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Need a Warranty Be Material to Avoid a Contract of Insurance in Montana?

In construing the effect of warranties in marine-insurance contracts, the early English cases held that a breach of warranty avoided the policy even though the warranty related to a matter which might not be material to the risk.[1] A warranty defined the risk, and the parties could stipulate that a statement made by the insured defining the risk should conclusively be presumed to be material.[2]

In *Jeffries v. Economical Mutual Life Insurance Company*,[3] the insured warranted that he was single when in fact he was married. The Supreme Court of the United States held this was a defense to the insurer, even though married men are better risks. Thus, the Supreme Court of the United States adopted the English rule as applied to marine insurance risks and uncritically applied it to non-marine insurance risks; and state courts did the same thing.[4] It is obvious that the transfer of the English rule to non-marine insurance risks resulted in an unbalanced bargaining situation between insured and insurer with the insurer's superior power of selection and control over the risks. The courts slavishly followed,

> "A rule of tight construction devised for astute bargains between equals . . . (and) by the use of the printed forms the insurer narrowly restricted the bargaining about warranties."[5]

The official abrogation of the doctrine which precludes inquiry into the materiality of facts warranted has been accomplished by statute

[1]Kenyon & Another v. Berthon (1778), 1 Doug K.B. 12, 99 E.R. 10. The warranty was, "In Port 20th of July, 1776.' The ship was proven to have sailed the 18th. Lord Mansfield held this was a warranty and though the difference of two days might not make any material difference in the risk, yet the underwriter was not liable.

[2]DeHahn v. Hartley (1786) 1 Term R 343, 14 Engl. Rul. Cas. 171; Baring v. Clagett (1802) 3 Bos & P. 201.

[3](1874), 89 U. S. 47, 22 L. Ed. 833.

[4]Duncan v. Sun River Fire Insurance (1831) 6 Wend. 488, 22 Am. Dec. 539; Fitch v. Amer. Popular Life Ins. Co. (1875) 59 N. Y. 557, 17 Am. Rep. 372.

[5]Patterson, **Warranties in Insurance Law,** 34 COLUM. L. REV. 595 (1934).

in most of the states.[6] The legislative intent of these statutes is evidently to obviate the avoidance of insurance contracts upon breach of warranted facts unless those facts are material to the risk.[7] Statutes of this character are valid,[8] and generally are liberally construed in favor of the insured to preclude forfeiture for breach of a warranty which relates to an immaterial matter.[9]

[6] 4 COUCH, CYCLOPEDIA OF INSURANCE LAW (1929), §§820a-820rr, pp. 2628-2666. A number of statutes have been drafted in such general terms that they would seem to apply to every kind of insurance, e.g., Neb. Comp. Stat. 1922, §7787 as set out and discussed in Muhlbach v. Ill. B. Life Assn. (1922) 108 Neb. 146, 187 N.W. 787. The statutes of most of the states apply to life policies either specifically or by implication. e.g., Easton D. P. Dye Works v. Travelers Ins. Co. (1923) 234 N. Y. 441, 138 N.E. 401 (Construing N. Y. Ins. Laws 1906, §581). Some state statutes relate to health and accident policies, e.g., Conn. Pub. Laws 1913-1915, p. 1849, Chap. 223; others to life and health, e.g., Makos v. Banker A. Ins. Co. (1921) (Mo. App.) 234 S.W. 369, construing Mo. Rev. Stat. 1919, §6142; and still others to life and accident policies, e.g., Security L. Ins. Co. v. Schwartz (1922) 221 Mich. Pub. Acts 1917, p. 607, §17. Fire insurance policies are within the meaning and application of many statutes, e.g., Albert v. Mutual L. Ins. Co. (1898) 122 N. C. 927, 65 Am. St. Rep. 693, (Construing N. C. Act March 4, 1893.) Fidelity insurance has also been held to be within the purview of some statutes, e.g., Kentucky, Minnesota, and Oklahoma statutes have been held to apply to applications for fidelity insurance.

[7] Metropolitan L. Ins. Co. v. Goodman, (1914) 10 Ala App. 446, 65 So. 449; Mutual L. Ins. Co. v. Mandelbaum (1922) 207 Ala. 234, 92 So. 440, 29 A.L.R. 649.

[8] Brotherhood of American Yeomen v. Manz, (1922) 23 Ariz. 610, 206 P. 403. Such statutes are generally considered as being within the states' police power and not contrary to public policy, e.g., John Hancock M. L. Ins Co. v. Warren (1901) 181 U. S. 73, 21 S. Ct. 535, 45 L. Ed. 765, affirming Ohio Ins. St.

