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The "Insurance Contract" Warranties and Representations

LEGISLATION

THE "INSURANCE CONTRACT" WARRANTIES AND REPRESENTATIONS

The "Insurance Contract"

From the standpoint of the insured, possibly the most important provisions of the Insurance Law are those dealing with the insurance contract since any defense to his (or his beneficiaries') recovery will more likely than not arise from that source. Thus it is understandable why any legislation for the "protection" of the insured frequently involves the contract of insurance and when the New York Insurance Law was recently revised,[1] several important changes concerning the insurance contract were enacted. For instance, included in the recent revision is the first statutory definition in this state of an "insurance contract".[2] Under Section 41 (1), the term "insurance contract" is

". . . deemed to include any agreement or other transaction whereby one party, herein called the insurer, is obligated to confer benefit of pecuniary value upon another party, herein called the insured or the beneficiary, dependent upon the happening of a forfuitous (*sic*) event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event. . . ."[3]

The definition of an insurance contract[4] at common law took many forms[5]

1. N. Y. Laws 1939, c. 882, constituting Chapter 28 of the Consolidated Laws. The revised Insurance Law took effect January 1, 1940, except Article IX-C dealing with Non-Profit Medical Indemnity, Or Hospital Service Corporations which took effect June 15, 1939. For a discussion of the revised Insurance Law see Note (1940) 40 COL. L. REV. 880.

2. N. Y. INS. LAW (1939) § 41 (1). This policy of the legislature defining an "insurance contract" is not original with New York. At least nine other states have definitions of "insurance" or "insurance contracts" on their statute books, *e.g.*, CAL. CIV. CODE (Deering, 1935) § 2527; COLO. STAT. ANN. (Michie, 1935) c. 87, § 1 (b); MASS. ANN. LAWS (Supp. 1940) c. 175, § 2; MINN. STAT. (Mason, 1927) § 3314; MISS. CODE ANN. (1930) § 5131; OKLA. STAT. ANN. (Supp. 1940) tit. 36, § 2; ORE. CODE ANN. (1930) § 46-101; S. D. CODE (1939) § 31.0101; WASH. REV. STAT. ANN. (Remington, Supp. 1940) § 7032.

3. The remainder of N. Y. INS. LAW § 41 (1) defines a fortuitous event as ". . . any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party".

4. Whether a particular contract is one of insurance depends, of course, on the nature and contents of the agreement and not on its terminology. Ollendorff Watch Co. v. Pink, 253 App. Div. 73, 300 N. Y. Supp. 1175 (3d Dep't 1937). "What is in substance a contract of insurance cannot be changed into something else by giving it another name." People v. Roschli, 275 N. Y. 26, 29, 9 N. E. (2d) 763, 764 (1937). It has even been held to be immaterial whether the term "insurance" is used in the contract. State v. Beardsley, 88 Minn. 20, 92 N. W. 472 (1902).

5. Probably the best known of the earlier definitions is that furnished by Common-

but basically it was an agreement whereby one party (the insurer) for a consideration promised to indemnify another (the insured) against a specified risk.[6] Like any other definition left to be formulated by the courts free from statutory restrictions, the various contracts as they came up for judicial review received, naturally enough, divergent treatment. Some of the earlier decisions regarded an insurance contract as being one to *pay money*[7] thus excluding agreements to render services on the happening of a contingent event.[8] The later cases, however, held it enough to constitute insurance if one party promised to confer a benefit upon the other.[9] Little difficulty should be experienced on this point under the new law as Section 41 (1) declares it sufficient that the insurer confer "benefit of pecuniary value". Such provision would include both a payment in

wealth v. Wetherbee, 105 Mass. 147, 160 (1870), where an insurance contract is defined as being ". . . an agreement, by which one party, for a consideration (which is usually paid in money, either in one sum, or at different times during the continuance of the risk,) promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest". See also People *ex rel.* Kasson v. Rose, 174 Ill. 310, 51 N. E. 246 (1898), where the court quoted a number of definitions of the term "insurance".

