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INSURANCE — MATERIAL MISREPRESENTATIONS — MATTER OF FACT OR OF LAW—"MEDICAL CONSULTATION" CASES—Statutes, in some two-thirds of the forty-eight states, have the approximate effect of changing all warranties in life insurance policies into representations.[1]

[1] GOBLE, INSURANCE 112 (1931); VANCE, INSURANCE 394 (1930); PATTERSON,

And in most of the remaining states the courts have interpreted statements of the applicant as representations rather than warranties wherever there has been room for doubt,[2] to avoid the harshness[3] of the rules governing a breach of warranty. The effect of all this is to eliminate immaterial misrepresentations of fact from the list of the insurer's possible defenses,[4] and to increase the importance of determining when a misrepresentation is material, and by whom[5] that inquiry is to be pursued.

For our present purposes it is sufficient to state that, at common law, a misrepresentation of fact made by a life insurance applicant is deemed to be material if the insurer was thereby reasonably[6] and substantially influenced in his decision as to accepting the risk, or as to the terms of the acceptance.[7] And the general rule is that the application of this test[8] of materiality to the facts of a given case is for the jury, save where the misrepresentation is so clearly material or immaterial as to be such as a matter of law.[9]

A special phase of this latter problem, the "medical consultation" case, was the concern of a recent New York Court of Appeals decision in *Geer v. Union Mutual Life Ins. Co.*[10] There, decedent, in response to

INSURANCE LAW 309 ff. (1935); 9 TULANE L. REV. 304 (1935).

[2] VANCE, INSURANCE 390 ff. (1930); PATTERSON, INSURANCE LAW 252 ff. (1935); Moulor v. American Life Ins. Co., 111 U. S. 335, 4 S. Ct. 466 (1884).

[3] For example, see Jeffries v. Economical Life Ins. Co., 22 Wall. (89 U. S.) 47, 22 L. Ed. 833 (1874), where recovery was barred though insured was a better risk than he warranted himself to be.

[4] Since the rule is settled that if a statement of the insured is a representation rather than a warranty, it must be at least material as well as false for the insurer to avoid liability, in absence of fraud. VANCE, INSURANCE 360 (1930).

[5] I.e., matter of law for the court, or of fact for the jury.

[6] As to what standard of "reasonableness" applies, see the late Chief Justice Taft's discussion in Penn. Mut. Life Ins. Co. v. Mechanics Co., (C. C. A. 6th, 1896) 72 F. 413 at 423-430; PATTERSON, INSURANCE LAW, § 82 (1935); VANCE, INSURANCE 384 (1930).

[7] VANCE, INSURANCE 382 ff. (1930); 4 COOLEY, INSURANCE 3039 (1927); 4 COUCH, CYCLOPEDIA OF INSURANCE LAW, § 829 (1929).

[8] Not to be confused with determination of the fact of misrepresentation. For an example of this latter, see Metropolitan Life Ins. Co. v. Fitzgerald, 137 Ark. 366, 209 S. W. 77 (1919).

[9] Connecticut Ins. Co. v. Colorado Co., 50 Colo. 424, 116 P. 154 (1911); Life & Casualty Ins. Co. v. Burkett, 38 Ga. App. 328, 144 S. E. 29 (1928); Gurley v. Massac Assn., 186 Ill. App. 492 (1914); Missouri Life Ins. Co. v. Pater, (C. C. A. 7th, 1926) 15 F. (2d) 737; American Central Ins. Co. v. Alexander, (Tex. Comm. App. 1933) 56 S. W. (2d) 864; Mack v. Pacific Life Ins. Co., 167 Minn. 53, 208 N. W. 410 (1926); and in general, see 4 COOLEY, INSURANCE, 3086 (1927); 4 COUCH, CYCLOPEDIA OF INSURANCE LAW 2698 (1929).