[9] Metro. L. Ins. Co. v. Goodman, (1914) 10 Ala. App. 446, 65 So. 449. However, some courts have failed to take into account the legislative intent and have instead adhered to the rule precluding inquiry into the materiality of a warranted fact, 4 COUCH CYCLOPEDIA OF INSURANCE LAW (1929), §§820a-820rr, pp. 2628-2666 and COUCH, CUMULATIVE SUPPLEMENT (1945) §§820a-820rr. As a general rule, the statute supersedes any conflicting contract provisions which expressly make the answers in an application a part of the insurance contract and material, e.g., Fidelity M. L. Association v. Ficklin, (1897) 74 Md. 185, 23 A. 197.

THE STATUTES IN MONTANA AND CALIFORNIA

Montana and California early enacted statutes dealing with warranties.[10] The first section to mention materiality, R.C.M. 1935, Section 8126, sets out the elements of a warranty as to the future, or a promissory warranty.[11] It is provided, "A statement in a policy which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty that such an act or omission shall take place." R.C.M. 1935, Section 8128 further provides, "The violation of a material warranty or other material provision of a policy, on the part of either party thereto, entitles the other to rescind."[12] Here, materiality seems to be extended to all types of warranties. But some qualification of this seems contemplated by R.C.M. 1935, Section 8129, which provides, "A policy may declare that a violation of specified provisions shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy."[13] Do these statutes require that a warranty must be material in order that its breach avoid the policy? Certainly the mere reading of the statutes leaves one confused; and the matter has not been clarified by the decisions in Montana and California.

MONTANA DECISIONS

In *Collins v. Metropolitan Life Insurance Co.*,[14] the insured sought to recover upon a life insurance policy, in which had been incorporated the application stating that he was not in any way "connected" with the liquor business. The policy provided that it was to be void if any statement in the application was not true. The Montana Supreme Court found that

[10]R.C.M. 1935, §§8121 through 8130 (Enacted 1895) and Cal. Civil Code, 1920, §§2603 through 2612 (Enacted 1872) provide the same in each respective section. In order to clarify discussion of the statutes as interpreted by the California courts, Montana code numbers, as they appear in R.C.M. 1935, §§8121 through 8130, will be substituted for respective California code numbers in the body of this comment. R.C.M. 1935, §8121 provides: "A warranty is either express or implied," and R.C.M. 1935, §8122 provides: 'No particular form of words is necessary to create a warranty.' Further, R.C.M. 1935, §8123 provides, in effect, that every express warranty must be contained in the policy itself or incorporated therein by reference.

[11]Courts generally distinguish between affirmative and promissory warranties. Generally, an affirmative warranty asserts an existing fact or condition or a denial of its existence; whereas, a promissory warranty is one in which the insured undertakes that some particular thing shall or shall not be done or that some condition shall be fulfilled. See 4 COUCH CYCLOPEDIA OF INSURANCE LAW (1929), §858, at p. 2823.

[12]Cal. Civil Code, 1920, §2610.

[13]Cal. Civil Code, 1920, §2611.

[14](1905) 32 Mont. 329, 80 P. 609, 108 Am. St. Rep. 58.

the insured was not in any way "connected" with the liquor business and therefore the fact warranted was not false. However, the court said, *obiter dictum,* that cases cited by the insurer,

> "undoubtedly sustain the view that it makes no difference whether the particular representation is material to the risk or not, . . . The question of materiality is settled and determined by the stipulations of the contract, and their truth or falsity made determinative of the rights of the parties."

In *Pelican v. Mutual Life Insurance Co.,*[15] it appears that the insured stated in his application for life insurance that he had not suffered from tuberculosis; and the policy provided that all statements made by the insured were to be deemed representations and not warranties. The insured died of acute pulmonary tuberculosis about nine months after receipt of the policy. The court held that the statements were to be construed as representations and not warranties.[16] However, the court said in regard to a warranty,

> "The general rule is that a warranty must be a part and parcel of the contract, made so by express agreement of the parties upon the face of the policy . . . It need not be actually material to the risk; its falsity will bar recovery by the express stipulation the statement is warranted to be true and thus is made material."

In *Mandoli v. National Council of Knights and Ladies of Security,*[17] it appears that the insured made statements in an application for life insurance that she had not consulted or received treatment from a doctor within five years previous to making the application for insurance and the insured agreed that the statements in the application constituted warranties. Evidence revealed that the insured had been treated for certain minor ailments within the five years. The Montana Supreme Court, in giving judgment for the insurer because of falsity of statements warranted to be true, quoted the general rule advanced in *Pelican v. Mutual Life Insurance Co.*[18]

15 (1911) 44 Mont. 277, 288, 199 P. 778.

