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Insurance: False Answers in an Application

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Notes

INSURANCE: FALSE ANSWERS IN AN APPLICATION

I. INTRODUCTION

When the eagerness of a careless or unethical insurance agent to sell an insurance policy coincides with the natural propensity of the average man to assume that the agent will properly record his answers to questions, legal difficulties frequently occur. Many cases have arisen in Kentucky and other jurisdictions in which an applicant has truthfully given an agent information which would decrease his chances of obtaining insurance coverage, or make coverage more expensive; and, the agent, desiring to sell a policy and receive his commission, has inserted false answers which would aid the applicant in acquiring insurance protection. A related legal problem arises when an agent fills in answers on the application form without posing the questions to the insured.

The courts of this country have taken conflicting positions in determining whether the insured may recover on the policy in such situations. After a series of recent decisions favoring insurance companies, the Kentucky Court of Appeals substantially changed its position in a case decided in March of 1969, in which the majority opinion stated the Court would no longer place the full responsibility on the applicant to see that the application was correctly filled out. Many courts and legal writers state that the majority rule is that if an applicant gives truthful answers to questions contained in the application, but the agent of the insurer falsely records them, the insurer cannot rely on the falsity of the answers to avoid liability on the policy. Yet, there is said to be a majority rule, or trend toward a rule, that the insured has a duty to read or to have read to him the insurance application. Therefore, he is presumed to have knowledge

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1 The reader may gain some idea of the surprising frequency with which this problem arises in the courts by glancing at the citations listed in 45 C.J.S. Insurance §§ 729, 732 and 733 (1946).
of its contents and is bound by the information given in the application even though it may contain false answers which were inserted by the agent.

One court, when confronted with conflicting decisions, declared that this area of the law was in a state of "utter confusion" and that the cases could not be "reconciled on any reasonable basis." While this writer does not succumb to such a pessimistic viewpoint, it is true that there are conflicting decisions concerning the insertion of false answers in an application by an insurance agent. This confusion may be explained in part by the difficulty in deciding which of the two innocent parties must bear the loss. The applicant, wanting insurance coverage, has approached the transaction in good faith by truthfully answering all the questions asked by the agent. He has paid his premiums regularly and has relied upon the belief that he was adequately insured. Now, the anticipated casualty having occurred, he or his beneficiaries expect to collect on the policy. The insurer is also an innocent party to the transaction. If he had known the true information concerning the circumstances involved, he would never have issued the policy or accepted the premiums paid by the insured; or, at least, would have demanded a higher price for coverage. Now he is being asked to pay on a risk he did not intend to take—a result of the dishonesty or negligence of one of his employees. No matter how the case is decided, an innocent party will lose, and the court may unconsciously be influenced by sympathy for one party or the other.

Another reason for the variation in results is the presence of conflicting legal principles and policy considerations in this area of the law. In the first section of this note, principles of agency, contracts, and the law of evidence will be discussed because each has great influence on the decisions reached in these cases.

In later sections, special policy provisions, statutes affecting insurance applications, and circumstances surrounding execution and possession of the application will be considered. The author will explore the development of Kentucky law, and discuss the implications of recent decisions.

II. Basic Legal Theories Involved

A. Agency Law

It is a basic principle of agency law that the actions and knowledge of an agent are imputed to his principal. An insurer is charged by

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7 17 J. Appleman, supra note 3, at 9401, n. 2; 44 C.J.S. Insurance § 139, at 798 (1948).
some courts with knowledge of the falsity of the answers in an application since its agents knew that the answers were untrue. Therefore, it cannot rely on the falsity of the statements to avoid liability on the policy. Courts taking this position feel that it is the responsibility of the insurance company to select competent, trustworthy agents in order to protect itself from unintended risks. As the New Jersey court stated in Heake v. Atlantic Casualty Insurance Company, "Since [the insurer] has placed the agent in a position to do such acts it must be answerable for the manner in which the agent has conducted himself in doing business on behalf of the principal."9

Other courts take the position that the insurance agent, when inserting the false answers in the application, is not acting for his principal. It is said that when an agent of an insurer intentionally inserts false statements in a policy, though he is apparently acting for his principal, he is, in reality, acting for himself and against the principal.10 His act is part of a fraudulent scheme he has devised for his own benefit and is therefore outside of the scope of his agency.11 Arguments have been made that an agent of an insurer becomes the agent of the applicant while filling out an application thereby making the applicant, rather than the insurer, responsible for the misrepresentations. This argument has had little success.12

B. Contract Law

It is a basic principle of contract that, in the absence of fraud or mistake, a party is bound by the terms of a contract which he accepts, and he will not be allowed to deny knowledge of its terms in an action upon the instrument.13

Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and assent to them. . . .14

This rule originated during a period in which contracts were the result of negotiation and bargaining between the parties. Today, courts who wish to avoid the conclusion that the insured is bound by the

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13 American Fidelity Co. v. Mahoney, 174 A.2d 446, 449 (Me. 1961); Bearden v. Countryside Cas. Co., 352 S.W.2d 701, 706 (Mo. 1961).
false answers inserted in the policy by the agent and by provisions voiding the policy in case of material misrepresentations try to assert that the insurance policy is a special type of contract to which the general rules of contract law should not be applied.\textsuperscript{15} Insurance policies are standardized forms prepared by the insurance company. The individual applicant, therefore, has no opportunity to negotiate with the insurance company regarding the terms which will or will not be included in his policy. The company, using its own legal experience and the legal experience of other insurance companies, has drafted a contract which it feels to be most advantageous to its own interests. Among its objectives in drawing up such a form are saving the time and trouble of bargaining and simplifying administration. The finished form, which has been drafted by lawyers and/or semantic experts is duplicated many times and the copies are distributed to the agents of the company who offer to sell insurance coverage to the public. The prospective purchaser of the insurance knows that his only choice is to accept the entire policy form as it has been printed by the company, or to be without coverage. Of course, he may purchase a policy from another insurance carrier, but he will confront the same problem of the standardized contract form.