[10] 273 N. Y. 261, 7 N. E. (2d) 125 (1937).

inquiry[11] in his application for life insurance, failed to list the name of a certain doctor, at whose order he had been hospitalized for two weeks some four years previous for para-typhoid, and whom he had consulted for a nervous condition a few weeks before applying for the policy. The court held, two judges dissenting, that save in the instance of consultation for trivial ailments, not deemed to be within the contemplation of the insurer's inquiry,[12] failure to disclose medical consultations is a material misrepresentation as a matter of law, requiring a directed verdict for the defendant insurer. The dissenting opinion maintained, on the other hand, that no reason existed for not referring the materiality of the misrepresentation to the determination of the jury, it not being so clearly material or immaterial in this case as to call for a directed verdict.

The decision in the *Geer* case follows rather naturally from other recent New York decisions.[13] It is likewise supported by the substantial majority of other state cases on the same point.[14] A like federal rule[15] has made that forum a popular haven for insurers.

The majority rule is of practical significance, for under it a certain legal defense for the insurer supplants the jury with its sympathetic

[11] "Give name and address of each physician consulted by you during the past ten years, and cause for consultation."

[12] This is the view very generally taken by the courts as to casual ailments not deemed to have any permanent effect on one's health. Arkansas State Life Ins. Co. v. Allen, 166 Ark. 490, 266 S. W. 449 (1924); Southern States Life Ins. Co. v. Morris, 24 Ga. App. 746, 102 S. E. 179 (1920); Mutual Life Ins. Co. v. Leaksville Mills, 172 N. C. 534, 90 S. E. 574 (1916); 14 VA. L. REV. 313 (1928); 21 MICH. L. REV. 941 (1923).

[13] Anderson v. Aetna Life Ins. Co., 265 N. Y. 376, 193 N. E. 181 (1934); Minsker v. John Hancock Ins. Co., 254 N. Y. 333, 173 N. E. 4 (1930); Jenkins v. John Hancock Ins. Co., 257 N. Y. 289, 178 N. E. 9 (1931). For possible distinguishing grounds as to the first two cases, see dissenting opinion in the Geer case, 273 N. Y. 261 at 279 ff.

[14] Loder v. Metropolitan Life Ins. Co., 128 Pa. Super. 155, 193 A. 403 (1937); Kerpchak v. John Hancock Ins. Co., 97 N. J. L. 196, 117 A. 836 (1922); Hughes v. Metropolitan Life Ins. Co., 117 Me. 244, 103 A. 465 (1918); Shaughnessy v. New York Life Ins. Co., 163 Minn. 134, 203 N. W. 600 (1925); Schas v. Equitable Life Ins. Co., 166 N. C. 55, 81 S. E. 1014 (1914); Lewis v. New York Life Ins. Co., (Mo. App. 1919) 209 S. W. 625; Sowiczki v. Modern Woodmen, 192 Mich. 265, 158 N. W. 891 (1916).

Contra: Metropolitan Life Ins. Co. v. Cooper, 54 Ga. App. 192, 187 S. E. 167 (1936); Mutual Life Ins. Co. v. Held, 157 Md. 551, 146 A. 755 (1929); Plotner v. Northwestern Life Ins. Co., 48 N. D. 295, 183 N. W. 1000 (1921). Cf. Mutual Life Ins. Co. v. Ontario Co., [1925] App. Cas. 344.

[15] Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613, 36 S. Ct. 676 (1916); Kavakos v. Equitable Life Assur. Soc., (D. C. App. 1936) 88 F. (2d) 763; Prudential Life Ins. Co. v. Loewenstein, (C. C. A. 4th, 1935) 76 F. (2d) 479; Equitable Life Ins. Co. v. Carver, (D. C. Wash. 1936) 17 F. Supp. 23.

leanings toward the insured.[16] But the reason for the rule, so far as the decisions are resorted to, is much more elusive than its significance. The *Geer* case, and its predecessors,[17] are unique in devoting considerable discussion to this point, but the conclusion of the New York court is not entirely satisfactory. It is based largely on the theory that the insurer is entitled, by virtue of specific questions, to insist on certain factual disclosures as bases for its determination regarding acceptance of risk. This proposition, taken at its face value, is hard to reconcile with the policy of the New York statute,[18] which provides that all statements by the insured shall be deemed representations and not warranties. And an embarrassment in its application is pointed out by a recent English decision[19] in the event the insurer be disposed to extend his specific inquiries to consultations concerning trivial ailments.[20]