16 The courts will always determine whether a representation is material. The general test of materiality is "whether the insurer would have regarded the fact or matter communicated, as substantially increasing chances of loss insured against so as to bring about a rejection of the risk or charging of an increased premium." See 29 Amer. Juris. 424, §525. Penn. Mut. L. Ins. Co. v. Mechanics Saving Bank & T. Co., (C.C.A. 6th) 74 F. 413, 73 F. 653, and 38 L.R.A. 33, is cited.

17 (1920) 58 Mont. 671, 194 P. 493.

18 (1911) 44 Mont. 277, 288, 199 P. 778.

In view of the dicta in these cases, it would seem that the insurer may avoid a policy upon breach of an affirmative warranty which is immaterial; but these cases made no reference to the statutory provisions.[19]

Weyh et al v. California Insurance Co.,[20] is the first case which interprets the warranty sections of R.C.M. 1935 as applied to affirmative warranties. It appears that insured bought an automobile from an automobile dealer who assigned the contract of conditional sale to a commercial credit company. The latter secured a policy of insurance with the defendant insurance company. The policy stated that the age of the car was "warranted" by the insured. The car was a 1926 model, rather than a 1927 model as was stated in the policy. The court held the warranty was material to the risk involved since the age affected the premium rate.[21] The plaintiff had contended, however, that "merely calling statements warranties does not make them such"; and that the clause of the policy rendering it void for misrepresentation of *material facts,* coupled with the fact that the policy did not specifically designate the provisions which would render it invalid, brought the policy within the rule respecting representations. The plaintiff cited R.C.M. 1935, Section 8129,[22] to uphold this contention. In answer, the court said this section "clearly refers to provisions in a policy other than warranties" and that R.C.M. 1935, Section 8125,[23] dealing with an express warranty, and R.C.M. 1935, Section 8130,[24] which states that "a breach of warranty . . . in its inception prevents the policy from attaching to the risk," were controlling. In effect, the court said that materiality is not important if a policy states that it is subject to warranties therein contained and that it shall be void if any of them are violated by the assured.

The court's interpretation of R.C.M. 1935, Section 8129 would seem to leave the situation in a more confused state than existed prior to the court's decision. But it does appear that the Montana Supreme Court has not abrogated the distinction between representations and warranties, and, where there is false affirmative warranty, the Montana court will not look to the materiality of the fact warranted but will consider the contract of insurance voidable.

[19]R.C.M. 1935, §§8121 through 8130.

[20](1931) 89 Mont. 298, 296 P. 1030.

[21]The court cited HUDDY ON AUTOMOBILES (8th Ed.) p. 1139 and BERRY ON AUTOMOBILES, p. 1570.

[22]Cal. Civil Code, 1920, §2611.

[23]Cal. Civil Code, 1920, §2607.

[24]Cal. Civil Code, 1920, §2612.

CALIFORNIA DECISIONS

How have the California courts interpreted the same statutes? In *Solomon v. Federal Insurance Co.*,[25] a fire insurance policy was issued covering the insured's car. The policy stated that it was to be null and void if any warranty was breached. The court held a misdescription of the age of the car to be

> "such a material misdescription of the thing insured as to constitute a breach of express warranty provided for in" . . . R.C.M. 1935, Section 8125.

It was said further,

> "If the misdescription of the auto amounts to a breach of warranty, this clause in the policy taken in connection with . . . (R.C.M. 1935, Section 8129) of the civil code, precludes any consideration of the materiality of the breach."

Again, in *Wilkinson v. Standard Accident Isurance Company of Detroit*,[26] the court said, *obiter dictum*,

> "An agreement between insurer and insured that the falsity of any statement in an application for insurance will avoid the policy is binding, regardless of the materiality of the statement."

In *Bennett v. Northwestern National Insurance Company*,[27] an insurance policy covering fire and theft of a car was issued containing a warranty clause that statements of certain facts in the policy were warranted to be true. The court said,

> "It is the general rule that an affirmative warranty is in the nature of a condition precedent to the validity of the policy, and, if broken in its inception, the policy never attaches to the risk which it purports to cover . . . without regard to the materiality of the facts warranted."

Thus the California court seemed to hold that materiality is not important when dealing with an affirmative warranty.

Victoria S. S. Co. v. Western Assurance Co. of Toronto[28] involved an agreement whereby the amount of money the insured would earn by carrying a load of lumber was insured. The premium rate was fixed at a certain percentage of the freight to be charged. The assured agreed to declare the amount of the risk, i.e., the amount of lumber shipped,

[25] (1917) 176 Cal. 133, 167 P. 859.
[26] (1919) 180 Cal. 252, 180 P. 607.
[27] (1927) 84 Cal. App. 130, 257 P. 586.
[28] (1914) 167 Cal. App. 130, 257 P. 586.

when it became known to him. The ship burned while being loaded. The court held that the failure to declare the amount of the risk as it became known was not an act which materially affected the risk since such a declaration could not change the amount of the premium or the liability of the insurer in case of loss. The court construed Sections 8126,[29] 8128,[30] and 8129[31] together in saying that,

> "under these provisions no right to avoid or rescind a subsisting policy occurs from the violation of any provision thereof, whether technically a warranty or not, unless such provision is material, except in such cases where the policy itself declares that such breach shall avoid it."