6. The elements essential to an insurance contract as set forth by Professor Vance were: 1. An insurable interest in the insured, 2. Risk of loss, 3. Assumption of that risk by the insurer, 4. Distribution of losses among a large group bearing similar risks, 5. Payment of a premium by the insured. A contract containing only the first three elements merely "shifted the risk" and did not constitute a contract of insurance, but if the five elements were present, the contract "distributed the risk" and was an insurance contract. VANCE, INSURANCE (2d ed. 1930) 5, 58. See also Tyler v. New Amsterdam Fire Ins. Co., 4 Rob. 151, 155 (N. Y. Super. Ct. 1866), setting forth the minimum ingredients of an insurance contract to be, "(1) the subject matter, (2) the risks insured against, (3) the amount, (4) duration of the risk, and (5) the premium of insurance; a contract of insurance is incomplete which wants any of these".

7. *E.g.,* Commonwealth v. Wetherbee, 105 Mass. 149 (1870) (definition is set out in full in note 5 *supra*); State *ex rel.* Att'y Gen. v. Farmers' & Mechanics' Mut. Ben. Ass'n, 18 Neb. 276, 25 N. W. 81 (1885); Pirics v. First Russian Slavonic Greek Catholic Benevolent Soc., Under the Protectorate of Archangel St. Michael, 83 N. J. Eq. 29, 33, 89 Atl. 1036, 1038 (1914). See also Group Health Ass'n v. Moor, 24 F. Supp. 445 (D. C. D. C. 1938) (statutory definition spoke of "payment of indemnity" and the court held that meant a payment of money).

8. Commonwealth *ex rel.* Hensel v. Provident Bicycle Ass'n, 178 Pa. 636, 36 Atl. 197 (1897) (mutual protective association agreed to repair if injured and replace if stolen bicycles of its members). While the case is sometimes cited for the proposition that to be an insurance contract the agreement must be to pay in money, its authority on this point is questionable since a statute was involved.

9. Ollendorff Watch Co. v. Pink, 279 N. Y. 32, 17 N. E. (2d) 676 (1938) (replace watches lost through robbery or burglary); People v. Roschli, 275 N. Y. 26, 9 N. E. (2d) 763 (1937) ("Plate Glass Fund" to replace broken glass of members); People v. Standard Plate Glass & Salvage Co., 174 App. Div. 501, 156 N. Y. Supp. 1012 (3d Dep't 1916) (care for plate glass and replace same if broken). *Contra*: Moresh v. O'Regan, 120 N. J. Eq. 534, 187 Atl. 619 (1936), *rev'd on other grounds,* 122 N. J. Eq. 388, 192 Atl. 831 (1937).

money and the rendering of services, thus adopting the view of the more recent cases.[10]

On the whole, there is little doubt that this new statutory definition is at least as inclusive as the common law concept of an insurance contract. But now that the courts must look to the confines of a statute rather than the flexible boundaries of the common law, the problem presented is whether every contract falling within the four corners of Section 41 (1) must automatically be held to constitute an insurance contract, or in other words, whether an "insurance contract" as now defined by statute is more inclusive and broader in scope than it was at common law so that activities usually not viewed as insurance will be brought within the meaning of an "insurance contract" with the concomitant required compliance with the Insurance Law.[11]

Since under Section 41 (1) an insurance contract exists when the conferring of a benefit is "dependent upon the happening of a fortuitous event", it would appear at first blush that the generality of those terms would include a warranty.[12] Closer analysis, however reveals a warranty is still outside the field of insurance. In the first place, Section 41 (1) itself defines a fortuitous event as being ". . . any occurrence or failure to occur which is . . . to a substantial extent beyond the control of either party."[13] But a breach of warranty is not an occurrence "beyond the control of either party". If anything, it is the very control the warrantor originally possessed that led him to make the warranty and any breach that occurs is due to his failure to exercise adequately that control while he had it. This element of control by itself would seem to take a warranty out of the meaning of a fortuitous event and consequently out of the statute. But an additional ground exists for believing a warranty is still outside the scope of insurance. Fundamentally insurance refers to a *future* peril whereas a warranty refers to a *present inherent* defect in the article.[14]