Standardized contracts, unilaterally prepared, have been termed "adhesion contracts" because one party draws up the instrument and other party has the sole option of adhering to it.\textsuperscript{16} Adhesion contracts, though they can occur where the parties have approximately equal bargaining power, are usually found where one party has a stronger bargaining position than the other. In such a situation, the party in the stronger bargaining position will frequently be more familiar with the terms of the contract than the weaker party. The insurer who usually has had adequate time during the drafting period to examine the provisions of the policy and to have them interpreted by its legal counsel, is obviously more familiar with the terms of the instrument than the purchaser of insurance. If the purchaser takes the time to examine his policy, he may find himself confused by the technical phraseology and the many conditions and stipulations contained therein.\textsuperscript{17}

It has been said that people buy insurance as if it were a com-

\textsuperscript{15} W. Vance, supra note 5, \$ 44, at 253-59.


\textsuperscript{17} For a discussion of the ambiguity of language in insurance contracts, see Mooney, Functional Analysis of Exceptions in Accident Insurance, 1964 U. Ill. L. Forum 485.
and, therefore, do not think to examine the policy carefully. Not only do the illiterate and poorly-educated fail to read the policies, but even persons of average intelligence and business sense rely upon the good faith of the agent.

Many courts feel that the preceding arguments do not furnish sufficient reason for treating insurance contracts differently than other types of contracts. These courts believe that one who has had the opportunity to read his insurance policy and does not do so is foreclosed by his own negligence. This position will be discussed later.

C. The Law of Evidence

It is a fundamental rule of evidence that parol testimony will not be admitted to vary or alter the terms of a written contract. Using this principle, many courts have refused to permit the insured to testify that he gave answers to the insurance agent which were different from those shown in the policy application. Some of the reasons why this rule should be followed are found in the early case of New York Life Insurance Co. v. Fletcher:

It would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others.

However, many courts admit parol evidence. Professor Vance's Handbook on the Law of Insurance describes the two theories under which parol evidence is admitted. A few courts admit evidence that the misrepresentations were due to the fraud or mistake of the in-

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21 W. Vance, supra note 5, § 44, at 261-62.
23 117 U.S. 519, 529 (1886). The court suggests that the offeror in the insurance contract situation is the applicant. Is this realistic in an adhesion contract negotiation?
surer's agent on the ground that such statement was not in fact the
statement of the insured even though he may have signed the appli-
cation and accepted the policy. Many courts admit parol evidence in
support of an estoppel alleged by the insured to prevent the insurer
from taking advantage of a defense due to his own wrong.24

III. Estoppel and Waiver

It is said to be the majority rule that an insurer cannot avoid
liability on an insurance policy because of material misrepresentations
in the application where the false statements were entered by the
agent without the fraud, collusion, or actual or constructive knowledge
of the insured.25 If the insurer does attempt to avoid liability by al-
leging that the untrue statements prevent recovery on the policy,
there are two defenses which may be used against him. One of these
is the defense of waiver, which may be defined as a relinquishment of
some right or privilege or of the opportunity to take advantage of
some defect or wrong.26 The court may hold that the agent's know-
ledge of the falsity of the answers is imputed to the insurer and that
the insurer, by later issuing the policy and accepting the premiums
paid by the insured, is deemed to have waived the right to rely on the
misstatement in the application.27

The second and, perhaps, the most frequently used defense is the
principle of equitable estoppel. Estoppel may be distinguished from
waiver by the fact that waiver is a relinquishment of a right and
estoppel is the inhibition to assert it.28 An estoppel arises where a
litigant is precluded from alleging or denying a certain fact or set of
facts because of his own acts or admissions.29 In the insurance cases
being discussed, the acts giving rise to the estoppel are those of the
insurer's agent, which are imputed to his principal. To permit the in-
surer to avoid liability on the policy, it is argued, would be to permit
him to profit by his own wrong. The insurer, therefore, is estopped
from asserting the defense of material misrepresentation.30

24 W. VANCE, supra note 5, § 44, at 261-62.
(1940); 29A AM. JUR., supra note 3, at 228.
P.2d 144 (1952).
IV. Duty to Read

It is the majority rule that the insured has a duty to read, or to have read to him, the insurance application; and, therefore, he is charged with knowledge of its contents. This rule has been applied in cases in which the applicant was unable to read or write the English language and in cases where he was an illiterate.

Many courts, however, are more lenient in these situations, and have not found it inexcusably negligent for such a person to fail to read his policy.

Several decisions imposing a duty to read insurance policies are based on fact situations in which the insured received a copy of the policy and the application from the insurance company and held them in his possession. In a recent Louisana case where the decedent had had the insurance policy in his possession for about two months, the court felt it necessary to charge him with constructive knowledge of the falsity of answers contained therein. The duty to read, which is placed upon the insured upon receipt of his policy, was described by a Missouri appellate court as follows:

...(I)t is not enough that the applicant for insurance shall have merely made truthful answers to the questions put to him in his application; ... the element of continued good faith enters into all such transactions; ... upon the delivery of the policy, the insured must exercise reasonable diligence to discover the contents of the contract, and to advise the insurer of the falsity of any of the representations constituting material inducements for the insurance of the policy...

