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Misrepresentation in Application for Liability Insurance

*Julien C. Renswick**

THE PURPOSE OF THIS PAPER is discussion of the defenses available to the insured when the insurer attempts forfeiture of a liability policy, particularly auto accident liability, for alleged misrepresentation at the time of application by the insured.

Before directing our attention to the cases, some attention should be given to the sales practices employed by agents in selling liability insurance to customers, as knowledge of their techniques of salesmanship is necessary to an understanding of many decisions.

Insurance is sold to a consumer by an agent who may be working for one or several carriers. The agent is generally held to be in the service of the insurer rather than the consumer. The insurer usually has the right to reject an applicant, and makes this decision based upon information contained in a written application form, furnished to the agent by the insurer, to be completed by the applicant.

The applicant almost never knows as much about liability coverage as does the agent. The questions on the application, a printed form prepared by the insurer, are frequently obscure, if not incomprehensible. Therefore, even if the agent initially turns the application forms over to the applicant to fill the answers in himself, in answering the application the applicant typically asks the agent for assistance.

Because the filling in of the application by the consumer himself may be time consuming, may result in defaced application forms, and may contain extraneous information, the agent not infrequently decides to perform the mechanics of filling out the answers himself, with information orally given to him by the applicant, asking no more writing of the applicant than the latter's signature. The applicant, respecting the superior know-how of the agent, almost never protests this procedure.

There is often an additional reason why the agent supervises the application process. Even though the agent, as the servant of the carrier, wants to secure prudent desirable risks for the

* Of the Cleveland bar.

insurer, this agent is also interested, as a commission salesman, in writing as many policyholders as he can. Accordingly, this ambivalence, in a borderline case where he knows the insurer may or may not accept the risk, is capable of causing the agent to shade the responses of the applicant in a manner likely to cause the carrier to accept rather than reject the risk, so as to produce another commission for the agent. Where the agent handles the application himself, this shading can be done either as the result of how the questions are asked (if at all), and how the answers are written.

This process of shading answers so as to invite acceptance rather than the rejection of the applicant is further encouraged by merchandising techniques of the large liability carrier's selling on a mass production basis, so that the agent no longer has the ultimate knowledge of the insured and his family that would militate against such techniques. The mass producing agent may never see the insured again after the initial interview, and frequently has no independent recollection of the interview.

This practice of agents, recognized by the West Virginia Court in 1885 in *Schwarzbach v. Ohio Valley Protective Union*,¹ is as prevalent now as it was then, applying to casualty as well as to life insurance agents.

So that under this system adopted now, it is believed, by all or nearly all life insurance companies, that agents to procure application, have a direct pecuniary interest and generally a large one to procure applications, on which the insurance company will issue policies, and in order to do so, these agents frequently take the preparations of such applications into their own hands and procure the signature of the insured who, trusting to the agent, has not read the application.

So much for the discussion of the insurance business. Let us now assume that there is a misrepresentation by the applicant which causes the carrier to deny coverage. What, if any, remedies are available to the insured or the injured to compel coverage?

Construction of the Contract

Initially, the contract of insurance and the application should be examined minutely to rule out the existence of any ambiguity or obscurity which might explain away the incorrect answer.

¹ 25 W. Va. 622, 662 (1885).

The general rule of construction, by which an insurance policy is construed strongly against the insurer and favorably to the insured, applies to the application and matters contained therein as to the policy itself, inasmuch as the application is also prepared by the insurer.² Accordingly, there is an affirmative duty on the part of the insurer to frame questions in the application so that they will be free from misleading interpretations.³

In support of this rule of construction a Maryland federal district court held that a negative answer to a question in an application for automobile casualty insurance, inquiring whether any operator was mentally impaired because of eye, leg or arm paralysis etc., was not misrepresentation though one of the operators in the family had been affected previously with epilepsy.⁴ And a California court refused to permit an auto insurer to cancel a policy for misrepresentation in the application where the policyholder represented his occupation was that of rancher, though he was also a part time fireman and was on his way to answer a call in his line of duty as a fireman when the loss occurred.⁵

But let us assume that the claimed misrepresentation cannot be explained away by the obscurity or ambiguity of the language in the application. Where do we next go?

