 129 (1936) (insured mistook his arthritis for lumbago but correctly represented his opinion of his health); Valesi v. Mutual Life Ins. Co., 151 La. 405, 91 So. 818 (1922) (insured's statement that the most he ever drank at one time was "one or two" drinks was substantially correct); Sandifer v. Louisiana Life Ins. Co., 84 So. 2d 455 (La. App. 1st Cir. 1953) (insured was unaware of his heart disease); State Life Ins. Co. v. Cumpton, 144 So. 769 (La. App. 2d Cir. 1932) (insured was unaware of his tuberculosis); Brennan v. National Life and Accident Ins. Co., 122 So. 147 (La. App. 2d Cir. 1929) (where applicant was asked: "To what extent do you now or have you in the past used intoxicants?" His answer of "no" was not incorrect since he did not drink habitually."

Recovery was also had in cases controlled by Act 97 of 1908 (repealed by Act 31 of 1944) which provided that where an insurance policy on life written without a physical examination the company is presumed to have waived its rights to a forfeiture of the policy for false answers pertaining to health: Massachusetts Protective Ass'n v. Ferguson, 168 La. 271, 121 So. 863 (1929); Brown v. Continental Casualty Co., 161 La. 229, 108 So. 444 (1925); Blackwell v. Fireside Mut. Ins. Co., 11 So. 2d 65 (La. App. 1st Cir. 1942); Langston v. United States Nat. Life & Casualty Co., 4 La. App. 474 (1st Cir. 1926). See Comment, The Entire Contract Policy Statute, 16 Tul. L. Rev. 270 (1942).
Louisiana Law Under the Insurance Code

The Louisiana Insurance Code provides that, with the exception of fire,\textsuperscript{27} health and accident, and life insurance, no incorrect representation or warranty will be deemed material or avoid any policy unless made with an intent to deceive.\textsuperscript{28} The first sentence of R.S. 22:619(B),\textsuperscript{29} the Insurance Code article dealing specifically with misstatements in life and health and accident insurance, embodies the Entire Contract Policy Statute declaration that, in the absence of fraud, all statements in the application will be deemed representations and not warranties. The last sentence of this section, which appeared in Louisiana legislation for the first time in the Insurance Code of 1948, provides:

"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."\textsuperscript{30} (Emphasis added.)

The natural import of this language is that an incorrect statement will render a contract voidable when it is material, or when it is made with an intent to deceive. Only the latter alternative under this interpretation would constitute a deviation from the traditional rule as an additional means of avoiding insurance contracts.

In \textit{Gay v. United Benefit Life Insurance Co.}\textsuperscript{31} the Louisiana Supreme Court rendered its first decision interpreting this language. The case involved a representation by an insured, who had been a "blue baby," that he had never been afflicted with a heart or circulatory disease. The court held that the insurer, in order to bar recovery, must prove that the applicant's misstatement was material and was made with the intent to deceive. It was determined that the last sentence of R.S. 22:619(B) did not evidence a legislative intention to change the law, but that the prior jurisprudence had made the intent to deceive a requisite

\textsuperscript{27} LA. R.S. 22:692 (1950).
\textsuperscript{28} Id. 22:619(A): "Except as provided in Sub-section B of this Section and R.S. 22:692, no oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured or in his behalf, shall be deemed material or defeat or avoid the contract or prevent it attaching, unless the misrepresentation or warranty is made with intent to deceive."
\textsuperscript{29} Id. 22:619(B).
\textsuperscript{30} Ibid.
\textsuperscript{31} 233 La.. 226, 96 So.2d 497 (1957).
to avoidance for misstatement. The court found that the inaccurate representation was not made with the intent to deceive since either the insured did not understand the meaning of the term "blue baby" or did not believe himself to have been one.

One aspect of this decision seems to be unquestionably salutary. In holding that the insurer must prove that the insured's representation was inaccurate, material, and made with an intent to deceive, the court appears to have abandoned the notion that an insurance contract may be rescinded for an immaterially inaccurate representation made with an intent to deceive. This would appear to be a sound result, since the purpose of allowing rescission for a misstatement is to protect the insurance company and its other policyholders against undesirable risks, not to punish the dishonest applicant whose dishonesty has caused no harm.

