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Insurance - Medical Certificates of Health and Statutory Estoppel

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INSURANCE—MEDICAL CERTIFICATES OF HEALTH AND STATUTORY ESTOPPEL

This article is an investigation of the various judicial decisions construing the purpose and effect of section 209.07 of the Wisconsin Statutes, which provides:

> If the medical examiner of any life or disability insurance company shall issue a certificate of health, or declare the applicant a fit subject for insurance, or so report to the company or its agent under the rules and regulations of such company, it shall thereby be estopped from setting up in defense of an action on a policy issued thereon that the insured was not in the condition of health required by the policy at the time of the issue or delivery thereof, unless the same was procured by or through the fraud or deceit of the insured. This section shall apply to fraternal benefit societies.[1]

The typical factual situation which underlies the problems in the application of section 209.07 is relatively simple. An insurance company requires an applicant to submit to a medical examination, in the course of which the applicant makes a false representation. Thereafter, the insurance company denies all policy liability based upon the false statement of the insured.

Iowa decisions are relied upon extensively throughout this article.[2]

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[1] WIS. STAT. §209.07 (1963). See also Annot., 172 A.L.R. 143 (1948) for an excellent review of this subject matter.

[2] Iowa decisions are relied upon extensively since, as declared in Platke v. John Hancock Mutual Life Insurance Company, 27 Wis. 2d 1, 5, 133 N.W. 2d 277, 280 (1965); "the underlying purpose of the legislature in enacting Sec. 209.07, Stats., can be learned from declarations of the Iowa Supreme Court . . . because our statute, adopted in 1911, was derived from the Iowa Statute [IOWA CODE §1812 (1897)] enacted in 1897. In Weimer v. Economic Association (1889) 108 Iowa 451, 453, 79 N.W. 123 the court set out the purpose of the statute:

"'The very evident purpose of the statute is to prevent the defeat of recovery on any policy where the company has by its skilled agent, examined and passed upon the fitness of the applicant for insurance. The estoppel is directed to an inquiry as to the condition of health, and it is quite immaterial what representations have been made or warranties given. The company, having investigated, and for itself ascertained and declared the condition of the assured to be such as required by its rules and regulations, will not be permitted to interpose as a defense the physical infirmities of the deceased, of which it knew, or might have known, as the result of its examination; and the fraud or deceit referred to is that of procurring the report or certificate of the physician, and not the policy, . . .'"

While the original Iowa provision, §1812 of the 1897 Code, is identical to its modern counterpart, §511.31 IOWA CODE ANNO. (1962), it is in some respect different from the original Wisconsin provision, Wis. Laws 1911, ch. 507, §4202, and the present WIS. STAT. §209.07 (1963), which also differ from each other in some respects.

Two other states have somewhat similar statutes to Wisconsin's section 209.07: SOUTH DAKOTA CODE §31.1507 (1939) and PURDON'S PENNSYLVANIA STATS. ANNO. §511(a). However, the Pennsylvania statutory estoppel applies to cases both where a medical examiner of the insurer passes on the insurance risk of the applicant and also where a medical examination is waived.

HISTORY AND PURPOSE

The common law has long treated insurance contracts as a class unto themselves,[3] recognizing that although contract law is applicable, superimposed thereon is a permeating body of legal principles applying solely to insurance contracts.

The common law distinguished the two types of statements by the insurance applicant which if untrue, even though not necessarily fraudulent, might be grounds for holding an insurance policy voidable at the will of the insurer. One such statement, termed a "representation," was collateral to the insurance contract and not an actual part of the contract.[4] Any statement made by an insurance applicant relative to an insurance purchase, such as his age or past health, was a representation. Only a *material* misrepresentation by the insured could void the policy.[5] On the other hand, a "warranty" was considered a part of the contract, and strict compliance in fact was necessary,[6] regardless of good faith or immateriality. The content of a warranty could be identical to a representation, with the only difference that the former was incorporated expressly into the insurance contract. The original predisposition of courts to treat the insured's statements in the policy as warranties rather than representations gradually reversed itself, so that courts eventually began to construe statements of the applicant as representations, rather than warranties, whenever possible.[7] Therefore, assuming no fraud, the repeated issue before the common law courts centered on the materiality of the misrepresentation. Materiality could be determined by asking the question, "did the fact or circumstance represented or misrepresented operate to induce the insurer to accept the risk or to accept it at a lesser premium?"[8] But even such a judicial liberalization lost much of its effect when courts held that inquiry by the insurer relative to a specific matter conclusively established the materiality of such matter.[9]

As a result, many states enacted statutes which had the purpose and effect of placing warranties and representations upon the same legal basis. The statutory abolition of the technical distinction between these two concepts occurred in Wisconsin in 1909 with the enactment of Sec-

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[3] Crowell, *False Statements by Applicants for Policies of Life Insurance,* 19 MARQ. L. REV. 228, 229 (1935).