Statutory Assistance

The first stopping off place should be the state code of the jurisdiction involved, to learn whether the legislature has seen fit to give special assistance to the insured. Some of the states have statutes which restrict the right of the insurer of a liability carrier to cancel for misrepresentation. Ohio is not one of those states.

² Nielsen v. Mutual Service Casualty Ins. Co., 243 Minn. 246, 67 N. W. 2d 457 (1954).

³ 13 Appelman, Insurance Law and Practice 345 (1943).

⁴ Government Employees Insurance Co. v. Cain, 226 F. Supp. 589 (D. C. Md. 1964).

⁵ "We should also observe that we are considering an application for insurance and an insurance policy which were prepared by plaintiff and which must be construed against it It is well established that conditions which provide for a forfeiture of the interest of the assured, or other persons claiming under the policy, are to be strictly construed against the insurance company, and, if there is any ambiguity in a policy which may reasonably be solved by either one of two constructions, the interpretation shall be adopted which is the most favorable to the assured . . ." Farmers Automobile Inter Insurance Exchange v. Calkins, 39 Cal. App. 2d 390, 393, 103 P. 2d 230, 232 (1940).

The pertinent section of the Ohio Revised Code which deals with Casualty and Motor Vehicle Insurance⁶ deals almost exclusively with rate making. Not one provision of this entire chapter deals with the rights of an insured in the event of cancellation.

There is, however, a most significant section in Chapter 3911, dealing with Domestic and Foreign Life Companies. It is Ohio Revised Code § 3911.06 *False Answer*:

No answer to any interrogatory made by an applicant in his application for a policy shall bar the right to recover upon any policy issued thereon, or be used in evidence at any trial to recover upon such policy, unless it is clearly proved that it was fraudulently made, that it is material, and that it induced the company to issue the policy, that but for such answer the policy would not have been issued, and that the agent or company had no knowledge of the falsity or fraud of such answer.

The attempt to apply this section of the code to prevent cancellation of an auto casualty policy has not been conspicuously successful. The first rejection occurred in the Court of Appeals of Scioto County in *Republic Mutual Insurance Co. v. Wilson*⁷ where the Court held that Section 9391, now Section 3911.06, was not applicable to an automobile insurance policy, but was applicable only when a suit was brought upon a life insurance policy. This view was followed by the Court of Appeals of Cuyahoga County a few years later in *Burpo v. The Resolute Fire Insurance Co.*⁸ Most recently, the Sixth Circuit Court of Appeals endorsed this view in an appeal from a case involving an Ohio assured in the Western Division of the Northern District of Ohio in *Allstate Insurance Co. v. Cook*.⁹

The only opinion contrariwise, also involving an Allstate policy, is the reported opinion of the Court of Appeals of Allen County in *Spriggs v. Martin*.¹⁰

Many of the problems and uncertainties of the law in this jurisdiction would be remedied were the legislature to apply Ohio Revised Code, § 3911.06, to casualty and automobile insurance applications.

⁶ Ohio Rev. Code §§ 3937.01-3937.16.

⁷ 66 Ohio App. 522, 35 N. E. 2d 467 (1940).

⁸ 90 Ohio App. 492, 107 N. E. 2d 227 (1951).

⁹ 324 F. 2d 752 (6th Cir. 1963).

¹⁰ 115 Ohio App. 529, 182 N. E. 2d 20 (1961).

Breach of Warranty or Misrepresentation

Another section of the Ohio Revised Code, § 3515.01 (d), in the chapter entitled Life Insurance Policy Provisions, contains language which would provide great comfort to casualty policyholders if extended to coverage other than life insurance. This subsection provides that:

No policy of life insurance issued or delivered in this state . . . unless such policy contains: (D) A provision that all statements made by the insured in the application shall, in the absence of fraud, be deemed representations and not warranties.