However, the court's interpretation of the prior jurispru-

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32. Gay v. United Benefit Life Insurance Co., 233 La. 226, 230, 96 So.2d 497, 498 (1957); "After the 1906 act, as well as subsequent to the 1916 statute, this court interpreted such language to mean 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. Cole v. Mutual Life Ins. Co. of N.Y., 129 La. 704, 56 So. 645; Goff v. Mutual Life Ins. Co. of N.Y., 131 La. 98, 59 So. 28; Valesi v. Mutual Life Ins. Co. of N.Y., 151 La. 405, 91 So. 818; Cunningham v. Penn Mutual Life Ins. Co. of Philadelphia, Pa., 152 La. 1023, 95 So. 110; and Carroll v. Mutual Life Ins. Co. of N.Y., 168 La. 953, 122 So. 638." Contra Karno v. Metropolitan Life Insurance Company, 137 F. Supp. 893, 899 (E.D. La. 1956): "It is not incumbent on the defendant to prove fraud on the part of the insured in order to void the policy. The intent of the applicant or his good faith in making a false statement in an application for life insurance is not relevant under LSA R.S. 22:619, subd. B, as it is under 22:619, subd. A, which refers to applications for insurance generally."

33. The court quoted from the assigned reasons of the trial judge, id. at 233, 96 So.2d at 499: "Here the decedent was informed as a small child that he had been a 'blue baby.' But there is no evidence that he had any understanding of the meaning of the term and . . . such understanding is rare among most laymen. In addition . . . the decedent reasonably could have doubted and disbelieved what he had been told about being a 'blue baby'. . . . For the 'blue baby' almost invariably dies within the first year . . . , is unable to lead a normal life, has a . . . bluish color, and is subject to quick and extreme fatigue. But this decedent lived to reach the age of thirty-seven years, . . . did not have a noticeable bluish color . . . , and . . . engaged in long hours of work driving large trucks between New Orleans and California."

34. See note 23 supra.

dence as requiring an intent to deceive in order to avoid an insurance policy for a materially incorrect representation seems questionable. In the cases cited for this proposition the court’s scrutiny of the applicant’s misstatement for an intent to deceive seems to have been solely for the purpose of deciding whether or not the statement was a fraudulent warranty, which would vitiate the policy without more. Until the Gay case, the Louisiana Supreme Court consistently indicated that the two elements of inaccuracy and materiality alone in a representation would constitute grounds for rescission of the insurance contract.

36. A potential source of confusion in analyzing the jurisprudence concerning misstatements in life and health and accident insurance contracts are the cases applying La. Acts 1934, No. 160. This statute, which was repealed by the Insurance Code, dealt with policies of industrial life insurance, a term employed to designate insurance issued by domestic insurers with limited underwriting powers. See Mataya v. Delta Life Ins. Co., 222 La. 509, 62 So.2d 817 (1953); Purvis, *Commentary on Louisiana Insurance Code*, in 15 West’s Louisiana Statutes Annotated 1, 29 (1959). The act, as amended by La. Acts 1936, No. 144, and 1938, No. 140, declared that no industrial life insurance policy could be avoided because of a misstatement unless it wilfully concealed the applicant’s ill health. In applying this statute the courts have required proof of an intent to deceive for the avoidance of an industrial policy.


37. In the opinion of Valesi v. Mutual Life Ins. Co., 151 La. 405, 407, 91 So. 818, 819 (1922) there is some discussion of whether or not the insured’s “representation” was fraudulent. Close examination of the case reveals that the court was concerned with the presence of an intent to deceive in the insured’s statement only for purposes of determining its status as a warranted fact under Act 52 of 1906: “[G]ranting that deceased was in the habit of using intoxicants to a greater extent than he indicated when being questioned on the point, the same would have the effect of a warranty and vitiate the policy only if he concealed the true fact in such a manner as to amount to a fraud.”

The same view is expressed more clearly in a later opinion by the same Justice: “We conclude, therefore, that fraud not having been alleged, the situation is the same as if the defense rested upon the grounds that the answers were representations, not warranties, and avoided the policy because material to the risk, and were untrue. Act No. 52 of 1906.” Cunningham v. Penn Mut. Life Ins. Co., 132 La. 1023, 1026, 95 So. 110, 111 (1923).