[4] 45 C.J.S. 156, 157, *Insurance,* §473(4)a; Crowell, *supra* note 3 at 230.

[5] 45 C.J.S. 157, *Insurance* §473 (4)a; Crowell, *supra* note 3 at 230; Prieger v. Exchange Mut. Ins. Co., 6 Wis. 89 (1859), Murphy v. American Mut. Accident Ass'n., 90 Wis. 206, 62 N.W. 1057 (1895).

[6] 45 C.J.S. 156, *Insurance* §473 (4)a; Crowell, *supra* note 3 at 230.

[7] 45 C.J.S. 162, *Insurance* §473 (4)b; Crowell, *supra* note 3 at 231.

[8] *Supra* note 3 at 232.

[9] See Cobb v. Covenant Mut. Benefit Ass'n., 153 Mass. 176, 26 N.E. 230, 232 (1891).

tion 4204(m),[10] which is almost identical with today's Section 209.06 of the Wisconsin Statutes.[11]

In 1911, Wisconsin enacted an estoppel provision[12] which was the predecessor of Section 209.07. This section and section 209.06 are related in that each deals with the effect of misrepresentations upon the insurer's liability. However, whereas section 209.06 lists three alternative attributes of misrepresentation, any one of which will cause the policy to be void, section 209.07 makes an insurance policy voidable only where the misrepresentation fraudulently induced action by the medical examiner and disregards the alternatives of "contributed to the loss" and "increased the risk."

The Wisconsin court clearly expressed the scope and relationship of these two statutes in *Frozena v. Metropolitan Life Ins. Co.:*

> There seems to be no escape from the conclusion that where a medical exam is had and a report made that the applicant is a fit subject for insurance, an estoppel arises against the company in the absence of fraud or deceit practiced by the insured upon the medical examiner in order to induce a favorable report and that the provisions of sec. 209.06 avoiding the policy where an innocent misrepresentation increases the risk, must be limited to situations where there has been no certificate of health or recommendation of the risk by the examiner.[13]

As expressed by the court, section 209.06 bows to an application of section 209.07 where a certificate of health or its statutory equivalent is issued without fraud. This holding has been given recent confirmation by *Platke v. John Hancock Ins. Co.*[14]

The basic purpose of the estoppel statute appears to be the protection of the insured. While section 209.06 placed the risk of innocent misrepresentations—material to the issuance of the policy—upon the insured, section 209.07, enacted several years later, in effect shifted that risk to the insurer. Indeed, the basic purpose of section 209.07 apears to be the protection of the insured. The protection being statutory in nature and a matter of public policy, it may not be waived by the insured. Insofar

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[10] Wis. Laws 1909, ch. 288.

[11] WIS. STAT. §209.06 (1963) provides: "(1) No oral or written statement, representation or warranty made by the insured or in his behalf in the negotiation of a contract of insurance shall be deemed material or defeat or avoid the policy, unless such statement, representation or warranty was false and made with intent to deceive, or unless the matter misrepresented or made a warranty increased the risk or contributed to the loss.
(2) No breach of a warranty in a policy shall defeat or avoid such policy unless the breach of such warranty increase the risk at the time of the loss, or contributed to the loss, or existed at the time of the loss.
(3) This section applies to fraternal benefit societies.

[12] Wis. Laws 1911, ch. 507, §4202.

[13] 211 Wis. 373, 376, 247 N.W. 333, 334 (1933).

[14] 27 Wis. 2d 1, 6, 133 N.W. 2d 277, 280 (1965).

as the statute and life insurance policy are inconsistent or incompatible, the statute governs.[15]

Requirements for Operation of Section 209.07

The statute applies only to applications for life and disability insurance policies. The medical examiner referred to by the statute is not the medical director of the insurance company, but the actual examining physician who performs the physical examination for the insurance company.[16]

For the statute to be operative, the examiner must either (1) issue a certificate of health; (2) declare that the applicant is a fit subject for insurance; or, (3) so report to the company or its agent. Furthermore, such certificate, declaration or report must not have been procured by or through the fraud or deceit of the insured.

While section 209.07 designates three distinct acts by the medical examiner, any one of which will cause the statute to be applicable, it appears the courts have failed to make any real distinction between the three and seem, in effect, to treat them as synonymous. Substance and not the form of the report is determinative of whether it is within the contemplation of the statute.