There is much confusion concerning the distinction between representations and warranties in insurance litigation. Yet the ruling of the Court as to whether there is a breach of warranty or misrepresentation frequently determines the result in this type of law suit.

A representation is a statement of the insured concerning a fact or facts which induces the insurer to accept the risk. A warranty is a stipulation within the policy, on the truth or fulfillment of which the validity of the insurance contract depends. To put it a little differently, a representation is part of the preliminary proceedings leading to the contract while a warranty is a part of the completed contract between the insurer and the insured.¹¹

If a representation be false, it must concern a material matter or be made for the purpose of fraud. A warranty need not relate to a material matter, so that once it is determined that a warranty is broken, no inquiry will be made by the Court to determine whether it was significant or trivial, or whether it be made fraudulently or innocently.¹²

How does this affect answers in an application? On the face of things, it would seem that those responses are recitations of facts which induce the carrier to assume the risk. Therefore they sound like representations. The difficulty normally occurs when the insurer adopts an answer to a question in the application as part of the contract, identifying such adopted answer as a condition, covenant, or most frequently, a declaration. Several such answers may be embraced in the printed contract, the small print

¹¹ Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452 (1853).

¹² Connecticut Mutual Life Ins. Co. v. Pyle, 44 Ohio St. 19, 4 N. E. 465 (1886).

of the policy reading "in reliance upon which" the carrier makes its contract with the insured.

Typical of such declaration is one wherein the insured declares that neither the insured nor any resident in his household has been cancelled or suspended for some number of years prior to the application date. This makes the safe driving record of the applicant and his family an integral part of the contract, so that, assuming it is a warranty, if the insurer shows that one of the family may be in violation of this declaration, whether material or not, the contract falls at the option of the insurer.

The successful use of this device makes the lot of the carrier far less difficult when it chooses to challenge coverage of its insured. It no longer needs to show that the incorrect answer in the application was the product of fraud. Materiality need not be shown. Once it is shown that a declaration has been violated by the insured, a breach of warranty is charged by the insurer, which entitles it to void the insurance contract *ab initio*.

The advantage of this device to the insurer is best exemplified by the opinion of *Allstate Insurance v. Cook*.¹³ The policyholder, Cook, had signed an Allstate application in which he denied that he or any member of his household had ever had a license suspension or revocation. A 17 year old son had his license suspended by Juvenile Court for a two month period. The Sixth Circuit affirmed the Trial Court's decision in favor of the carrier, holding that the answer to the question on the application was incorporated into a declaration appearing on a supplemental page of the policy, "in reliance upon which" Allstate issued the policy. A warranty was created, according to the Court, by the language of the policy, which breach justified the voiding of the policy *ab initio*.¹⁴

Cook is to be contrasted with an earlier decision in *Spriggs v. Martin*,¹⁵ involving an identical insurance policy. The same question in the Allstate application was involved, the dispute arising over whether the applicant, Martin, had been cancelled by a prior auto carrier. This Court of Appeals of Allen County, after feebly distinguishing an earlier Court of Appeals opinion in

¹³ *Supra* note 9.

¹⁴ "An express warranty must be strictly complied with and the insured is not permitted to allege as an excuse for non-compliance, that the risk is not affected by the breach thereof since the parties have agreed that the stipulated facts or acts shall be the basis of the contract." *Id.* at 754.

¹⁵ *Supra* note 10.

Burpo v. Resolute Fire Insurance Co.,¹⁶ concluded that the declaration on the supplementary page was a representation and not a warranty. Though recognizing that Ohio Revised Code section 3911.06 is in the chapter on life insurance policies, the Court's opinion revealed that it would in some instances apply it to casualty policies, and affirmed the trial court's decision to apply the rule of proof of fraud in *Cross v. Ledford*¹⁷ before permitting forfeiture of the policy.

In examining the printed contract of a casualty policy we see it is solely the creature of the insurer. We have here no protracted negotiations between two parties, each represented by counsel, who after extended discussion, turn out a joint work product re-edited and revised to suit the wishes of both parties. The insured almost never sees the printed contract until he is accepted as a risk.