If the insured has had a reasonable opportunity to discover misrepresentations and does not inform the insurer of the false statements,
his silence will be deemed to be ratification of the statements in his application.\textsuperscript{38} This rule was applied in a 1962 Oregon case\textsuperscript{39} in which the insurance policy with the attached application was not delivered until after the injury occurred and the insured attempted to collect. The plaintiff contended that the defendant's delay in forwarding the policy made it impossible for him to discover the false assertions in the application prior to his injury. He did not, however, assert that he did not read the policy and application after having received them from the defendant; nor did he make any showing that he was unable to do so. The court held that the plaintiff had a reasonable opportunity to discover the misrepresentations and that his silence constituted ratification of the statements contained in the application. The policy and application had been mailed to the plaintiff a month before he had filed his claim. The court stressed the fact that the words "Please Read Your Policy" were printed in large capital letters on the face of the policy, and that the photostatic copy delivered to the plaintiff was printed in contrasting black and white and was bound to attract attention.

In jurisdictions in which there has been held to be a duty to read the application, resulting in the insured being bound by statements contained therein, the standard has been relaxed in particular situations. An exception is described in Heake v. Atlantic Casualty Insurance Company, a 1954 New Jersey case:

In New Jersey, the general rule is that the insured is bound by the terms of the policy that he has received and had an opportunity to read, and reformation will be denied if he has been negligent in failing to apprise himself of its contents. . . . Yet it is also quite clear that where the insurer has been guilty of fraud or other unconscionable conduct, it cannot successfully plead that if the insured had exercised reasonable care he would not have been defrauded.\textsuperscript{40}

The court in Heake then discussed the youth of the insured and his reliance upon the agent.

The standard may be relaxed in situations where the insured was misled by statements of the agent. In a California case, the court acknowledged that "when the insured has a copy of the application in his possession he is presumed to have read it and to be aware of any misstatements therein, even though they were not due to his own fault . . ."\textsuperscript{41} but stated the rule would not apply where the insured

\textsuperscript{39} Id.
could not have ascertained that his answers were false in the sense that they withheld required information. In that case, the insured had relied on the agent’s interpretation of a question in the policy to the effect that it was not necessary to inform the insurance company of an injury received in the Armed Services where that injury did not lead to a medical discharge. *John Hancock Mutual Life Insurance Company v. Schwarzer*, a 1968 case from Massachusetts, involved a situation in which the insured was misled by statements of the agent. The applicant had told the insurance agent about her illnesses and hospitalization. The agent said that he would inform the insurance company of this, and if there was any question, he would notify the applicant. The court stated that his delivery of the policy “was an implied representation that he had reported to the company and that the information given by her was not material to defeat issuance of the policy.” It noted that in most jurisdictions, the principle that the acceptance of a contract establishes all of its terms is applied to insurance policies. However, this court felt that the particular conduct giving rise to an equitable estoppel might be such as to excuse the reading of the policy; and if so, the acceptance of the policy with the attached application would not bind the insured to the false statements contained therein. In this case, the court thought that even if the insured had read the application, she would not have believed any misrepresentation was being made to the company because of the statement of the agent.

Of course, the insured cannot recover on the policy in any jurisdiction where he colludes with the insurance agent to defraud the insurer by inserting false answers in the application. Bad faith short of collusion also defeats recovery on the policy. In *Temperance Insurance Exchange v. Coburn*, the insured asserted that he had informed the insurer’s agent honestly concerning the matters in question, but admitted that he had watched the agent fill out the application and knew that she had written false answers. The court held that where an applicant knows that the agent is not copying true answers to the questions on an application for insurance, the insurer is entitled to a cancellation of the policy. It has been held that where the conduct of an agent raises a clear presumption that he would not communicate a

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43 Id. at 53.
44 Id.
certain fact, the principal will not be bound by the knowledge of his agent.\textsuperscript{47} It would seem reasonable to say that in such instances, a duty arises in the applicant to convey the information to the insurance company. The \textit{Temperance Insurance Exchange} case and cases similar to it carry this principle over into the law of insurance.

V. Special Policy Provisions

Using legal experience gained from past cases in the insurance field, insurance companies have devised various provisions which can be drafted into policy forms in an attempt to avoid liability in the case of fraud or mistake on the part of the agent in filling out the application. To avoid the general rule that the knowledge of an agent, acquired within the scope of his duties of employment as to facts material to insurance coverage, is imputed to the company, many policies include such stipulations as a provision that knowledge of the agent shall not be held to effect a waiver of any part of the contract, or that no statements made to, or information acquired by, an agent shall bind the insurer unless stated in the application.\textsuperscript{48} There is substantial authority that the insurer may, through such limitations on the authority of its agents of which the insured has notice, avoid liability on the policy where untrue answers are placed in the application by its agent without knowledge of the insured.\textsuperscript{49} At least one jurisdiction has held, however, that a limitation of authority contained in an insurance policy will not operate retroactively to apply to conduct surrounding the application.\textsuperscript{50} Still other jurisdictions have held that such limitations on the scope of agency do not preclude the raising of an estoppel against the insurer to assert the defense of misrepresentation.\textsuperscript{51}

Another provision frequently used in life insurance policies is that the policy shall not take effect unless the insured is in good health at the time of delivery.\textsuperscript{52} Where such a provision is used and the agent answers questions in such a way as to misrepresent the state of health of the applicant, the insurer is still protected against having to pay on a bad health risk he did not intend to take (assuming, of course, that there are no additional facts which would constitute a waiver of the provision by the company).