The Nature of the Estoppel

The effect of section 209.07 was precisely defined in *Mutual Life Ins. Co. v. Cunningham:*

> The statute declares an 'estoppel' in a certain fact situation. This estoppel is positive and is not rebuttable. When the fact situation exists (as here), the statute exerts its full force and the provisions in the contract relating to innocent false statements in the application for insurance lose all influence whatever may be the fact as to the truth or falsity of such statements. Thus the effect of the statute is, in a practical sense, to change the contract while the method of bringing about that effect is through estoppel which is often regarded as remedial. This is that character of estoppel which is really 'a rule of substantive law masquerading as a rule of evidence. . . .'[17]

While estoppel is basically a procedural device which the law supplies as a remedy to prevent legal recognition of an otherwise relevant

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[15] Schware v. Home Life Ins. Co., 134 Pa. Super. 53, 3 A. 2d 949, 952 (1939).

[16] The Iowa Court declared such in the case of Peterson v. Des Moines Life Ass'n., 115 Iowa 668, 87 N.W. 397, 398 (1901):

> "It is no doubt customary for life insurance companies to have a general medical advisor or director at the home office, whose advice is taken into account in determining whether the risk shall be accepted; but the person who makes the actual examination, and reports on applicant's condition, is evidently the medical examiner or physician referred to."

[17] 87 F. 2d 842, 845 (1937). In this case the health of the insured was precarious at the time of the required medical examination and at the time of the delivery of the policy. However, the insured was ignorant of that fact.

allegation of one party to an action, by statute it has the effect of a substantive rule incorporated as a term of the insurance contract.[18]

The estoppel created by the statute is effective only as to those matters affecting the *condition of health* of the applicant prior to the issuing of the policy.[19] In the absence of fraud and assuming the issuance of a medical certificate or its statutory equivalent, the insurer is estopped, or legally prevented from denying the truthfulness of statements made by the insured to the medical examined which had a bearing on the physical condition or health of the insurer. Such matters include not only statements of the insured concerning his own health, past and present, but also statements made regarding the health of ancestors and other members of the applicant's family.[20] "There may, no doubt, be warranties as to other matters not relating to the health of the insured,—such as his place of residence or occupation,—breach of which will avoid the policy notwithstanding the statute. . . ."[21] These statements being outside the scope of section 209.07, should be examined in the light of section 209.06's three tests for voidability.[22]

The next question which presents itself is whether the statute's estoppel applies only to the condition of health of the applicant as of the time of the examination, or does it extend beyond this and include the time up to the issuance of the policy? It is certain that section 209.07's estoppel, preventing the insurer from denying "that the insured was not in the condition of health required by the policy" applies *at least* to the condition of health as of the time of the examination.

The common law rule was defined by the court when it stated, "the generally accepted rule is that the applicant . . . is under a duty to disclose to the insurance company any facts which develop or are discovered by him after the making of the application, before the policy takes effect, that materially increase the risk."[23] However, the Wiscon-

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[18] A similar decision to Mut. Life Ins. Co. v. Cunningham, *supra* note 17, was made in Equitable Life Ins. Co. v. Mann, 233 Iowa 293, 7 N.W. 2d 566 (1943), and New York Life Ins. Co. v. Hesseling, 236 Iowa 412, 19 N.W. 2d 191 (1945).

[19] "The estoppel is directed to inquiry as to the condition of health, and it is quite immaterial what representations have been made or warranties given. The company having investigated, and for itself ascertained and declared the condition of the assured to be such as required by its rules and regulations, will not be permitted to interpose as a defense the physical infirmities of the deceased, of which it knew, or might have known, as the result of its examination . . ." Weimer v. Economic Life Ass'n., 108 Iowa 451, 79 N.W. 123 (1899).

[20] McGowann v. Supreme Court of Independent Order of Foresters, 104 Wis. 173, 183, 80 N.W. 603, 607 (1899).

[21] Peterson v. Des Moines Life Ass'n., 115 Iowa 668, 87 N.W. 397, 398 (1901).

[22] That is, whether a) "such statement, representation, or warranty was false and made with intent to deceive," or b) "the matter represented or made a warranty increased the risk," or c) "contributed to the loss."

[23] Fieseth v. New York Life Ins. Co., 20 Wis. 2d 295, 302, 122 N.W. 2d 49, 53 (1963).

sin statute, section 209.07, and its Iowa counterpart,[24] provided that the estoppel applies to the condition of health required by the policy at the time of issue or delivery. Thus, with the creation of section 209.07, the widely held common law rule was swept away.[25] Today, in cases where the estoppel arises, it applies to all matters affecting health subsequent to the examination, up to the time of the issuance of the insurance policy.[26]

The Iowa court stated this principle in *Peterson v. Des Moines Life Ass'n.:*

> It is to be noticed that the estoppel declared by the statute is as to the condition of health of the assured at the time the policy was issued. . . . In short we think that the estoppel relates to all matters inquired about so far as they bear on the health and physical condition of the applicant affecting the risk, whether they refer to the time the policy is issued or some previous time; for the ultimate question is whether the applicant is a suitable person to accept as a subject of life insurance.[27]