10. See cases cited *supra* note 9.

11. It is well settled that the business of insurance is so affected with a public interest as to be subject to state regulation. German Alliance Ins. Co. v. Lewis, 233 U. S. 389 (1913). On the general topic of state regulation of insurance see 1 COUCH, INSURANCE (1929) §§ 244-247 and RICHARDS, INSURANCE (4th ed. 1932) § 6. As to what constitutes an insurance contract see Note (1939) 33 ILL. L. REV. 593; Note (1938) 48 YALE L. J. 117; (1938) U. OF CHI. L. REV. 118; (1938) 7 FORDHAM L. REV. 268; Comment (1937) 36 MICH. L. REV. 311; Comment (1936) 36 COL. L. REV. 456.

12. As used here, a "warranty" refers to the law of sales. In general, a warranty refers to the quality or capacity of the goods sold. Stevenson v. Kirkland Seed Co., 176 S. C. 345, 180 S. E. 197 (1935). Warranties have repeatedly been held not to constitute insurance. Cole Bros. & Hart v. Haven, 7 N. W. 383 (Iowa 1880); Evans & Tate v. Premier Refining Co., 31 Ga. App. 303, 120 S. E. 553 (1923).

13. Even at common law it was an essential requirement that the contingency be beyond the control of the parties.

14. This distinction was well phrased in State *ex rel.* Duffy v. Western Auto Supply Co., 134 Ohio St. 163, 16 N. E. (2d) 256, 259 (1938) the court stating: "A warranty promises indemnity against defects in the articles sold, while insurance indemnifies against

Thus despite the broad terminology of Section 41 (1) a contract of warranty apparently is still not insurance.

An interesting situation is also presented by the status of annuities. Reduced to its simplest terms, an annuity is but an agreement to pay a specified sum to the annuitant at stated times either for life or for years.[15] Under its common law view of an insurance contract, New York had held that annuities were not contracts of insurance.[16] A similar distinction between life insurance and annuity contracts was also recognized by the courts of other jurisdictions.[17] As statutory definitions of insurance and insurance contracts were adopted, annuities were repeatedly held to be outside the definitions, the basis for the decisions being that the statutes in defining insurance spoke of payment or indemnification upon the suffering of a loss, injury or destruction whereas an annuity provides for payment not upon the "destruction, loss or injury" of anything but rather upon the *absence* of a destruction, loss or injury (*i.e.*, upon the *continuance* of the life of the annuitant).[18] New York in its statutory definition of an insurance contract provides for payment not upon the "loss, destruction or injury" of anything but rather upon the happening of a fortuitous event and if the annuity payments are not to commence until two years after the annuitant has furnished the consideration, the payments are thus made to commence upon the happening of a fortuitous event, *viz.*, the living of the annuitant for two more years. However, under the new statute, payment is made only if upon the happening of the fortuitous event a material interest of the insured is adversely affected but under an annuity contract payments are made only as long as a material interest of the annuitant is *not* adversely affected, *i.e.*, that the annuitant does not die.[19] This would seem to relegate

loss or damage resulting from perils outside of and unrelated to defects in the article itself". See also Ollendorff Watch Co., Inc. v. Pink, 279 N. Y. 32, 36, 17 N. E. (2d) 676, 677 (1938).

15. *In re* Thornton's Estate, 186 Minn. 351, 243 N. W. 389, 391 (1932); Ballou v. Fisher, 154 Ore. 548, 61 P. (2d) 423, 425 (1936).

16. "The courts have long recognized the essential differences between life insurance policies and annuity contracts." Matter of Sothern, 170 Misc. 805, 808, 14 N. Y. S. (2d) 509, 512 (Surr. Ct. 1938); People v. Security Life Ins. & Annuity Co., 78 N. Y. 114, 34 Am. Rep. 522 (1879).

17. Commonwealth v. Metropolitan Life Ins. Co., 254 Pa. 510, 98 Atl. 1072 (1916); Daniel v. Life Ins. Co. of Virginia, 102 S. W. (2d) 256, 257 (Tex. Civ. App. 1937); Carroll v. Equitable Life Assur. Soc. of United States, 9 F. Supp. 223 (W. D. Mo. 1934).