\textsuperscript{48} See 45 CJS Insurance § 692, at 648 (1946).
\textsuperscript{52} National Life & Accident Ins. Co. v. Roberson, 180 Okla. 265, 68 P.2d 796 (1937).
VI. STATUTORY PROVISIONS

Some states have enacted provisions to the effect that the persons soliciting insurance and procuring the application will be considered to be the agent of the company issuing the policy. Such statutes have been used to justify a judgment for the insured, but this has not always been the result.

Statutes have been enacted in many states providing that the insurance application shall be attached to the policy and embodied into the contract. It has been argued that such statutes are enacted for the benefit of the insured, to give him the opportunity to read his application and discover any errors made by the agent in filling in the blanks, but in actual operation, the statute is advantageous to the insurer. The effect of these statutes on the insurance law is clearly explained by the Supreme Court of Massachusetts in John Hancock Mutual Life Insurance Company v. Schwarzer:

... [The majority view is that the insured is bound by misstatements appearing in an application attached to the policy delivered to and retained by him. The rule has been applied in jurisdictions which apply or had applied the equitable estoppel doctrine. ...]

The rigorous application of this rule [which I would presume would result from enactment of a statute requiring the application to be attached to the policy and embodied in it] in effect wipes out the equitable estoppel doctrine.

The court mentioned that Indiana, Nebraska, New York and Oregon had applied the estoppel doctrine prior to the adoption of statutes embodying the application in the policy. Though the legislature of its own state had enacted such a statute, the court stated that notwithstanding the general contract rule, it was of the opinion that under Massachusetts law the particular conduct giving rise to the estoppel might be such as to excuse the reading of the policy.

Kentucky, a jurisdiction in which the equitable estoppel doctrine has been applied, enacted a statute embodying the insurance application into the policy and containing the following requirements:

All policies issued by a company to persons within this state, which policies contain any reference to the application of the insured or by-laws or rules of the company, either as forming part of the policy or contract between the parties thereto or as having any bearing on the

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55 E.g., Indiana, Kentucky, Nebraska, New York, Ohio and Oregon.
57 237 N.E.2d 50, 52 (Mass. 1968).
58 The facts in the Schwarzer case are discussed supra in section IV of the text.
contract, shall have the application, bylaws and rules or the parts thereof relied upon as forming part of the policy or contract, or as having any bearing on the contract, attached to the policy or printed on the face or reverse side thereof. Unless either so attached and accompanying the policy, or printed on the face or reverse side thereof, the same shall not be received as evidence in any action for the recovery of benefits provided by the policy, and shall not be considered a part of the policy or of the contract between the parties . . . .

Many Kentucky cases decided after enactment of the statute have held the purchaser of insurance to a strict duty to read his policy, resulting in a greater number of judgments for the insurer. These cases will be discussed in a later section of this note.

VII. THE DEVELOPMENT OF KENTUCKY LAW

The insured frequently won in the early Kentucky cases, but a subsequent line of decisions imposing a duty upon the insured to read his policy reflected a trend favorable to insurance companies. This trend continued until the recent decision in Pennsylvania Life Insurance Company v. McReynolds in which the Court declined to place the full responsibility upon the insured to see that the application is correctly filled out. By looking at the Kentucky cases in chronological order, we can see the changes taking place.

A. Early Kentucky Law—Estoppel & Waiver

In the late nineteenth century, Kentucky began applying the principle of equitable estoppel to insurance companies. In Western Assurance Company v. Rector, an 1885 case, the court formulated the following rule:

In all cases where the agent filling out the application is clothed with real or apparent authority to make a contract of insurance, and knows the facts, the company is estopped from claiming that it has been misled by omissions or misstatements. If the applicant acts in good faith, relying on this apparent authority, and makes true answers to all questions asked, and the agent, without his knowledge or consent, through mistake or ignorance, writes answers deemed by him the equivalent of so much of the answers actually given as he considers necessary to be written, a recovery can not be prevented by reason of the fact that the agent failed to write all of the answers actually given, or wrote that which was not the equivalent of the answer so given, though the answer as written was not true in fact. . . .

59 KY. REV. STAT. § 299.130 (1962).
60 Kentucky Cent. Life Ins. Co. v. Combs, 432 S.W.2d 415 (Ky. 1968); Mills v. Reserve Life Ins. Co., 335 S.W.2d 955 (Ky. 1960); Reserve Life Ins. Co. v. Thomas, 310 S.W.2d 267 (Ky. 1958).
61 No. 69-188 (Ky. Court of Appeals, Mar. 28, 1969).
62 7 Ky. L. Rptr. 523 (1885).
63 Id. at 523.
In this case, the agent had misled the insured by stating that gunpowder was included in the term "general merchandise" used in the application to describe the storeowner's stock of goods. If the insured had read the policy, however, he would have discovered his duty to obtain the consent of the insurance company before acquiring a policy on a store which carried gunpowder as an item of merchandise.  

The principles enunciated in Western Assurance were upheld in an 1887 case in which the agent, upon being told by the insured that he intended to replace a stovepipe, which ran up through a drum fixed in the roof, with a brick chimney, wrote in the application that the stovepipe ran into a chimney. The Court held that where an applicant answers honestly and truthfully all questions asked him, he may rely on the insurance agent who is writing the application to record them correctly. If the agent does fill in false answers without the knowledge of the applicant, the applicant will not be prevented from recovering on the policy on the grounds that misrepresentations have been made in the application.