The Iowa court extended this thought in *Mickel v. Mut. Life Ins. Co.:*

> [A]n insurance company has a right to contract with an applicant that the policy shall not go into effect until delivery thereof to such applicant while he is in good health, but such provision is for the sole benefit of the insurer and gives it the option to refuse to deliver the policy to the applicant, if he is not at the time in good health. In other words, the insurer has the option of withholding the policy, in which event it would not go into effect, or of delivering it to the insured. If it accepts the latter alternative, the policy goes into effect at once, and the bar of the statute precludes the insurer from setting up the contract as a defense in an action thereon.[28]

The statute has the effect of destroying any defense to policy liability which has its basis in a false statement of facts material to insurance risks, where such action is not inspired by deceit or fraud. Then too, any condition affecting the insurability of the insurance applicant, such as a stroke, occuring at any time either prior or subsequent to the physical examination by the insurer, is not grounds for a defense by the insurer, *per se,* if concealed. That is, even though the applicant fails to disclose a fact material to the insurability of the applicant, such failure under section 209.07, will not be a basis upon which the insurance company can refuse to admit policy liability, if such concealment was innocent and without an actual intent to defraud the insurance company.

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[24] IOWA CODE ANNOTATED §511.31 (1962).
[25] VANCE, INSURANCE §74 (3rd. ed. 1951).
[26] Ludwig v. John Hancock Mut. Life Ins. Co., 271 Wis. 549, 554, 74 N.W. 2d 201, 204 (1956). Although, this case is cited, the author feels the reasoning of this case is not satisfactory.
[27] 115 Iowa at 668, 87 N.W. at 398-399.
[28] 204 Iowa 1266, 213 N.W. 765, 768 (1927).

THE NATURE OF THE MEDICAL REPORT

The courts have been almost universal in their declarations that more than a mere certification of the physical measurements made by the examiner is required as a basis for an application of the statutory estoppel. Typical of such decisions is the Wisconsin Court's holding in *Jesperson v. Metropolitan Life Ins. Co.:*

> The medical examiner simply certified height, weight, measurements, pulse, and blood pressure and that he found no evidence of impairment of the heart, brain, stomach, lungs, etc. These answers were all in response to specific questions required to be answered by the medical examiner and there is nowhere in the record, so far as we can discover, a certification of health or declaration that the applicant is a fit subject for insurance. Under these circumstances sec. 209.06 applies to make an innocent representation by the insured which increases the risk a circumstance avoiding the policy. Hence, while we consider that the jury's finding as to intent to deceive is supported by the evidence, we need not labor this point because the point becomes immaterial.[29]

The first Iowa case that dealt with its statutory estoppel provision, was *Weimer v. Economic Life Ass'n.*[30] Two of the questions in the physical examination report form furnished by the insurer to the medical examiner were: "Are you satisfied that there is nothing in the applicant's physical condition, habits, personal or family history, not distinctly set forth, tending to shorten her life? . . . Do you unquestionably recommend the applicant for insurance?[31] Both of these questions were answered in the affirmative by the examiner and a life insurance policy was issued. The court, in holding the estoppel statute applicable, declared:

> Where, in answer to one or more questions, or in some other way, the examiner, in words or in language so meaning, declares that the applicant is a fit subject for insurance, it is sufficient. The very evident purpose of the statute is to prevent the defeat of recovery on any policy where the company has, by its skilled agent, examined and passed upon the fitness of the applicant for insurance.[32]

In all the cases in which the Iowa court applied its estoppel statute,[33] the questions found in the insurance policy application forms were directed to the medical examiner, and specifically referred to the insurance *risk* or the *insurability* of the applicant. Such questions, when an-

[29] 251 Wis. 1, 4-5, 27 N.W. 2d 775, 777 (1947).
[30] 108 Iowa 451, 79 N.W. 123 (1899).
[31] *Ibid.*
[32] *Ibid.*
[33] Bolting v. New York Life Ins. Co., 182 Iowa 797, 166 N.W. 278 (1918); Faber v. New York Life Ins. Co., 211 Iowa 740, 265 N.W. 305 (1936); McNabb v. State Farm Life Ins. Co., 116 F. Supp. 641 (S.D. Iowa 1953); Crandall v. Banker's Life Company, 245 Iowa 540, 62 N.W. 2d 169 (1954).

swered favorably to the applicant by the insurer's medical examiner, clearly put the issuance of the policy within the application of the estoppel statute. In cases such as these, few would argue that the Iowa court had extended the scope of the statute beyond its intended purpose and intent. The statute is not applicable unless there has actually been a determination of insurability by the medical examiner.