Moreover, the rule making proof of an intent to deceive essential to the insurer's defense in every case involving an incorrect representation may not be desirable. Since the contract cannot be avoided for any honest error of the applicant, insurers cannot rely to a great extent upon his statements in calculating the risk. Insurance companies must depend more heavily on other sources of information for the evaluation of risks, such as independent investigations and examinations. The result of more careful screening of applicants could mean additional expense to insurers which might not be entirely offset by a possible consequential decrease in the number of poor risks carried. In addition, the insurer will less often be able to rescind the contracts that do cover undesirable risks because of the difficulty of proving fraud. It is possible that these factors may operate ultimately to cause an increase in premium rates in life and health and accident insurance. Since other kinds of contracts may be rescinded on the mere showing of material error the decision in the Gay case may reflect a judgment that insurance contracts are vested with a greater social interest and should be preserved with greater vigor than other types of contracts. This determination would appear to involve a policy consideration of more complexity than is suitable for treatment within the judicial process.

It is possible that the holding of the Gay case will be restricted to the proposition that a correct representation of an erroneous opinion of health will not avoid the policy. This result would again leave the meaning of R.S. 22:619(B) in doubt. In this event, perhaps an examination of other interpretations of

38. Patterson, Misrepresentation by Insured Under the New York Insurance Law, 44 Colum. L. Rev. 241 (1944): “Even though in most cases further information is obtained by the insurer from the medical examiner and from an independent ‘inspection' of the risk, the applicant’s statements are necessarily relied upon to some extent with respect to his medical history, family history, former habits and other matters not readily accessible to the insurer's investigation.”

39. Harnett, Misrepresentations in Life Insurance Applications: An Analysis of the Kansas Law and a Proposal for Reform, 17 Kan. B.A.J. 214, 225 (1948): “[P]roof of fraud is difficult and especially so to an insurer before a jury, presenting a danger to justice; many false claims can succeed under the bad faith requirement, the result being encouragement of wrongdoing of this sort.”


42. The rule of the Gay case was recognized in Kennison v. United States Letter Carriers, Mutual Ben. Ass'n, 132 So.2d 94 (La. App. 1st Cir. 1961), but the decision for the insured appears to be based on the immateriality of the undisclosed physical defect, which was menstrual irregularity. Cf. World Insurance Co. v. Pipes, 255 F.2d 464 (5th Cir. 1958).
similar statutory provisions may prove helpful in future construction of the statute.

Interpretations of similar statutes. In Campbell v. Prudential Ins. Co. of America the Illinois Supreme Court construed a section of the Illinois Insurance Code containing language identical to that of R.S. 22:619(B). In this case the applicant had made representations regarding his medical history which were clearly incorrect and material to the risk. In deciding for the insurance company the court held that proof of an actual intent to deceive was unnecessary to avoid the policy. The opinion stated that the primary legislative purpose in enacting the statute was to place all incorrect statements in insurance applications, whether warranties or representations, on the same footing, and that the statute should be read in the disjunctive. Thus the court indicated that either an innocent but material misstatement or an immaterial but fraudulent misstatement would be grounds for avoiding the policy. Other courts construing similar or identical statutes have negated any requirement of an intent to deceive in the insured for purposes of avoiding the policy due to a materially incorrect representation.

Writers have urged that a statutory provision such as R.S. 22:619(B) should be read to mean that either fraud or materiality attending an inaccurate statement may be, but not necessarily is, sufficient to avoid the contract. This interpretation

43. 15 Ill.2d 308, 155 N.E.2d 9 (1959), 54 Nw. U.L. Rev. 275.
44. ILL. REV. STAT. c. 73, § 766 (1957).
45. The insured represented that he had not had any operation during the preceding 10 years; that he had never been confined to a hospital and had never had an ulcer; that he had not lost any time from work during the preceding year because of illness, and that he had not been treated by a doctor during the preceding five years. 15 Ill.2d 308, 309, 155 N.E.2d 9, 10 (1959).
46. It was generally held, in Illinois, before the enactment of the statute that misrepresentations would avoid a policy only when material, made with knowledge of their falsity, and with intent to deceive. See Note, 54 Nw. U.L. Rev. 275 (1959).
47. E.g., Tolbert v. Mutual Life & Benefit Insurance Co., 236 N.C. 416, 72 S.E.2d 915 (1952), which held that a material representation which is incorrect will constitute sufficient ground upon which to avoid the policy under a statute providing that statements in an application shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy. See also Telford v. New York Life Ins. Co., 9 Cal.2d 103, 69 P.2d 833 (1937), holding that an incorrect representation of fact, whether intentional or unintentional, which is material to the risk, vitiates the policy. The presence of an intention to deceive is not essential.
would make fraud or materiality a minimum requisite for avoidance and would not compel the court to rescind the contract in any case. As a practical matter, this view appears to render ineffectual such a statute in most jurisdictions. Most courts, left to their own resources, have required incorrect representations to be material in order to avoid a policy.\textsuperscript{49} Apparently, no court has avoided a contract for an immateriality incorrect representation even when made with the intent to deceive.\textsuperscript{50} It would appear unreasonable to expect courts to initiate such a practice in the absence of a positive legislative instruction.