In a 1914 case, the plaintiff attempted to recover on his insurance policy after he was accidentally injured by falling from a passenger coach. The agent who had sold the policy testified that he had written the answers in the application literally as given to him by the insured, while the insured testified that he had informed the agent of certain injuries and treatments received prior to the accident which were not revealed in the application. The Court, in upholding a judgment for the insured, stated that the equitable estoppel doctrine was followed in Kentucky. Under the fact situation in this case, it was for the jury to determine whether the insured had answered questions truthfully and completely and whether, without fraud or bad faith on his part, the agent of the insurer wrote answers in the application which he knew were false or so incomplete or so worded as to create a false impression.

To counteract the effect of these unfavorable decisions, insurance companies began drafting into their policies the provision that notice to or knowledge of the agent would not preclude assertion by the insurer of any defense. In Sun Indemnity Company of New York v. Hulcer, such a provision was held ineffectual to prevent the insured from recovering on a policy containing false answers or errors.

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64 Id. at 524.
65 Springfield Fire and Marine Ins. Co. v. McNulty, 8 Ky. L. Rptr. 876 (1887).
66 General Accident Life & Fire Assur. Corp. v. Richardson, 157 Ky. 503, 163 S.W. 482 (1914).
67 251 Ky. 484, 65 S.W.2d 471 (1933).
inserted in the application by the agent where the insured had no knowledge of the limitation. In *Standard Auto Insurance Association v. Russell*,68 the Court cited the rule that if the agent writes false answers to questions propounded to the applicant or, by misleading statements, induces the applicant to make false answers when the applicant is acting in good faith, the insurer is estopped from avoiding liability on the policy because of such false statements. The Court went on to state that the insurer could not avoid enforcement of the rule by provisions in the policy to the effect that the agent acts as agent for the insured while filling out the application or that the insurer shall not be liable for the acts of its agents.

In *Western and Southern Life Insurance Company v. VanHoos's Administratrix*,69 the Court held that where an agent fills in answers in an application without asking the questions, and the answers are false, the company is estopped from asserting their falsity as a defense. A judgment was rendered for the insurer, however, on the issue of waiver of the sound health provision of the policy. The insured had been in the last stages of tuberculosis before application for the policy was made, and the Court held that such facts precluded a claim of waiver of that provision. It was not proved that the agent had knowledge of the bad health of the insured. Neither, however, was it proved that the agent would not have learned of the bad health of the applicant had he so inquired.

A similar case was decided in 1945.70 The agent of the company testified that he knew the insured had received treatment for a back injury a few weeks previous to the application for insurance. He asked the insured if there was any good reason why he could not get the insurance and then proceeded to answer all the questions in the application himself. The question: "What illnesses, disease or injuries has Life Proposed had in the past three years?" was answered "None." Questions as to whether insured had ever undergone hospital treatment or suffered a serious injury were also answered negatively. Citing *National Life Company v. Rigney*,71 the Court stated that the insurer could not rely upon misrepresentation because the knowledge of the agent was imputed to the company. However, since it was not shown that the insurer knew that the applicant was suffering with pernicious anemia at the time of delivery of the policy, the insurer could not be deemed to have waived the sound health provision of the policy.72

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68 199 Ky. 470, 251 S.W. 628 (1923).
69 283 Ky. 577, 142 S.W.2d 145 (1940).
70 Western & S. Life Ins. Co. v. Downs, 301 Ky. 322, 191 S.W.2d 576 (1945).
71 297 Ky. 743, 180 S.W.2d 847 (1944).
72 322 Ky. at 326, 191 S.W.2d at 578.
B. The Middle Period--
Duty to Read

One of the earliest cases involving a duty to read was Kentucky Central Life and Accident Insurance Company v. Lynn.73 In this case, the father of an eighteen-year old diabetic had applied for life insurance on his son. There was conflicting evidence concerning the issue of responsibility for false statements in the application. The application contained representations that the insured had never had diabetes, and that he had had no illnesses or diseases in the past three years. The Court was of the opinion that had this been the only defense the question should have been submitted to a jury. But the company also relied on provisions (1) allowing avoidance where the insured had been treated for a disease during a two-year period before issuance of the policy and (2) stating that no person had authority to waive or change any part of the policy except by an endorsement signed by the president or secretary of the insurer.74 The Court, in holding that a verdict for the insurer should have been directed, mentioned that the insured was "an intelligent young man, able to read and write and understand."75 The Court felt that the insured had an obligation to read his policy at the time it was delivered to him, "and then, if dissatisfied with his contract as written, to have raised a righteous row in protest."76 The Court suggested that he then could have refused to accept the policy or pay the premium. (The Lynn case was later overruled to the extent that it may have implied that where the limitation on the agent's authority appeared for the first time in the policy, the insured would be bound retroactively from the date the application was signed.)77

In Commonwealth Life Insurance Company v. Keen,78 a man applied for life insurance for his seventeen-year old son who suffered from rheumatic heart disease. The boy had been hospitalized and one of his attending physicians had stated that there was no hope of ultimate recovery. The father testified that he had told the insurance agent that his son had had rheumatic fever, but that it was his belief that he was much improved since his release from the hospital. He said the agent had not asked the questions but inserted answers himself. The insured argued that the company was estopped from relying

73 304 Ky. 416, 200 S.W.2d 946 (1947).
74 Id. at 418, 200 S.W.2d at 947.
75 Id. at 421, 200 S.W.2d at 948.
76 Id.
78 313 Ky. 301, 231 S.W.2d 78 (1950).
on the misrepresentation to avoid liability on the policy because the false answers had been inserted by its own agent. The insured also maintained that the agent had waived provisions in both the policy and the application regarding the falsity or truth of answers by writing in answers without questioning the applicant or his father. Provisions had been drafted into the policy to the effect that knowledge acquired by the insurance agent would not bind the company unless it was set out in writing in the application or in the report of the medical examiner, and that the policy would not take effect unless and until it was delivered, provided the insured was in good health on that date. The Court felt that "any applicant for insurance especially one who has taken out policies on four members of his family has, or should have, some reasonable knowledge of the nature and purpose of questions in an application." After hearing the statement which had been made by the boy's physician, the Court could not believe that the father was ignorant of his son's condition. In the light of the misleading statements and the fact that the insured was not in good health upon the delivery of the policy, the Court held that the insurer was entitled to a pre-emptory instruction.