Wisconsin followed the reasoning of the early Iowa decisions. In the *Frozena* case,[34] the medical examiner had characterized the applicant as a "first-class" risk medically in answer to a question in the report form asking him to characterize the applicant as a "first-class, average, doubtful or poor" insurance risk. Acting upon such facts, the court issued its landmark distinction between mere certification of physical tests and measurements without comment and the actual reporting to the insurance company that the applicant was a fit subject for insurance. The court held that only the latter gave rise to an application of section 209.07.[35]

In *Gibson v. Prudential Life Ins. Co.,* the court held that the medical examiner, negatively answering the question "in your opinion is this risk questionable because of any factor such as presence or history of mental or physical defect, character, habits, or environment"[36] in effect made a "declaration that the applicant was a fit subject for insurance." The court declared:

> We are unable to perceive substantial distinction in the purpose and effect of the question here compared to one which may have inquired; "In your opinion is the applicant a fit subject for insurance because of the presence or history of a physical defect, etc.?"[37]

In the 1963 case of *Fjeseth v. New York Life Ins. Co.,*[38] the court summarily dismissed any discussion of section 209.07 by declaring that there was no evidence that the insurer's medical examiner ever certified the insured's health to the insurer. The court, holding section 209.07 inapplicable, also pointed out that the policy expressly stated that the medical examiner is not authorized to pass upon insurability. A question arises as to whether the court could have based its decision upon this last point alone. May a court rely solely upon such a provision in an insurance medical application form and fail to give effect to section 209.07 when the examiner acting on his own does in effect certify the health or pass upon the insurability of an applicant? In such cases a showing of actual reliance by the insurer on such unauthorized evalua-

[34] Frozena v. Metropolitan Life Ins. Co., 211 Wis. 373, 374, 247 N.W. 333, 333 (1933).
[35] *Id.* at 376, 247 N.W. at 334.
[36] 274 Wis. 277, 281, 80 N.W. 2d 233, 235 (1956).
[37] *Id.* at 287, 80 N.W. 2d at 238.
[38] 20 Wis. 2d 295, 297, 122 N.W. 2d 49, 50 (1963).

tions would seem to be sufficient to effectuate an application by the courts of section 209.07. It would also appear proper to disregard express application provisions denying the medical examiner's authority to judge insurability, if the application in fact contained questions which in effect solicited such judgment.

The most recent Wisconsin case dealing with section 209.07 has been the most radical as far as its determination of the type of medical examiner's report which comes within the purview of the estoppel section. In *Platke*[39] the Wisconsin court based its application of section 209.07 upon the negative response to the last question in the medical examination report. The medical examiner was asked this question: "In your opinion is there anything detrimental in the habits, surroundings or occupation of the proposed insured?"[40] This is the only case where either a Wisconsin or an Iowa court has applied the estoppel statute to a medical report in which the medical examiner was not requested to pass *specifically* on the "risk" or "insurability" of the applicant. The majority in the *Platke* case held that the examiner's answer to the above question in the application form constituted a certificate of health or a declaration that the applicant was a fit subject for insurance under the estoppel statute. After an investigation of the prior cases dealing with the estoppel statute, the court declared, "[I]t becomes clear that no special verbiage is required to constitute the certification or declaration contemplated in Sec. 209.07. Stats."[41]

The dissent in that case held, "The court's opinion comes perilously close to holding that all of these medical examiner reports in which the physician certifies to the findings made by him of his physical examination of the applicant constitutes a certificate of health or declaration of fitness."[42] The dissent then formulated a test which they declared should be applied to determine whether a medical examiner's report comes within the provision of section 209.07:

> Do the statements of the medical examiner in his report go beyond merely stating his objective findings so as to express an opinion as to general health or fitness for insurance? The mere fact that one statement may express an opinion with respect to one element of the whole such as does question 20, should be held to be insufficient to constitute an expression of opinion as to the total health or fitness of the applicant for insurance.[43]

The dissent under such a test holds that the question under discussion did not cause the report to come within the application of the estoppel statute because "the opinion asked for in question 20, does not relate

[39] 27 Wis. 2d 1, 133 N.W. 2d 277 (1965).
[40] 27 Wis. 2d at 9, 133 N.W. 2d at 282.
[41] *Id.* at 7 ,133 N.W. 2d at 281.
[42] *Id.* at 11, 133 N.W. 2d at 283.
[43] *Id.* at 12, 133 N.W. 2d at 284.

to the general fitness of the applicant so as to constitute a certificate of health. Rather, it is restricted to the habits, surroundings, or occupation of the applicant."[44]

It is submitted that the dissent is justified in holding that the majority's application of section 209.07 to question 20 of the examination report is an unwarranted extention of the express terms of section 209.07. However, it may be that the motive prompting such an extention is not unsound. It might well be argued that in the absence of fraud, once an applicant has been subjected to a medical examination by the insurer's examiner, that no lack of a condition of good health prior to the issuance of the policy should be available as a defense to the insurer. The effect would be to extend the statute to those medical reports which the courts have in the past held to be outside the operation of the estoppel statute. If such liberalization, as is illustrated in its primary stage by *Platke,* is carried to its fullest extent as indicated above, much of the prior case law restricting the availability of section 209.07 would be inapplicable. However, while the decisions prior to *Platke* would probably be decided similarly under the *Platke* rule due to the particular facts of those cases, it is doubtful whether the narrow interpretation of the applicability of section 209.07 announced in such earlier opinions is consistent with *Platke's* broader construction.