18. Curtis v. New York Life Ins. Co., 217 Mass. 47, 48, 50, 104 N. E. 553-554 (1914). This case involved a contract of pure endowment but what was said was applicable to an annuity contract for, as the court pointed out, "an annuity contract in effect is one providing for the payment of a series of pure endowments". *Id.* at 50, 104 N. E. at 554; Mutual Benefit Life Ins. Co. v. Commonwealth, 227 Mass. 63, 65, 116 N. E. 469 (1917); Hall v. Metropolitan Life Ins. Co., 146 Or. 32, 28 P. (2d) 875 (1934).

19. *Cf.* N. Y. INS. LAW (1939) § 46 (2), setting forth the kinds of insurance that may be authorized in New York and stating "annuities" to mean all agreements to make

annuity contracts in New York under Section 41 (1) to the same status as the statutory definitions of other states have placed them, *viz.*, that they are not contracts of insurance.[20]

An insurance contract as defined in Section 41 (1) would also appear to include the increasingly popular "group health"[21] and "group hospitalization" plans whereby the members of said associations, in return for the payment of their dues or subscriptions, become entitled to medical or hospital services when the need for such services arise. These plans seem to be within Section 41 (1) because they contemplate the conferring of benefit of pecuniary value dependent on the happening of a fortuitous event in which the member will have a material interest adversely affected by the happening of said event. Previously whether such associations were doing an insurance business depended largely upon the factual set up of the respective plans.[22] Any difficulty in New York, however, is solved by the Insurance Law which expressly provides for the organization of corporations for the purpose of furnishing medical expense indemnity and hospital service to subscribers of the corporations.[23] This would include both "group health" and "group hospitalization" plans so that whether their contracts are "insurance contracts" within Section 41 (1) is of no importance now because the Insurance Law expressly provides for them.[24]

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periodical payments where the making or continuance of the payments "is dependent upon the continuance of human life".

20. While a company whose sole business is the granting of annuities is apparently not engaged in making insurance contracts within the meaning of Section 41 (1), nevertheless such a company would appear to be subject to the Insurance Law since under Section 46 (2) annuities are designated as one of the kinds of insurance that may be authorized.

Cf. MASS. ANN. LAWS (1933) c. 175, § 118 which so broadly defines a life insurance company as to expressly include the making of annuity contracts. Concerning this statute, the court in Mutual Benefit Life Ins. Co. v. Commonwealth, 227 Mass. 63, 65, 116 N. E. 469, 470 (1917), said that if a company issued only contracts of annuity it would be deemed to be a life insurance company.

21. See N. Y. Herald Tribune, March 28, 1941, p. 1, col. 4.

22. Held not to be engaged in the insurance business: Jordan v. Group Health Ass'n, 107 F. (2d) 239 (App. D. C. 1939) (the association assumed no liability to furnish the services but merely agreed to contract with others to render the services); *cf.* State *ex rel.* Fishback v. Universal Service Agency, 87 Wash. 413, 151 Pac. 768 (1915). Note (1939) 52 HARV. L. REV. 809.

Held to be engaged in the insurance business: (1932) Ops. Att'y Gen. N. Y. 348 (corporation obligated itself to furnish hospital services to certificate holders).

23. Sections 250-259 of the revised Insurance Law. The old Insurance Law apparently only provided for "group hospitalization" plans. See Sections 452-461 of the old Insurance Law.

24. Of course such plans are subject to the provisions of the insurance law so far as the revised insurance law is applicable. Section 251 of the revised Insurance Law. Consequently those sections dealing with the insurance contract (*e.g.*, representations, warranties, *etc.*) would seem to apply to such plans.