In Metropolitan Life Insurance Company v. Tannenbaum, there was no question of a limitation on an agent's authority prior to issuance of the policy. The limitation was set forth in the application which provided that no statement made to or knowledge on the part of "any agent, medical examiner or any other person as to facts pertaining to the applicant shall be considered as having been made or brought to the knowledge of the company unless stated in either Part A or Part B of this application." Citing Connecticut Fire Insurance Company of America v. Roberts and several other Kentucky cases, the Court held that where limitations on soliciting agents' authority are contained in the application, the insured is charged with notice thereof, and the insurer will not be bound by an act of waiver by the agent which conceals information material to the risk. It was the opinion of a majority of the Court that it was error to submit the case to a jury.

The dissent criticized the line of decisions which began with the Roberts case, and urged the Court to return to the principles of the

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79 Id. at 302-03, 231 S.W.2d at 78.
80 Id. at 303, 231 S.W.2d at 78-79.
81 Id. at 304, 231 S.W.2d at 79.
82 Id.
83 240 S.W.2d 566 (Ky. 1951).
84 Id. at 570.
85 226 Ky. 534, 11 S.W.2d 148 (1928).
86 240 S.W.2d at 570.
Russell case which had refused to give effect to a limitation on the authority of an agent.

In Reserve Life Insurance Company v. Thomas, a copy of the application was attached to the policy—a procedure required by statute before statements in the application can be received as evidence in an action for recovery of benefits or before the application will be considered a part of the contract between the parties. The application contained no notice to the insured concerning any limitations on the agent's authority but notified him that no insurance was effective until a policy was actually issued by the company. The policy itself contained a provision that the company's agents did not have authority to waive policy provisions without approval of the home office. The Court stated that the misrepresentations were made at the inception of the insurance contract and that parol evidence should be admitted to show the surrounding circumstances. Although the Court reversed a judgment for the insured, it refused to lay down any hard and fast rule on the duty to read one's policy.

Unlike Tannenbaum, the Thomas decision apparently was not based on provisions limiting the authority of the agent. The rationale for the decision was stated as follows:

However, in the case at bar, the evidence discloses that the representations in the application were so palpably false that recovery on the policy should not be permitted regardless of who was responsible for insertion of the false answers. For this reason, the judgment is reversed.

The Court noted that it had recently placed more responsibility on an applicant for insurance “to see to it that his representations to the company approach the truth.”

Two years later, in Mills v. Reserve Life Insurance Company, the Court took a clear and unambiguous stand. Though the insured in that case was an illiterate, the court nevertheless held him to a duty to read his insurance application. “A handicap which makes it more difficult for one to fulfill a duty, does not have the effect of excusing the duty.” The majority stated that that he had an obligation to procure someone to read and explain it to him before he signed it,

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88 240 S.W.2d at 571.
89 310 S.W.2d 267 (Ky. 1958).
91 310 S.W.2d at 269.
92 Id. at 270.
93 Id.
94 335 S.W.2d 955 (Ky. 1960).
95 Id. at 957.
and failure to do so was so grossly negligent as to raise an estoppel against him. The dissenting opinion expressed the viewpoint that it is reasonable to expect an insurance purchaser to read his application only if he is literate. The *Tannenbaum* case and the majority opinion in *Mills* were criticized as unjust results.96

The Court again confronted the problem of the illiterate applicant in the recent case of *Kentucky Central Life Insurance Company v. Combs,*97 wherein it was stated flatly that when the falsity of the representation is established and its materiality is not disputed, there can be no recovery—despite the illiteracy of the applicant.98 The position of the majority was strongly criticized in a dissenting opinion which cited the *Russell*99 case as authority for the proposition that a principal is bound by the acts of his agent within the scope of an agent's authority even when there is a provision limiting the authority, if the person dealing with the agent is ignorant of the limitation. It was noted that *Russell* had never been overruled and the majority was criticized for having strayed from its rationale. *Connecticut Fire Insurance Company v. Roberts*100 (which the dissent described as one of the leading cases which set the stage for "this fiasco"101) was distinguished since the conduct there had occurred at the inception of the contract, when the application was being taken. In *Roberts* the insured had claimed that the agent waived a policy clause prohibiting the purchase of additional insurance. The Court upheld the defense of the company that the agent did not have authority to make such a waiver, since the insured had notice of the limitations on his authority. The dissenters in *Combs* pointed out that there was an existing policy in the hands of the insured which provided that the agent could not waive requirements, and this factor in *Roberts* made it unlike the situation in which the agent fills in answers on the application under circumstances in which the insured has no notice of limitations on the agent's authority.102 The rule followed by the Court in the *Combs* case was criticized as being impractical and undesirable and "conceived in mistake."103

For these reasons I would overrule it, but even beyond this, it penalizes the poor, aged, ignorant and unlettered. Invariably the highly trained soliciting agent of the company seeks these people out and in