The Applicant's Fraud

Initially, it is essential to understand the fraud of the insured which vitiates application of the estoppel under section 209.07 is fraud in the procurement of the medical certificate and not the policy itself. In the absence of proof that the insured obtained the medical certificate or its statutory counterpart through his fraud, the insurer will be estopped or prevented from denying liability because of the fact that the insured was not in the condition of health required for coverage by the policy. This view is amply illustrated by the Iowa court in the *Weimer* case where the court declared, ". . . and the fraud or deceit referred to is that of procurring the report or certificate of the physician and not the policy, . . ."[45] The Iowa court amplified such holding in the subsequent case of *Stewart v. Equitable Mut. Life Ass'n.* by finding that the word "same" in the last clause of the statute referred to "issue a certificate of health or declare the applicant a fit subject for insurance, or so report to the company." In so doing the court declared, "we think that the reasonable and certainly the grammatical construction of the statute."[46] The Wisconsin court echoed such holdings by declaring that the statute applied ". . . in the absence of fraud or deceit practiced by the insured

[44] *Id.* at 11, 133 N.W. 2d at 283.
[45] 108 Iowa at 451, 79 N.W. at 123.
[46] 110 Iowa 528, 81 N.W. 782, 783 (1900).

upon the medical examiner in order to induce a favorable report. . . ."[47]

While there has been some argument against this construction,[48] the courts have been in concert with the Iowa court's statement in *Wood v. Farmers' Life Ass'n.*:

> Any other construction of the language of the statute would leave it without effect, for it would still be open to the company, as it was before the statute, to contend that the policy was fraudulently procurred by reason of false statements in the application, and the truth of the statements would thereby practically be made matter of warranty, not withstanding the medical examination. . . .[49]

The Wisconsin court in *Monahan v. Mut. Life Ins. Co.*[50] made a fundamental, yet all important, distinction between a mere false statement by an insurance applicant and fraud in the insurance application:

> This section applies to all oral or written statements made in the negotiation of a contract of insurance. While sec. 209.07 deals specifically with the certificate of health and estops the company from going back of that certificate unless the same was procured by or through the fraud or deceit of the insured, we cannot ignore the provisions of sec. 209.06 in determining what constitutes such fraud and deceit. By the latter section it is not sufficient to prove that the statements were merely false. It must appear that the false statements were made with actual intent to deceive.

The Iowa court in *Equitable Life Ins. Co. v. Mann*[51] defined the six elements that must be established to prove fraud.

(1) There must be a material misrepresentation of an existing fact. The Iowa court cited a Fourth Circuit Court decision, *Fountain & Herrington v. Mutual Life Ins. Co.*, which held: "Answers made in response to questions in the application as to prior illness, consultation with physicians and applications for other insurance, where the applicant, as here, declares that they are true and offers them as an inducement to the issuance of the policy, are deemed material as a matter of law. . . ."[52]

Some courts have even gone so far as to declare, as did a Massachusetts court,[53] that inquiry by the company relative to a specific matter conclusively established its materiality. However, such a statement would probably have to be qualified in practice so as to cover only those matters which in fact do relate to the insurance risk.

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[47] Frozena v. Metropolitan Life Ins. Co., 211 Wis. 373, 376, 247 N.W. 333, 334 (1933).
[48] 11 WIS. L. REV. 447 (1936).
[49] 121 Iowa 44, 95 N.W. 226, 227 (1903).
[50] 192 Wis. 102, 107, 212 N.W. 269, 271 (1927).
[51] 233 Iowa 293, 7 N.W. 2d 566, 567 (1943).
[52] 55 F. 2d 120, 123 (4th Cir. 1932).
[53] Cobb v. Covenant Mut. Benefit Ass'n., 153 Mass. 176, 26 N.E. 230 (1891).