If the insurer has discussed the features of its coverage at all, either in its advertising or through its agent at the interview, it has dwelt on the benefits of its coverage to the insured, and has ignored his obligations. It is pure fiction to say that the insurer and the insured have bargained for the printed language appearing in the brochure, which the insured receives and sees only after being accepted and paying the initial premium, and it is even more tenuous to maintain that the insured has knowingly warranted anything which may be contained in the fine print of that contract.

The carrier issued the policy because of the preliminary promise or representations made by the applicant, and for any misrepresentations made therein by the insured, that insured should suffer as required by law. But our Courts ought not allow a representation to be transformed into a warranty by boiler plate language of a casualty insurer in order to avoid the burden of proof required in misrepresentation.

It is submitted that whether a promise in an insurance contract is a warranty should be determined less by the language

¹⁶ *Supra* note 8.

¹⁷ "In order to maintain an action to rescind a contract on the ground that it was procured by fraudulent representations, it must be proved by clear and convincing evidence (1) that there were actual or implied false representations of material matters of fact, (2) that such representations were false, (3) that such representations were made by one party to the other with knowledge of their falsity, (4) that they were made with intent to mislead a party to rely thereon, and (5) that such party relied on such representations with a right to rely thereon." 161 Ohio St. 469, 120 N. E. 2d 118 (1954).

of the contract, especially one prepared and printed only by one of the contracting parties, than by the intention of both parties to the agreement. In the absence of any applicable statute, we submit the following criteria in Volume 7 of *Couch, Cyclopaedia of Insurance Law* 305 (2nd ed. 1961) as postulates for consideration by a tribunal faced with this problem.

Whether a statement is a warranty or not depends upon the intention of the parties which is determined from the language employed and the subject matter to which it relates. In determining this intent, and the consequent existence or non-existence of a warranty—

- (1) the Court will assume that the written words of a contract conveyed to the minds of the parties thereto the meaning and effect which have been imputed to such words by well-established judicial determinations, or by general usage of trade.
- (2) the Court will carefully examine every part of the contract, and construe it as a whole, in order to determine the intention of the parties which, when ascertained, will govern.
- (3) the contract must be construed with reference to the subject matter and the value of the risk.
- (4) the contract must be upheld and given effect if possible since neither forfeiture nor warranties are favored by construction.
- (5) the contract is entitled to reasonable construction.
- (6) Courts will not create, extend or enlarge the contract obligation by construction, or delete or add words or clauses.
- (7) the language used must be construed in accordance with its ordinary or popular meaning subject to such exceptions as and in case of usage, technical terms, etc.
- (8) the written clauses control the printed ones.
- (9) the contract should, in case it is open to construction, be construed strictly against the insurer which formulated it, and liberally in favor of the insured.

Let us now proceed by assuming that we have a misrepresentation, rather than a breach of warranty, which cannot be explained away by ambiguity or obscurity in the policy.

As indicated in the prior section, unlike a breach of warranty, a misrepresentation *per se* is not enough to violate the policy.

Misrepresentation Leading to Forfeiture

It may be said that in Ohio in order to defeat coverage, the representation in the alternative must relate to a material matter or must be made for the purpose of fraud.¹⁸ A few jurisdictions have been reluctant to permit cancellation based on materiality alone when there was no showing of fraud as well.¹⁹

Because of the difficulty with proving fraud under the Ohio rule, most attempted cancellations by carriers for misrepresentation stand or fall on the definition of materiality. The definition of materiality appearing in 12 *Appleman, Insurance Law and Practice*, 398, is deserving of repetition here:

If the representations materially induce the insurer to make the contract, or would reasonably have influenced the insurer in its action upon the application, the representation is deemed material. Some Courts have made the test that if, whether or not the insurer would have issued the policy had the true facts been known, or whether, acting in accordance with the usual practice of insurance companies, it would have declined to take the risk. Elsewhere it has been stated that the proper test is whether knowledge of the risk might reasonably have caused the insurer to decline the risk, and under this rule the question of whether the insurer would have actually issued the policy under these circumstances has been held immaterial. Under this general doctrine the fact that the risk of loss is not actually increased thereby, or that the loss arose by reason of some fact other than that which was misstated, has been held not to alter the result. The most generally accepted test of materiality is whether the matter misstated could reasonably be considered material in affecting the insurer's decision as to whether or not to enter into the contract, and estimating that degree of character of the risk, or in fixing the premium rate thereon.