96 Id. at 959.
97 432 S.W.2d 415 (Ky. 1968).
98 Id. at 417.
100 226 Ky. 534, 11 S.W.2d 148 (1928).
101 432 S.W.2d at 419.
102 Id. n. 1.
103 Id. at 422.
order to procure a commission for himself takes their money while the company issues a worthless policy. To me, this is the cruellest type of injustice. . . . If either party must suffer from an insurance agent’s mistakes, and wrong-doings, it must be his principal, the insurance company, who hired him in the first instance and has the right to fire him in the last.\textsuperscript{104}

C. McReynolds—The Beginning of a New Trend

In March of 1969 the Court of Appeals decided a case which, because it follows close on the heels of prior cases imposing a strict duty to read on the applicant, will surprise those watching trends in the field of insurance. In\textit{ Pennsylvania Life Insurance Company v. McReynolds},\textsuperscript{105} the insured had been approached by the soliciting agent of an insurance company who was in the midst of a sales contest. As the application for a health and accident insurance policy was being filled out, the agent asked if McReynolds had high blood pressure. He replied, “Not to amount to anything.” The agent then inquired whether it went up very high or up to 200 or something like that and McReynolds said, “No.” McReynolds told the agent he had diabetes in a mild form and that he controlled it by taking some tablets and watching his diet. The agent told the applicant he would put “no” to the question “Do you have diabetes?” The company issued the policy, and a month later McReynolds suffered a stroke and tried to recover on the policy. The defense of the insurance company was that the insured had falsely represented that he had never had heart disease, high blood pressure or diabetes.

In deciding McReynolds, the Court did not feel it was bound by its previous decisions in\textit{ Roberts, Tannenbaum} and\textit{ Mills}, all of which involved situations where the application form contained notice of limitations on the authority of the company’s soliciting agent. In McReynolds, there was no such notice in the application.

It is highly possible that the Court’s ruling may be extended in the future to situations in which the application form does contain a notice of limitations on the agent’s authority. This reversal in attitude might be expected to result from the Court’s recognition that insurance contracts are unique in nature. They are not contracts of bargaining, but of adhesion. The insured seldom reads the policy prepared by the insurer, but rather buys protection as he would any other commodity, assuming it is what he ordered. “For the courts to say that the insured

\textsuperscript{104} Id. at 422 (dissenting opinion of Osborne, J.).

\textsuperscript{105} No. 69-188 (Ky. Court of Appeals, Mar. 28, 1969).
is presumed to know the contents of the application and the policy is
to set up a presumption simply contrary to fact.”

When courts held that many of the limitations contained in policies
could have no effect as to transactions prior to the delivery of the
policy (such as conduct at the time of the application), insurers
reacted by inserting limitations in the application form, thereby
making the signed application, rather than just the policy, the terms of
the offer. Verdicts in Kentucky courts reflected the success of the new
maneuver by the insurance companies. However, the applicant con-
tinued to rely on the agent; and he was little more likely to read the
limitations in the application form than those contained in the policy
itself.

The Court observed in McReynolds that there was a problem of
balancing the need to protect insurers from material misrepresenta-
tions against the need to protect honest citizens “from the evil incidents
of sales methods which emphasize commissions for the soliciting agent
at the expense of the welfare of the interested applicant.” The prob-
lem was thought to be particularly acute in cases involving non-
medical health and accident insurance, where the carrier had the right
to require a medical examination of the applicant before issuing a
policy, but waived it. This was the situation in McReynolds. On the
signed application, the insured had authorized the carrier to procure
his medical record from his physician. If the company had exercised
this right, it would have discovered that McReynolds’ physician had
prescribed medication for his mild-to-moderate diabetes but had never
given him insulin until after the stroke. It would also have discovered
that at several times preceding the application he had an above-
normal blood pressure.

“In order to effect a better balance between the interests and
responsibilities of the carrier and the applicant in the field of non-
medical health and accident insurance,” the Court held that it would
no longer place “full responsibility,” as stated in Combs, on the ap-
plicant to see that the application is correctly filled out unless the ap-
plicant himself, or his agent, has inserted the answers on the ap-
plication form. The use of the clause “[W]e no longer will place full
responsibility” leaves unanswered exactly what duties and what degree
of responsibility the Court will impose upon the applicant for insurance
coverage. If the applicant knows false answers are being recorded, he
will be responsible for them, but his knowledge of the falsity may

106 Id. at p. 6 (majority opinion).
107 Id. at p. 7 (majority opinion).
108 Id. at pp. 7-8 (majority opinion).
depend on his understanding as to exactly what information the questions are seeking to elicit.

In McReynolds, the applicant had made full disclosure of his diabetes and high blood pressure conditions to the agent who considered them too inconsequential to report. The Court stated that if the applicant in good faith followed the implied assurance of the agent that this information was not required, and was thereby misled into believing his answers were truthful, then there had been no misrepresentation on his part. The summary judgment was reversed, and the Court directed that the issue of good faith be tried.

The majority opinion was severely criticized in a dissenting opinion which stated that the facts of the case brought it within the statute and the long-established rule. It was urged that a summary judgment for the company should have been given on the basis of the insured's testimony that he knew that the agent had put "No" to questions concerning whether he had heart disease, high blood pressure, and diabetes, when the correct answers should have been "Yes." Under this view of the facts, the insured must have known that the agent was inserting false answers, and the applicant should not be excused on grounds that he did not fully understand what information the questions sought. The Court's sudden departure from precedent through the overruling of a long line of decisions, two of which were still in the advance sheets, was criticized as creating an uncertainty and instability in the law which was deplorable and frustrating. If the statute and decisions were so wrong, the General Assembly could have repealed or amended the statute. It was not the function of the courts to do so.