It is obvious that for a medical examiner to clearly evaluate the insurability of an applicant, he must establish more than the applicant's present physical condition as indicated by the various physical measurements which he has made. He must also attempt to discover any latent conditions which may not be exposed by normal medical tests. Knowledge of the past history of the health of the applicant and his family is vital to such a task. These latter two elements become extremely important as far as the examiner's evaluations and recommendations are concerned. Any substantial deviation from the truth of such matters will constitute a *per se* material misrepresentation of an existing fact. In this regard, most courts hold that is it not necessary for the applicant to reveal his trivial illnesses.[54] The Iowa court declared:

> Thus, it has been held that a statement that the applicant is in good health is not shown to be false by proof of a temporary ailment, not indicating a vice in the constitution or so serious as to have some bearing on the general health and continuance of health; that is, such as acording to common understanding would be called a disease.[55]

However, in *Mutual Life Ins. Co. v. Hurni Packing Co.*,[56] the applicant for insurance had consulted a doctor within five years for a matter which appeared trivial to the applicant and yet the court held the estoppel protection inapplicable. The court found that the applicant had in effect committed fraud in his *repeated* statements to the medical examiner that he had not consulted any physicians. Such prior examinations may constitute a source of information to the medical examiner and may reveal conditions of the applicant's health not discovered by the medical examiner in his physical examination of the applicant. Thus, a court may hold repeated denials of the existence of prior medical examinations constitute fraud, even though the source of such examinations was a trivial matter.

(2) It must be established that the representation was false, that is untrue in the objective sense. (3) That the insurance applicant had knowledge that his statement to the medical examiner was false. (4) The applicant's intention that the misrepresentation be relied upon by the medical examiner, is one of the most important of the six elements required to establish fraud. This element may be a question for the jury as the trier of fact[57] or the court may find it as a matter of law.[58] (5) The fifth element follows from the fourth, that is, the medical

[54] Schneider v. Wis. Life Ins. Co., 273 Wis. 105, 113, 76 N.W. 2d 586, 589 (1955).
[55] Sargent v. Modern Brotherhood, 148 Iowa 600, 127 N.W. 52, 55 (1910). See also Annot. 172 A.L.R. 143, 151 (1948).
[56] 260 F. 641 (8th Cir. 1919); See also Annot. 172 A.L.R. 143, 151 (1948).
[57] See Platke v. John Hancock Mut. Ins. Co., 27 Wis. 2d 1, 133 N.W. 2d 277 (1965) for a good example of this principle.
[58] Monahan v. Mutual Life Ins. Co., 192 Wis. 102, 109, 212 N.W. 269, 272 (1927).

examiner who made the actual examination relied upon the misrepresentation of the applicant in making a report favorable to the applicant. The Iowa court declared in *Boos v. Mutual Life Ins. Co.:*

> The question is not, therefore, whether, if true answers had been made to the questions, a policy would have been issued by the defendent company. It might, or might not, with full information have accepted the risk. The inquiry at this point is limited to the effect of false statements upon the examining physician in determining and ascertaining the state of health of the applicant. Was he misled and deceived thereby and induced to issue a certificate of health when, had he been apprised of the facts, he would not have done so? This question must be answered by the testimony of the physician himself.[59]

The Wisconsin court by all indications is in accord with the Iowa rule laid down in the *Boos* case. However, the Wisconsin court was somewhat confused in its reasoning in *Monahan v. Mutual Life Ins. Co.* as is shown by the following quotation:

> Respondent contends that the medical examiner for the appellant did not rely upon her statements, but relied entirely upon his own examination and that therefore her statements are not material. This contention cannot be sustained. It is well known that insurance companies, in determining whether an applicant is a fit subject for insurance, rely not only upon a physical examination. . . .[60]

Here the court answered the respondent's contention that the *medical examiner* did not rely upon the respondent's misrepresentation, by declaring as a matter of law that *insurers* do rely upon such representations as were made by the respondent. The court, in effect, made the reliance of the insurer upon the misrepresentation rather than the reliance of the medical examiner, the crucial issue. This position is clearly erroneous and fails to meet the respondent's argument. Reliance by the insurance company is not an essential element in the proof of fraud for its reliance upon the medical report or certificate is presumed, in the absence of any showing to the contrary.[61]

(6) The sixth and last element of fraud which must be established is that the insurance company was thereby defrauded. It must be shown that the insurer is in a position less favorable than it was before the misrepresentation and that a cause for such change was in fact the misrepresentation. That is, the insurer got less than he bargained for.

The determination of whether fraud exists is usually a question for the jury. However, juries are often reluctant to find any intent to defraud once the insured is dead. A good illustration of this point is found

[59] 205 Iowa 653, 216 N.W. 50, 51 (1927).
[60] 212 N.W. 269, 272 (1927).
[61] Bohen v. New York Life Ins. Co., 188 Iowa 349, 177 N.W. 706, 711 (1920).