Supposing the insurer makes an independent investigation of the matters inquired about in the application. This does not alter the materiality of those responses, and does not lessen the right of the insurer to rely upon the applicant's representations.²⁰

¹⁸ *Connecticut Mutual Life Ins. Co. v. Pyle*, *supra* note 12.

¹⁹ See the jurisdictions listed in 12 *Appleman, Insurance Law and Practice*, 421 (1943).

²⁰ *Merchants Fire Assurance Corp. v. Lattimore*, 263 F. 2d 232 (9th Cir. 1959); *Reliance Life Insurance Co. v. Sneed*, 217 Ala. 669, 117 S. 307 (1928); 7 *Couch, Cyclopaedia of Insurance Law* 277 (2d ed. 1961).

For purposes of our paper, let us assume we have found a material misrepresentation in the application for automobile insurance under circumstances that would permit forfeiture. Does this automatically entitle the insurer the right to void the policy?

The answer is in the negative, as the insurer may be precluded from exercising its right to cancel *ab initio* because of waiver or estoppel brought about by the conduct of the insurer from two sources.

The first is the conduct of its agent at the time the application was prepared. The second derives from the conduct of its underwriting department or its claim department in continuing to permit the policyholder to remain one of its assureds after it has obtained knowledge of the misrepresentation, choosing to cancel later only when the coverage of the policy is involved.

Waiver and Estoppel by Conduct of the Agent

We have earlier alluded to the common practice of agents in completing the answers to the application themselves, either in or out of the presence of the applicant.

When a misrepresentation occurs in those circumstances, most Courts estop the insurer from voiding its policy, inasmuch as the misrepresentation was substantially contributed to by the agent.

Thus, if the insured correctly states facts to the agent but the agent fills in improper answers, as a result of mistakes in recording of the agent,²¹ or when correct answers are given by the insured, but the agent deliberately records those answers in a manner not correct,²² the insurer will be held responsible for the agent's error. The carrier may not avoid responsibility when the agent prepares the application on his own motion without direction by the insured.²³ Also if an applicant unintentionally makes a mistake in his responses, which mistake the insured's agent is aware of, but the agent fails to state the facts as he correctly knows them, the carrier is still liable.²⁴

²¹ *Farmers Insurance Co. v. Williams*, 39 Ohio St. 584 (1883).

²² *Saunders v. Allstate Insurance Co.*, 168 Ohio St. 55, 151 N. E. 2d 1 (1958); *Emmco Insurance Co. v. Palatine Insurance Co.*, 263 Wis. 558, 58 N. W. 2d 525 (1953).

²³ *Phoenix Insurance Co. v. Stark*, 120 Ind. 444, 22 N. E. 413 (1889); *Maloney v. Maryland Casualty Co.*, 113 Ark. 174, 167 S. W. 845 (1914).

²⁴ *Hartford Protection Insurance Co. v. Harmer*, *supra* note 12.

On the other hand, if it appears that the false answers were the product of collusion between the agent and the applicant, the insurance will be voided, in spite of the knowledge of the insurer's agent, inasmuch as the absolute lack of good faith by the policyholder will prevent a Court's allowing him to profit therefrom.²⁵

A different result may obtain when the application, though prepared by the agent, is capable of being read by the insured, but is not, and is only signed by him. The Ohio rule is that he is held to have knowledge of the contents of such application.²⁶ As well, it has been held that he is bound by those answers where the language of the policy recites that by acceptance of the policy the insured agrees that the statements in the declaration are his agreements and representations which he answers as true.²⁷ And this appears to be true where the policy warrants the truth of the answers, even though the answers may not have been read by him and may have been supplied by the agent.²⁸ These Ohio Courts of Appeals decisions are difficult to reconcile with the rationale of the earlier decisions reported in this section. Apparently, all three Courts relied on the policy language, which recited that the insured, by accepting the policy, warranted that his earlier answers were true, so that the results in each occurred because the Court decided there was a breach of warranty rather than a true misrepresentation.