In answer to the defendant's contention that Sections 8126 and 8128 were applicable only to implied warranties and that the violation of an express warranty avoids the policy regardless of materiality,[32] the court said,

> "Under section . . . (8126) a warranty, whether express or implied is deemed to be material only when it is to do or not to do a thing which materially affects the risk."

But in this case, the court was construing the effect of a promissory warranty as distinct from an affirmative warranty.[33] The case may be declaratory of a principle that a breach of immaterial provisions in a policy will avoid it only if the policy *specifically* provides for such avoidance upon breach thereof.[34] But it is not clear that the California court would consider materiality important when dealing with an affirmative warranty, although the California court, unlike the Montana Supreme Court, does seem to take the position that R.C.M. 1935, Section 8129 applies to warranty.

[29]Cal. Civil Code, 1920, §2608.

[30]Cal. Civil Code, 1920, §2610.

[31]Cal. Civil Code, 1920, §2611.

[32]Generally, implied warranties have been restricted to marine insurance policies, i.e., implied warranty as to seaworthiness. See 4 COUCH, CYCLOPEDIA OF INSURANCE LAWS (1929) §858, p. 2822.

[33]Gise v. Fidelity & Cas. Co. of N. Y. (1922) 188 Cal. 429, 206 P. 624, 22 A.L.R. 1476, involved a warranty that no person would be employed by the assured in violation of law. The court held since employment of persons under legal age **materially affected the risk,** breach would allow the insurer to avoid the policy.

[34]Everett v. Standard A. Ins. Co. (1920) 45 Cal. App. 332, 187 P. 996, involved an accident insurance policy. The policy stated, "Full compliance of the insured . . . with all provisions of this policy is a condition precedent to recovery hereunder . . ." The court recognized this language to be in the nature of a promissory warranty but said it fell short of a declaration ". . . that a violation of **specified** provisions shall avoid it," as provided in §8129 (Cal. Civil Code, 1920, §2611).

It is obvious that legislative action is necessary to clarify the Montana statutes. It is submitted that California took a step in the right direction when, in 1935, its legislature enacted a law,[35] affecting "every policy of life, disability, or life and disability insurance issued or delivered within this state . . .," which provides:

> ". . . and all statements purporting to be made by the insured shall, in absence of fraud, be representations and not warranties. Any waiver of the provisions of this section shall be void."[36]

The advent of an abrogation of the distinction between representations and warranties would almost certainly result in abandonment of the common law doctrine of materiality with respect to warranties.[37] If all statements by the insured in a policy are treated as representations, the materiality of the statements will be inquired into in every case; whether the warranty is express or implied, promissory or affirmative. Thus, the insured will be freed from the courts' application of a harsh doctrine that was developed by the English courts as protection for an infant merchant-marine industry.[38]

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[35]Cal. Statutes, 1935, Ch. 245, §10113.

[36]Martin v. Mut. Ben. Health and Acc. Assn. (1945) 71 Cal. App. (2d) 557, 162, P. (2d) 980, involved materiality of statements set forth in an application for insurance.

[37]Under such statutes, it has been held that the question of materiality of any such statement is for the jury, e.g., Penn. Mut. Life Ins Co. v. Mechanics Sav. Bank and Trust Co. (1896) 72 F. 413, 19 C.C.A. 286, 38 L.R.A. 33, unless the matter involved is manifestly material to the risk, e.g., March v. Insurance Co. (1898) 186 Pa. 629, 40 A. 1100, 65 Am. St. Rep. 887; nor can the parties by expressly agreeing upon materiality of the statement made, withdraw the question from the jury, e.g., Germania Ins. Co. v. Rudwig (1882) 80 Ky. 223. Under the common law rule, breach of warranty avoids the contract irrespective of its gravity, i.e., literal truth is essential to the validity of the contract of insurance; whereas, a false representation must not only be made with respect to a material matter and be false but it must appear that the applicant knows the falsity of the fact stated to be true and that it was made with a fraudulent and corrupt motive, e.g., Hazard v. New England M. Ins. Co., (1834) 8 Pet. 557, 8 L. Ed. 1043; Lieberman v. American B. & Cas. Co. (1922) 244 S.W. 102

[38]**Supra,** note 5