The dissent in McReynolds is undoubtedly correct in finding in that decision a sudden and surprising departure from the holdings of previous Kentucky cases. Nevertheless, it is a mere truism that every new trend in legal thought must have a starting point. Whenever courts have concluded that past cases were mired in an incorrect, unjust, or unrealistic interpretation of law, it has been necessary for them to depart from that interpretation and to overrule existing precedent in the process. It will always be a problem in the common law courts to balance the need for stability in the law with the need for flexibility and incorporation into the law of new concepts of justice.

Though McReynolds was limited in its holding to the non-medical

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health and accident insurance field, it would not be surprising if
future cases extended the new rule to other types of insurance. The
unique problems recognized by the Court of Appeals as existing in ad-
hesion contract situations do not arise solely in non-medical health
and accident policies. They occur in all types of standardized insurance
contract forms.

VII. CONCLUSION

Today, in many jurisdictions, the effects of the rule that an insurer
cannot avoid liability by a defense of material misrepresentation,
where the untrue answers were inserted by his agent without know-
ledge of the insured, are nullified in practice by the imposition on
purchasers of a duty to read their policies. The statutes enacted by
many states providing that the insurance application shall be attached
to the policy and thereby incorporated into the contract have aided
insurers in avoiding liability on such policies. By the use of careful
drafting, such as the inclusion of good health provisions and limita-
tions on the authority of agents, the insurer can secure an even more
favorable position.

In the field of non-medical health and accident insurance, Ken-
tucky no longer places the full responsibility on the applicant to see
that the application is correctly filled out. The Kentucky position may
be the more equitable one. It could be argued that of the two innocent
parties to the insurance contract, the insurer is the one best able to
remedy the evil. He selects the agents whom he hires and places them
in the position in which they are able to mislead applicants for insur-
ance into thinking that the company, with knowledge of the true facts
stated to its agent, has accepted the applicant as an insurance risk.112
The insurer should make an effort to ascertain that his employees are
competent and trustworthy. If, after careful selection, he does obtain
a few who are careless or dishonest, then who is more able to antici-
perate and provide against such a risk than the insurers, the people
whose daily business involves the anticipation of risks and provision
for contingencies? They are experienced in computing probability and
frequency of various occurrences, and are more able than the insured
to absorb and spread the risk.113

Looking at the problem from the viewpoint of administration of the
legal system, however, holding the parties to the statements and pro-

113 Macaulay, Private Legislation and the Duty to Read—Business Run by IBM
Machine, the Law of Contracts and Credit Cards, 19 VAND. L. REV. 1051, 1063
(1966).
visions as they are written in the application and the policy has definite advantages. Courts prefer to have accurate, precise, and efficient methods of fact-finding. If the contract is held to be the expression of the representations and intentions of the parties, all the facts which the court needs to decide the case are there in black and white. If, however, the parties are allowed to bring in outside evidence, questions will arise concerning statements made by the agent and the insured, and the vague, abstract concept of the "good faith" of the insured becomes an issue. The court must also be concerned about the possibility of perjury in such a situation.

Aside from administrative objectives, which are subordinate to considerations of justice in the decision-making process, many courts feel it is completely fair to bind the insured by the terms and statements in the insurance contract which he has accepted. Such a rule is consistent with general contract law, which imposes upon the party to a contract the duty to read the instrument, and charges him with a knowledge of its contents. It might be argued that the American public, being better educated today than at any time in our nation's history, should be capable of assuming such a responsibility. Many courts feel insurance contracts should be treated no differently than other binding agreements. It logically follows from this reasoning that one who does not read his insurance contract is inexcusably negligent and should be precluded from complaining about the untrue answers.

It has been questioned whether failure to read an insurance contract is negligence. Negligence has been defined as "the duty of exercising ordinary care" or the use of that care "which a person of ordinary prudence and caution would use." Vance suggests that the prevailing custom is for the insured to rely upon the "accuracy, skill, and good faith" of the agent in filling out the application. And as was pointed out in the dissenting opinion in Mills v. Reserve Life Insurance Company:

... [E]ven the average man who can read and write, and who is educated and experienced, is apt to trust the agent from whom he pur-

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114 See Id. at 1065.
115 See Id.
117 W. Vance, supra note 5, § 44, at 258-59.
119 W. Vance supra note 5, § 44, at 259-260.
120 335 S.W.2d 955 (1960).
chases an insurance policy to the extent that he permits the agent to fill out the application and then signs without reading it.\textsuperscript{131}

Can failure to read an insurance policy be called negligent behavior when the average man does not do so? Courts which recognize the principle that customary practice is not ordinary care but only evidence of ordinary care\textsuperscript{122} may say "yes" if the evidence of customary practice merely demonstrates that large numbers of persons are conducting themselves in a careless manner.

Future decisions in cases in which false answers were inserted in an application by an insurance agent may be influenced by the development of principles of law in the field of adhesion contracts generally. The issue to be decided may be phrased:

To what extent should a person be charged with knowledge of, and be bound by, the contents of a standardized contract form, when that person is the party in the weaker bargaining position and does not have an adequate opportunity to negotiate the terms of the contract?

By its decision in McReynolds, Kentucky has placed itself among those states recognizing that insurance contracts are of a distinct nature and should be treated in a different manner than other commercial contracts.

\textit{Kay K. Alley}

\textsuperscript{121} \textit{Id.} at 959 (dissenting opinion of Palmore, J.).

\textsuperscript{122} Northwest Airlines, Inc. v. Glenn L. Martin Co., 224 F.2d 120 (6th Cir. 1955).