Other jurisdictions have not been as demanding of the insured in this situation and have not denied recovery where he has failed to read the application.²⁹

And where the failure of the applicant to read the answers is brought about by illiteracy or a language barrier, his failure to read will not preclude his recovery on the policy.³⁰

²⁵ John Hancock Mut. Life Ins. Co. v. Luzio, 123 Ohio St. 616, 176 N. E. 446 (1931).

²⁶ Republic Mutual Ins. Co. v. Wilson, *supra* note 7.

²⁷ Burpo v. The Resolute Fire Ins. Co., *supra* note 8.

²⁸ Willig v. Prudential Ins. Co., 71 Ohio App. 255, 49 N. E. 2d 4 (1942).

²⁹ National Life Accident Insurance v. Vaughn, 32 S. 2d 490 (La. App. 1947); Tarluc v. Fall Creek Farmers Mutual Fire Insurance Agency, 203 Wis. 319, 234 N. W. 364 (1931).

³⁰ Evans v. Penn. Mut. Life Ins. Co., 322 Pa. 547, 186 A. 133 (1936); Fernandez v. Mutual Life Ins. Co., 230 Mo. App. 857, 78 S. W. 2d 526 (1935).

Waiver or Estoppel by Conduct of Employees Other Than Agents

The rationale of authorities in the preceding section is that where the insurer's agent is aware of some quality in the applicant which might make him undesirable as a risk, yet, in the face of such knowledge, accepts the risk and facilitates the acceptance of the applicant by the manner in which he prepares the application, the insurer rather than the insured should pay for the agent's irresponsibility and disloyalty.

There are other areas where the insurer may be held to have waived its right to forfeiture for misrepresentation, even though the agent was blameless and the knowledge of the false statement may not have come to the carrier's attention until a date well beyond the time of the application. These are three in number; waiver by reason of the assumption of the investigation or defense of a claim; waiver by renewal of the policy, and waiver by retention of premiums. In each instance the act constituting the waiver must be preceded by the insurer's acquiring the knowledge of the facts which constitute the forfeiture or breach.

A. Waiver by the Investigation of a Claim or Defense of Suit

An insurance carrier will not waive any defense it may have under a policy simply by investigating a loss which may have occurred thereunder.³¹ And in a complex investigation, it was held that an investigation of six to seven weeks after the notice of accident was received, before a rescission was sent to the policyholder, was not an unreasonable period of time in which to investigate before deciding to void the policy.³²

On the other hand, when the investigation develops a fact on which the right to forfeit may be claimed, the insurer must waive the defense if it thereafter proceeds as though the policy were valid.³³ The knowledge of several agents may combine to charge the insurer with a waiver.³⁴

Where the insurer undertakes a defense without knowledge

³¹ *Allstate Insurance Co. v. Moldenhauer*, 193 F. 2d 663 (7th Cir. 1952).

³² *Traveler's Indemnity Co. v. Harris*, 216 F. Supp. 420 (E. D. Mo. 1961).

³³ *American Ins. Co. v. Millican*, 26 Ala. App. 31, 153 S. 448 (1933).

³⁴ *Smiesters v. Denmark Mut. Home Fire Ins. Co.*, 177 Wis. 41, 187 N. W. 986 (1922).

of the facts of the breach of a policy, there is no waiver.³⁵ But as above, where the carrier assumes and conducts the defense with knowledge of facts that will allow forfeiture, without any reservation of right, it is precluded thereafter to set up a defense of non-coverage.³⁶

B. Waiver by Renewal

Where the insurer, aware of facts that would justify forfeiture of a policy, renews a policy, such renewal constitutes a waiver or estoppel.³⁷ Among the few reported cases in this area, a landmark decision is *English v. National Casualty Co.*,³⁸ where the Ohio Court permitted recovery by one over the permissible contract age of 65 when his premium payment had been accepted by the insurer at renewal time.³⁹