Another problem raised by the new statutory definition of an insurance contract is the status of the automobile clubs with their agreements to furnish members with various services. Prior to the revision of the Insurance Law, the trend of the decisions, as exemplified by *People v. Roschli*[25] and *Ollendorff Watch Co. v. Pink*,[26] was to enlarge the scope of an insurance contract and label as insurance agreements for the rendition of services subject to a risk. In the *Roschli* case, members of a grocers' association maintained a "Plate Glass Fund" to which each member contributed *pro rata* for his glass to be replaced in case of breakage, while in the *Ollendorff Watch Co.* case a seller of watches agreed to replace each purchaser's watch that was lost within a stated period through burglary or robbery. Both agreements were held to be contracts of insurance.[27] The services rendered by the automobile clubs would no less seem to be rendered under contracts of insurance since they appear to fall within the language of Section 41 (1).[28] If the seller in the watch case took the risk of the buyer losing the watch, does not the motor club take a like risk of the individual member having a need for the services offered by the association? While the point has not been directly passed upon in New York,[29] other jurisdictions have held somewhat similar associations to be doing an insurance business.[30] Considering the trend of the cases prior to the adoption of Section 41 (1) and the broad language employed in the definition, the next step may well be the affixing of the insurance label to the membership contracts of the automobile clubs—at least nothing in the statute appears to exclude such agreements.

In any event, now that a statutory definition of an insurance contract is available the courts will finally have a fixed definition to guide them. Whether they view it as but a codification of the common law or whether they hold the legislature intended to include all contracts falling within the four corners of

25. 275 N. Y. 26, 9 N. E. (2d) 763 (1937).

26. 279 N. Y. 32, 17 N. E. (2d) 676 (1938).

27. In the "plate glass" case the agreement was treated as being one where the contributors insured each other; in the watch case, the seller took a chance or risk that the customer would lose the watch during the stated period. Both cases arose before an insurance contract was defined by statute and rested solely on the common law view of an insurance contract.

28. To paraphrase Section 41 (1), the automobile association is obligated to confer a benefit of pecuniary value (*e.g.*, the furnishing of services) dependent upon the happening of a fortuitous event (*e.g.*, when the need for such services arises) in which the member has a material interest which will be adversely affected by the happening of such event.

29. (1931) Ops. Att'y Gen. N. Y. 196, 199-200, contains a *dictum* to the effect that automobile associations are not engaged in the insurance business. A somewhat similar *dictum* is contained in Allin v. Motorist's Alliance of America, Inc., 234 Ky. 714, 29 S. W. (2d) 19, 23 (1930). See (1937) 23 CORN. L. Q. 188, 190-191, notes 20, 21.

30. State v. Bean, 193 Minn. 113, 258 N. W. 18 (1934) (legal services, bail bond, towing services); Nat. Auto Service Corp. v. State, 55 S. W. (2d) 209 (Tex. Civ. App. 1932) (garage services).

the definition, at least it should have the salutary effect of working for consistency in the decisions of the courts.

Warranties and Representations

Aside from the new statutory definition, one of the most important changes affecting the insurance contract concerns representations and warranties. A representation, in the absence of a statute, refers to a statement made to give information to the insurer and which tends to influence the insurer to enter into the contract;[31] it relates to matters from which the insurer determines whether to accept the risk and at what premium.[32] A warranty, on the other hand, is a statement or stipulation contained in the policy as to the existence of certain facts, the literal truth as to which is essential to the validity of the contract.[33] In short, representations were held to be *collateral* to the contract while warranties were *part* of the contract.[34] Thus was developed the rule that a representation, if untrue, voided the policy only if it was material to the risk[35] and it was of no matter that the misrepresentation was innocently made.[36] The breach of a warranty, however, was more disastrous to the insured, for a warranty breach, even of an immaterial matter, was a complete defense to any recovery on the policy,[37] the innocence of the insured notwithstanding.[38]

The first serious inroad on these rules was made in 1906 when the old Insurance Law was amended to read that all statements made by the insured were in the absence of fraud to be deemed representations and not warranties.[39] Prior to the enactment of old Section 58, a statement regardless of its materiality could be made a warranty merely by inserting in the policy a clause that the insured warranted all statements in his application to be true.[40] This naturally

31. VANCE, INSURANCE (2d ed. 1930) § 105; RICHARDS, INSURANCE (4th ed. 1932) § 81. A misrepresentation was simply a false representation.