in *Conklin v. New York Life Ins. Co.*[62] Here the insured stated in his application that he had not been treated by any physician within five years. He also declared that no tests had been taken which established the presence of diabetes. However, the insured had been treated for diabetes over a period of more than a year with eleven days spent in the hospital due to such illness. Nevertheless, while such facts were established, the jury in a special verdict found no intent on the applicant's part to deceive the medical examiner. This is but one example of the many cases[63] in which the jury has flagrantly disregarded the actual facts and found a lack of intent to deceive, despite facts which preclude everything but fraudulent intent. To counteract such irresponsible tactics by the juries, the courts in these cases have tended to find an intent to deceive "as a matter of law."[64] The courts have done so after a close view of the facts of each case, particularly the intelligence and occupation of the insured. This point is vividly illustrated by the Wisconsin court in the *Conklin* case where the court stated:

> It seems incredible that an intelligent man such as the deceased undoubtedly was, who had been treated for diabetes for over a period of more than a year with eleven days in a hospital, could forget such weighty and material matters even if, as the plaintiff claims, the examination was made in the factory at a time when he was busily engaged in other matters and under somewhat distracting conditions. Such being the case, the false answers could have been made for no other possible purpose than to induce reliance upon them and thereby deceive the defendant company.[65]

In the *Platke* case,[66] the court found no intent to deceive as a matter of law and affirmed a jury's special verdict finding that the insured made misrepresentations without an intent to deceive. This may be taken by some to be an indication that today's court has retreated from its prior history of overturning the jury's finding of fact and finding deceit as a matter of law. However, such conclusion is unfounded. The court's affirmation of the jury's findings has a rational basis in the facts of that case. First, the court properly found that there was an ambiguity in the applicant's responses to several questions in the medical report, and second, the insurer's medical examiner testified that the insured "did not appear to be very bright . . . didn't have insight into what was wanted of him. . . ."[67] The court held the "jury could have thus concluded that he [the insured] was not likely to have entertained the de-

[62] 200 Wis. 94, 227 N.W. 251 (1929).
[63] Demirjian v. New York Life Ins. Co., 205 Wis. 71, 236 N.W. 566 (1931); Frozena v. Metropolitan Life Ins. Co., 211 Wis. 373, 247 N.W. 333 (1933) are demonstrative of this principle.
[64] *Ibid.*
[65] Conklin v. New York Life Ins. Co., 200 Wis. 94, 99, 227 N.W. 251, 253 (1929).
[66] Platke v. John Hancock Life Ins. Co., 27 Wis. 2d 1, 10, 133 N.W. 2d 277, 283 (1965).
[67] *Id.* at 10-11, 133 N.W. 2d at 283.

ceitful intentions which the appellant ascribes to him."[68] Therefore, it appears that in the future both fraud, found as a matter of fact by a jury and fraud found as a matter of law by the court, will continue to exclude certain cases from the estoppel of section 209.07.

CONCLUSION

Section 209.07 was enacted to prevent insurance coverage forefeiture under certain facts. In effect, the statute was aimed at destroying the possibility of a denial of insurance coverage to an applicant because of a misstatement or concealment to the insurer's medical examiner who had the duty of judging the insurance risk involved. Our laws are generally expressive of a great disdain for legal forefeitures, especially in cases where no real moral fault is involved. Such principle takes on a meaningful expression in section 209.07. Indeed, the thought of an impoverished widow being denied the proceeds from a life insurance policy that her deceased husband faithfully maintained throughout his life is distasteful. This is especially true if the reason for such denial is the husband's failure to mention a past serious illness which he forgot or thought inconsequential. Yet, while our emotions would tend to condemn such a situation, our minds should take cognizance of the needs of the insurer in its function of determining the insurability of an applicant before accepting a particular risk. As long as the life insurance industry is cradled in the hands of private enterprise, and prudential risk acceptance is required for business survival, there must be a legal recognition of the reciprocal rights and duties of both the insured and the insurer. Despite this, a statute such as section 209.06, which provides that false statements made without any intent to deceive by an insurance applicant may defeat the policy if the misstatement increased the risk or contributed to the loss, seems somewhat unjust in certain cases. An example of such is the case where the insurer has put the applicant through the inconvenience of a medical examination and has actually received the medical examiner's judgment of the insurability of the applicant. Shouldn't the insurer bear the risk of its medical examiner's failure to discover the true physical condition of the applicant, when the medical examiner's tests and measurements result in the issuance of a report in the insurability of the applicant? Once the insurer has used an expert to decide for it the difficult question of insurability, who should the burden of an innocent misrepresentation or concealment be placed on? Section 209.07 has placed it on the insurance company rather than the individual insured. The only question now is whether the law will evolve to the point where a medical examination alone, without any real judgment of the insurance risk by the medical

[68] *Id.* at 10-11, 133 N.W. 2d at 283.

examiner, will activate the estoppel of section 209.07 in the absence of fraud or deceit. It apears that the *Platke* case is a big step in that direction. The *Platke* decision may be the outer limits of the court's construction of section 209.07, or it may be just a milestone on the way to a broader construction.

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