In marked contrast is the recent Federal District opinion in *Allstate Insurance Co. v. Baileys*.⁴⁰ Baileys applied for insurance from our old friend Allstate in August 1955, answering NO to the question dealing with prior cancellation or suspension of his license. The answer was false. Baileys was renewed by Allstate in August of 1956 and August of 1957. He was involved in an accident in July of 1957, resulting in death to another. Allstate knew of the misrepresentation at the time of the renewal in August, 1957, and did not attempt cancellation until March of 1958 when it proffered a return of premiums.

³⁵ *American Casualty Co. of Reading v. Shely*, 314 Ky. 80, 234 S. W. 2d 303 (1950); *S & E Motor Hire Corp. v. New York Indemnity Co.*, 235 N. Y. S. 626, 134 Misc. Rep. 514 (1929).

³⁶ *Fidelity and Casualty Co. v. Blausey*, 49 Ohio App. 556, 197 N. E. 385 (1934); *Socony Vacuum Oil Co. v. Continental Casualty Co.*, 45 Ohio L. Abs. 458, 67 N. E. 2d 836 (1944).

³⁷ 29A Am. Jur. 240 (1960).

³⁸ 138 Ohio St. 166, 34 N. E. 2d 31 (1941).

³⁹ "The tender of the premium by the insured constituted an offer on his part to renew the policy for another year and this offer was subject to acceptance or rejection by the insurer. By the acceptance and retention of the premium, the insurer exercised that option. It would be inequitable and unjust to allow it to retain the premium and to delay exercising this option until injury occurred to the insured and then elect to escape liability under the policy. If no injury had resulted to the insured until the expiration of the year covered by the premium paid, clearly the insured could not recover the premium on the theory that the policy was ineffective and void. For the same reason the insurer could not retain the premium on a gamble that no liability would occur, and then escape liability after an injury occurs by claiming that a condition precedent had been broken." *Id.* at 170, 33.

⁴⁰ 192 F. Supp. 597 (N. D. Ohio E. D. 1960).

The Court proceeded to dispose of the last renewal in August of 1957 by holding that the policy could be cancelled *ab initio*, because of the claim record of the insured in the year prior to that renewal date (presumably the loss in question). This accident might provide a reason to cancel out the insured in the future at the option of the carrier, but it is shocking, in the face of the renewal by Allstate in August of 1957, several weeks after the notice of the loss was forwarded to the Allstate claims office, that the occurrence of the loss in one policy period would provide legal justification for the voiding of the coverage *ab initio* in the next policy period as long as the premiums were proffered back to the policyholder. The knowledge of the loss received by the claims department before the renewal period is chargeable to the underwriting department when the renewal occurs, even though the underwriter may not have had personal knowledge of that loss.⁴¹ The logic of the Court in *Baileys* case might threaten the coverage retroactively of any insured unfortunate enough to be involved in a loss with declarations similar to those employed by Allstate. Therefore, it is urged that *Baileys* is not likely to be accorded much weight as authority, in view of the violence which it does to the general law, not only of waiver and estoppel, but the law of casualty insurance coverage generally.

C. Waiver by Acceptance of Premium

The most frequent instances of post-application waiver or estoppel occur by reason of the keeping or continued acceptance of premiums by the insurer after the deemed fraud is discovered.

If it has knowledge which entitles it to terminate the policy by its own volition, and yet receives and accepts premiums on the policy thereafter, it is estopped to take advantage of the forfeiture.⁴² Thus, if the company accepts premiums after it knows of an accident and a loss as a consequence thereof, the agent is precluded from denying coverage, even though there

⁴¹ "The general rule, adopted by the overwhelming weight of authority, is to the effect that any knowledge or information coming to an authorized representative of the insurer while acting within the proper scope of his authority is the knowledge of the company. This is necessarily true since an insurance company is a corporation, and therefore an artificial legal person, which can have no knowledge of any facts save and except as the knowledge of its various agents and officers is imparted to it." 16 Appleman, *Insurance Law and Practice*, 633 (1944).