32. 4 COUCH, INSURANCE (1929) § 824.

33. *Id.* § 858.

34. 3 COOLEY'S BRIEFS ON INSURANCE (2d ed. 1927) p. 1866.

35. Higbee v. Guardian Mutual Life Ins. Co. of New York, 66 Barb. 462 (N. Y. 1873); Armour v. Transatlantic Fire Ins. Co., 90 N. Y. 450 (1882).

36. Armour v. Transatlantic Fire Ins. Co., 90 N. Y. 450 (1882). The reason was that even if innocent, the insurer entered into a risk different from what it planned. Banker's Life Ins. Co. v. Miller, 100 Md. 1, 59 Atl. 116 (1904).

37. Gaines v. Fidelity & Casualty Co., 188 N. Y. 411, 81 N. E. 169 (1907); Foot v. Aetna Life Ins. Co., 61 N. Y. 571 (1875); Metropolitan Life Ins. Co. v. Rutherford, 98 Va. 195, 35 S. E. 361 (1900); *see* Donley v. Glens Falls Ins. Co., 184 N. Y. 107, 113, 76 N. E. 914, 917 (1906).

38. Vose v. Eagle Life & Health Ins. Co., 60 Mass. 42, 47 (1850).

39. N. Y. Laws 1906, c. 326, § 16 which amended the old Insurance Law by inserting a new section, Section 58. Section 58 of the old law is now contained in Sections 142, 149, 150 of the revised Insurance Law.

40. *E.g.*, Gaines v. Fidelity & Casualty Co., 188 N. Y. 411, 81 N. E. 169 (1907), where the policy stated that the applicant was insured in consideration of certain statements made by him and which he warranted to be true.

led to cases of extreme hardship on the insured[41] and to alleviate that condition many states enacted statutes, of which Section 58 was an example, to modify the strict common law rule. Consequently Section 58 was held to abolish the differences previously existing between misrepresentations and warranties.[42] While the purpose of old Section 58 was to relieve the insured, the statute was so worded as to be susceptible of a most stringent interpretation *against* the insured. Since the statements of the insured in the absence of fraud were to be deemed representations and not warranties, it implied that a fraudulent statement of an immaterial matter would become a warranty.[43] This could hardly have been the intent of the legislature[44] and to preclude any difficulty on this point hereafter, the new revision has deleted the phrase "in the absence of fraud".[45] In any event, it was clear that the intention behind statutes like Section 58 was to put warranties on the same level as representations[46] or as one writer put it to "transform warranties into common law representations".[47]

Though the purpose of old Section 58 may have been to put warranties on the same basis as representations, the revision of the Insurance Law has apparently put warranties out of existence entirely in life, accident or health insurance or annuity contracts and has made *all* statements of the insured representations. This seems to be the only conclusion to be drawn from Section 142 (3) of the new law which provides that all statements made by an applicant for ". . . a policy of life, accident or health insurance or annuity contract

41. The problem was well put in Chamberlain v. New Hampshire Fire Ins. Co., 55 N. H. 249, 264 (1875) where Foster, C. J., said ". . . it has too often been found that the party apparently insured by the stipulations written upon one side of a piece of paper was uninsured by the conditions involved in the 'insurance typography' indorsed upon the other side of the same piece of paper". See also VANCE, INSURANCE (2d ed. 1930) 394.

42. Kasprzyk v. Metropolitan Life Ins. Co., 79 Misc. 263, 267, 140 N. Y. Supp. 211, 214 (Sup. Ct. 1913). Thereafter, even though a statement was made in the form of a warranty, if made in good faith and without fraud, it was the same as an ordinary representation and became a defense to the policy only if it was material. E. D. P. Dye Works v. Travelers Ins. Co., 234 N. Y. 441, 449, 138 N. E. 401, 403 (1923). A misrepresentation continued as before and to avoid a policy had to be material. Keck v. Metropolitan Life Ins. Co., 238 App. Div. 538, 264 N. Y. Supp. 892 (4th Dep't 1933), *aff'd*, 264 N. Y. 422, 191 N. E. 495 (1934).