The Louisiana Supreme Court appears to be the only tribunal of several which have considered statutes identical to R.S. 22:619 (B) to find a legislative design to make the intent to deceive a constant requisite to avoidance of an insurance policy. Several courts have adopted such a rule independent of legislation or under other types of statutes.\textsuperscript{51} However, it appears that in many cases allowing recovery in spite of an incorrect representation made in good faith the courts reached the same conclusion that would have been attained under a correct application of the traditional rule requiring only inaccuracy and materiality.\textsuperscript{52}

**Individual insurer standard.** Under the traditional jurisprudential view the insurer was required, in order to prove the materiality of the insured's representation, to show that a *prudent insurer* would not have accepted the risk on the same terms if he had been availed of a correct representation.\textsuperscript{53} Several states have adopted the *individual insurer* standard which demands that the party defending on the insured's incorrect representation prove that had the statement been accurate the particular insurer would not have entered the same contract. The advantage of the subjective standard over the objective one is that it permits an accurate determination of whether or not the insured improperly gained admission to a group of policyholders

\textsuperscript{49} See notes 4 and 5 supra.
\textsuperscript{50} PATTERSON, INSURANCE 433 (2d ed. 1957); VANCE, INSURANCE 388 (3d ed. 1951).
\textsuperscript{51} See PATTERSON, CASES AND MATERIALS ON INSURANCE 433 (4th ed. 1961).
\textsuperscript{52} E.g., Heidenreich v. Metropolitan Life Ins. Co., 213 Md. 286, 131 A.2d 914 (1957) (recovery allowed because the insured was in good faith in concealing ulcer; the court expressed doubt as to the materiality of the erroneous representation); Carpenter v. Sun Indem. Co., 138 Neb. 552, 293 N.W. 400 (1940) (insured was not in bad faith in denying that he had ever had an operation when in fact he had undergone an operation following a serious attack of osteomyelitis. He had enjoyed perfect health for a period of 22 years after the operation prior to the time of the application).
to which he was not eligible. This is important because of the variations in the practices of insurance companies with respect to different types of frailties among insureds. Although there appears to be no Louisiana case in which the issue was contested, the courts appear to have been in fact using the individual insurer standard.

Conclusion

The insurance contract should not be avoided upon a fraudulent immaterial statement. In all other types of contracts it is required that the fraud be on a material part of the agreement in order to rescind. But the insurer should not be restrained from avoiding the policy where the insured's representation, although innocent, is incorrect and material. Otherwise the insurer is able to place little reliance upon the insured's representation as a description of the risk, and must resort to more expensive methods to acquire dependable information pertaining to the risk. It would seem that adequate protection could be afforded the interests of both the insurer and the insured by demanding that the insurer prove that he, the individual insurer, would not have made the same contract had the insured's representation been correct.

R.S. 22:619 (B) may be read consistently with this view. The first sentence does not alter the nature of the warranty or the representation. The warranty is a term of the contract agreed upon by the parties, and the representation only an inducement to the contract. This sentence simply operates to give the same legal effects to a merely false warranty as that produced by the incorrect representation. The legal effects of the incorrect representation and the fraudulent warranty are not altered by this statute. The last sentence of the statute may be explained as an attempt to sum up this rule: To vitiate the contract the false warranty need only be made with an intent to deceive; however, if it is not made with an intent to deceive it may nevertheless avoid the contract if it is also material; and the incorrect representation need only be material to avoid the contract.

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54. Id. at 249.
56. Perhaps in future legislation consideration should be given the possibility