⁴² 29A Am. Jur. 250 (1960).

was a fraud at the time of the accident,⁴³ and a liability insurer who retains a portion of premiums covering a period of time within which an accident occurs waives its objection to the validity of a policy based upon facts of which it had knowledge.⁴⁴

The compelling reasons for applying waiver where the insurer has retained the premiums are set forth in *Scarritt Estate Company v. Casualty Company of America*⁴⁵ and *Merchants Indemnity Corporation v. Eggleston*.⁴⁶

The rationale is stated another way by the Ohio Supreme Court in *English v. National Casualty Co.*⁴⁷

It is also a well settled rule of law that an insurer, which, with knowledge of the facts which would entitle it to treat the policy as no longer in force, receives and accepts a premium on a policy, is estopped to take advantage of the forfeiture. The insurer can not treat the policy as void for the purpose of defense to an action to recover for a loss thereafter occurring, and at the same time treat it as valid for the purpose of earning and collecting further premiums.

Since waiver and estoppel are equitable remedies available to one allegedly wronged by the misconduct of another, they are likely to be applied by a Court only if the supplicant comes before the Court in cleaner raiment than does the defendant. Recognizing that, in all the cases, there is a taint of wrongdoing on the part of the insured at the time of the application, the Court is apt to look very closely upon the subsequent conduct of the insured in his relation to the insurer, to be sure the insured has thereafter dealt in good faith with the insurer.

Therefore, where the policyholder may have been playing fast and loose with his insurer for some period of time after the

⁴³ *Perry v. Campbell*, 45 Ill. App. 2d 271, 195 N. E. 2d 844 (1963).

⁴⁴ *Goldstein v. Metropolitan Casualty Ins. Co. of New York*, 10 N. J. Super. 291, 77 A. 2d 51 (1950); *Neat v. Miller*, 170 Wash. 625, 17 P. 2d 32 (1932); *Royal Indemnity v. Hook*, 155 Va. 956, 157 S. E. 414 (1931).

⁴⁵ "But the rule is well settled that if the insurer or its agent who takes the insurance knows of the existence of the ground of forfeiture provided in the policy, and with such knowledge delivers the policy and collects the premium, the ground of forfeiture is deemed waived. The opposite rule would enable an insurance company to play fast and loose with its patrons, to lull them into a feeling of false security by pretending that the insurance was valid, and when a loss occurred, bringing forth as a defense a ground of forfeiture that existed from the inception of the contract, and of which the insurer all along had full knowledge." 166 Mo. App. 567, 570, 149 S. W. 1049, 1050 (1912).

⁴⁶ 37 N. J. 114, 179 A. 2d 505 (1962).

⁴⁷ *Supra*, note 38 at 171, 34.

coverage was commenced, retention of premiums or renewal of premiums may still not be enough to cause the Court to invoke waiver or estoppel to prevent voiding of the policy.

Conclusion

Defense against the insurer's effort to void a casualty policy for misrepresentation, though it may be difficult, is not an impossible task. Close scrutiny of the application and contract of insurance may turn up ambiguity or obscurity that will cast doubt on the falseness of the representation. The manner in which the application was taken should undergo minute examination in order to determine whether the completed document was the product of the agent rather than of the insured. And it is vital to learn the date on which the carrier first had awareness of the facts which it claims were misrepresented, so that one may know the availability of the defense of waiver and estoppel.

The most confusion, and therefore the most difficulty, arises when the insurer maintains that the language of the contract makes the alleged false answer a breach of warranty rather than a misrepresentation. It is suggested that the desirable solution is remedial action by the legislature in providing for casualty policyholders the same protection now afforded to life insurance policyholders. Forfeiture of automobile liability insurance ought not to depend on the ingenuity of the attorneys preparing the small print of any particular insurance contract. Statutory standards defining forfeiture for misrepresentation should be created, to apply to all casualty insurers who sell their policies within the same boundaries.