43. It is significant that the courts in stating what was a warranty under Section 58 almost invariably included the element of fraud in their statements, *e.g.*, E. D. P. Dye Works v. Travelers Ins. Co., 234 N. Y. 441, 449, 138 N. E. 401, 403 (1923); Charlton v. Metropolitan Life Ins. Co., 202 App. Div. 814, 195 N. Y. Supp. 64 (2d Dep't 1922).

44. While the point seems never to have arisen in New York, the Supreme Court of Minnesota rejected the idea that a fraudulent immaterial representation would become a warranty. Johnson v. National Life Ins. Co., 123 Minn. 453, 144 N. W. 218, 220 (1913). See VANCE, INSURANCE (2d ed. 1930) 361.

45. Section 142 (3) now states that all statements of the applicant ". . . shall be deemed representations and not warranties. . . ."

46. Johnson v. National Life Ins. Co., 123 Minn. 453, 456, 144 N. W. 218, 219 (1913).

47. VANCE, INSURANCE (2d ed. 1930) 395.

shall be deemed representations and not warranties. . . ." With the deletion of the phrase "in the absence of fraud", seemingly under no circumstances can a statement of an applicant hereafter constitute a warranty in life, health or accident insurance or annuity contract.[48]

Representations, however, may still be created in New York and the revision contains an express definition of a representation.[49] The effect of a misrepresentation continues as before, *viz.*, that it must be material in order to avoid a policy.[50] Fraud by the applicant is of no importance; the only question is whether the misrepresentation, whether fraudulent or innocent, is material. The important change wrought by Section 149 (2), however, is the provision as to when a misrepresentation is material. Regardless of what the prior rule may have been,[51] the test for materiality hereafter is whether *the particular insurer* would have refused the risk had it known the true facts.[52] As an aid in determining what the insurer would have done, evidence of the practice of the insurer in accepting or rejecting similar risks is admissible.[53] Finally, if a misrepresentation as to past medical treatment is shown and the insured prevents a full disclosure of such treatment,[54] then the misrepresentation is presumed to be material.[55]

While the status of a representation is relatively certain and fixed, the same cannot be said of a warranty[56] under the new provisions of the Insurance Law.

48. Another change made by the revision is the extension of Section 142 (3) to apply to life, accident or health insurance and contracts of annuity. The old Section 58 was held applicable only to life insurance and not to accident insurance [Baumann v. Preferred Acc. Ins. Co., 225 N. Y. 480, 122 N. E. 628 (1919)], burglary insurance [Satz v. Massachusetts Bonding Co., 243 N. Y. 385, 153 N. E. 844 (1926)], or fraternal benefit societies [Hoff v. Hoff, 175 App. Div. 40, 161 N. Y. Supp. 520 (3d Dep't 1916)].

49. Section 149 (1) states: "A representation is a statement as to past or present fact, made to the insurer by . . . the applicant for insurance . . . at or before the making of the insurance contract as an inducement to the making thereof. A misrepresentation is a false representation. . . ".

50. Section 149 (2).

51. Geer v. Union Mut. Life Ins. Co., 273 N. Y. 261, 7 N. E. (2d) 125 (1937); *cf.* Equitable Life Assur. Soc. of United States v. Schusterman, 255 App. Div. 54, 5 N. Y. S. (2d) 368, 371 (1st Dep't 1938) where the court said that if the insured had disclosed all the facts ". . . such information might *reasonably* have affected the choice . . ." of the insurer. (Italics supplied.) Section 149 (2) seems to adopt a different test.

52. See Kuritzky v. National Casualty Co., 23 N. Y. S. (2d) 776, 779 (City Ct. 1940), where the court said that as a result of Section 149 (2): "No longer is a *prima facie* case of materiality made out by mere proof of the misrepresentation".

53. Section 149 (3).

54. By claiming the privilege of the relationship of physician and patient (N. Y. Civ. Prac. Act § 352), the insured can prevent full disclosure of the medical treatment.