Probably a more consonant rationale for the majority rule is that information concerning medical consultation is so important a clue to the health of the applicant, and to his correlative desirability as a risk, that the undisclosed consultation, save where it pertains to trivial ailments, would with certainty reasonably and substantially influence the insurer in his decision as to accepting the risk, or as to the terms of the acceptance. This assumption is no doubt implicit in many of the decisions enunciating the majority rule.

Before concluding, certain possible variants affecting the operation of the majority rule should be noted. First, in numerous jurisdictions the insurer must establish not only that the insured made a material misrepresentation, but also that the insured intended to misrepresent.[21] This is significant, for it means that normally there will be a jury question of good faith.[22] And added to the general bias of the jury, already referred to, there is the natural reluctance to label the insured, who has passed beyond, as a "fraud." Second, in a few jurisdictions,

[16] For example, in the Geer case the jury below had determined that the misrepresentations were not material.

[17] Note 13, supra.

[18] 4 N. Y. Cons. Laws (1909), p. 3902, § 58.

[19] Mutual Life Ins. Co. v. Ontario Co., [1925] App. Cas. 344. See note 14, supra.

[20] See note 12, supra. All the cases proceed on the avowed theory that such consultations were not contemplated within the scope of the inquiry, but strong policy considerations inspire this theory.

[21] Ratkovic v. Metropolitan Life Ins. Co., 126 Pa. Super. 492, 191 A. 201 (1937); Kerpchak v. John Hancock Ins. Co., 97 N. J. L. 196, 117 A. 836 (1922); Golightly v. New York Life Ins. Co., (C. C. A. 8th, 1936) 85 F. (2d) 122; 39 YALE L. J. 283 (1929).

[22] But in both the Ratkovic and Kerpchak cases, supra note 21, the court directed a verdict for the defendant insurer because, consultations as to fairly serious ailments having taken place within a couple of months prior to applying for the policy, the knowledge of falsity of the misrepresentations was imputed to insured as a matter of law.

statutes[23] require that the unrevealed matter increase the risk of loss—a hindsight approach, and therefore differing theoretically and practically from our majority rule.[24] Finally, and most drastic in their effect on the application of the majority rule, are those statutes[25] which insist that the thing misrepresented shall have in fact contributed to or caused the ultimate loss.[26]

These variants should be kept in mind, but should not lead one to underestimate the vitality and importance in many jurisdictions of the rule announced in the *Geer* case.

[23] See N. D. Comp. Laws (1913), § 6501; Mass. Gen. Laws (Ter. ed. 1932), c. 175, § 186.

[24] In Van Woert v. Modern Woodmen, 29 N. D. 441, 151 N. W. 224 (1915), the court applied the North Dakota statute, supra, but decided as a matter of law that the diseases consulted about in the unrevealed consultations increased the risk, without indicating whether it deemed this determination always to be one for the court or not.

But in applying the Massachusetts statute, the court of that state, in Schiller v. Metropolitan Life Ins. Co., (Mass. 1936) 3 N. E. (2d) 384, declared that whether nondisclosure of certain ailments and consultations concerning them increased risk of loss was a question of fact for the jury.

[25] Kan. Gen. Stat. (1935), § 40-418; R. I. Gen. Laws (1923), § 5037; Mo. Stat. Ann. (1932), § 5732.

[26] The Missouri and Rhode Island statutes both provide that this determination is for the jury.

An unusual result was reached by the Missouri court in Keller v. Home Life Ins. Co., 198 Mo. 440, 95 S. W. 903 (1906), where it declared in effect that no medical consultation nondisclosure could avoid insurer's liability under the Missouri statute because the "consultation" could not contribute to the ultimate loss. This is an unfortunate play on words.