55. Section 149 (4).

56. "The term 'warranty' as used in this section, means any provision of an insurance contract which has the effect of requiring, as a condition precedent of the taking effect of such contract or as a condition precedent of the insurer's liability thereunder, the exist-

This much is definite, however, that a revolutionary change has been made in New York as to the effect of a breach of warranty. Since early common law a warranty breach, regardless of its materiality, *ipso facto* avoided a policy.[57] This rule of law is no more, under the revision. Instead, a breach of warranty will avoid a policy or defeat a recovery thereunder only if said breach materially increased the risk of loss within the coverage of the contract.[58] Thus three questions must be answered by the trier of the fact: 1. Was there a warranty? 2. Was it breached? 3. Did the breach materially increase the risk? Previously an affirmative answer to the first two questions ended the matter; now, however, an additional finding of fact must be made.

It is when this new concept of a warranty and a warranty breach is applied to the standard fire insurance policy of New York that the uncertainty arises. The provisions of that policy are generally viewed as expressing conditions[59] and exceptions,[60] and a failure to observe a condition not only defeats a recovery but even precludes any consideration as to whether the condition increased the hazard.[61] Yet the Insurance Law defines a warranty in terms of condition precedent and declares a breach will avoid a policy only if the risk or hazard is materially increased by the breach. Thus the problem is presented whether the provisions of Section 150[62] will be held applicable to the standard fire insurance policy or whether the familiar rule of statutory construction will be adopted, *viz.*, that a broad statute (*e.g.*, Section 150 which is unlimited except as to subdivision (3)) will not be construed as affecting or applicable to a particular statute (*e.g.*, the standard fire insurance policy). If the former view is followed and Section 150 is held applicable to the standard fire insurance policy, then the effect of a breach of condition in said policy will immediately become a question of fact for the jury. After a breach is found, the

ence of a fact which tends to diminish, or the non-existence of a fact which tends to increase, the risk of the occurrence of any loss, damage, or injury within the coverage of the contract. . . . " Section 150 (1).

57. See cases cited *supra* notes 37, 38.

58. Section 150 (2).

59. *E.g.*, "This entire policy shall be void . . . (a) *if* the interest of the insured be other than unconditional and sole ownership;" *etc.* (Italics supplied.) Standard Fire Insurance Policy of the State of New York.

60. *E.g.*, ". . . this Company shall not be liable for loss or damage occurring (a) *while* the insured shall have any other contract of insurance . . ." on the same property. (Italics supplied.) Standard Fire Insurance Policy of the State of New York.

On this subject of conditions and exceptions in the standard fire insurance policy, see VANCE, INSURANCE (2d ed. 1930) 406, 689 *et seq.* RICHARDS, INSURANCE (4th ed. 1932) §§ 213 *et seq.*

61. Newport Improvement Co. v. Home Ins. Co., 163 N. Y. 237, 57 N. E. 475 (1900). *Accord*: Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452 (1894). *Cf.* Mack v. Rochester German Ins. Co., 106 N. Y. 560, 13 N. E. 343 (1887).

62. Subdivision (3) of Section 150 is, of course, clearly inapplicable as it refers to marine insurance.

jury would then have to determine whether that breach materially increased the risk of loss. The revision has also seemingly placed the insured in a better position to recover if a warranty is breached than if a misrepresentation is held to exist. This is so because a warranty breach will not defeat a recovery unless it materially increased the risk. A misrepresentation will defeat a recovery, however, if the insurer can show that it would have refused the risk had it known the true facts. It would appear the insurer is better situated to avoid the policy or defeat a recovery under a misrepresentation than it would under a warranty breach. The final determination of this problem will rest, of course, in the absence of any legislative utterance, with the courts, but it is apparent that their decisions on this point will be eagerly awaited.[63]

63. Section 150 (1) is confusing in another respect in that it states the term "occurrence of loss, damage, or injury" shall include the "occurrence of death, disability, injury, or any other contingency insured against. . . ." But under Section 142 (3) a warranty can no longer be created in life, accident or health insurance.