

## Insurance: Effect of Doubtful and Ambiguous Language in Applications and Policies

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by frequent repetition; aptitude by doing frequently the same thing; usage; established manner. When a person has repeatedly acted in a particular way at intervals, whether regular or irregular for such length of time as that we can predicate with reasonable assurance that he will continue so to act, we may affirm that this is his habit." *State v. Savage*, 89 Ala. 1, 7 So. 183, 7 L.R.A. 426 (1890).

However in another case on habitual drunkenness from the viewpoint of criminal law the element of loss of will power to resist alcoholic stimulants was not stressed. The court held: "An habitual drunkard is one who customarily becomes intoxicated, the word "habitual" meaning frequent or customary conduct, and it is not necessary that such person be intoxicated most of his time or that he shall have lost his will power so that he cannot resist stimulants." *Lester v. Sampson*, 180 S.W. 419 (Mo. 1915).

The necessity of giving a clear-cut definition of habitual drunkenness either under the divorce statutes or under the criminal law statutes does not appear to have arisen in any Wisconsin decisions.

ANTHONY FRANK.

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**Insurance—Effect of Doubtful and Ambiguous Language in Applications and Policies.**—Intestate on an application for a life insurance policy, on May 21, 1938, in reply to a question of whether he ever had an ailment or disease of the stomach answered "no." The true fact was that he did have cancer of the stomach, as was discovered by a physician who examined him in September 1938 and who inferred that cancer had existed for some time. The plaintiff sought to have the insurance policy rescinded on the ground that the lack of knowledge of such an ailment was a breach of a warranty, within the statute which provided, that the insured's misrepresentations or warranties in the negotiation of a policy, is not material and will not defeat the policy unless made with actual intent to deceive or unless the matter represented was made of one's knowledge, in a matter susceptible of knowledge, without having knowledge. Lower court gave judgment for the defendant. Held, on appeal, that there was no misrepresentation because the question in the application was of doubtful meaning, therefore it could not be construed as calling for more than an opinion or statement to the best of the applicant's knowledge or belief. The court also stated that an innocent misrepresentation in an application for life insurance could be constructive fraud, where the applicant stated as a fact something material to the risk, susceptible of knowledge and it be untrue, although he believed it to be true. *Metropolitan Life Insurance Co. v. Bruno*, 309 Mass. 7, 33 N.E. (2d) 519 (1941).

A review of the decisions reveals the fact that the courts have construed the language in insurance applications and policies most favorable to the applicant or the insured, when the language is ambiguous or of doubtful meaning. *Indiana Lumbermen's Mutual Ins. Co. v. Fair*, 109 F. (2d) 607 (C.C.A. 5th, 1941); *Wall v. Mutual Life Ins. Co. of New York*, 228 Ia. 119, 289 N.W. 901 (1940); *Muller v. Boston Casualty Co.*, 304 Mass. 549, 24 N.E. (2d) 514 (1931); *Miller v. Mutual Life Ins. Co. of New York*, 206 Minn. 225, 289 N.W. 399 (1939).

In reply to a question, on an application for life insurance, as to whether the applicant ever had the disease of rheumatism, he answered "no," while in fact there was evidence tending to show the insured had sub-acute rheumatism. The court held that the insured had the right to answer the question upon the

basis that its terms were used in their ordinary signification. If there was any ambiguity in the question so that its language was capable of being construed in an ordinary as well as a technical sense, the insurance company could not take advantage of such an ambiguity. *Price v. Phoenix Mutual Life Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166 (1871).

In *Purcell v. Washington Fidelity National Ins. Co.*, 141 Ore. 93, 16 P. (2d) 639 (1932), an applicant for health and accident insurance was asked, "what accident or health insurance have you in other companies or associations?" he answered "none," while the fact was he had a \$10,000 disability insurance policy upon reaching the age of sixty. This was followed by the question; "Do your average weekly earnings exceed the aggregate single indemnity payable under this policy and all other similar policies carried by you? The court stated that the use of the word "similar" was significant, and could readily confine the applicant's attention to straight policies of accident and health insurance and not to disability insurance. Since the application was prepared by the insurance company, ambiguities would be construed against it, and words susceptible of two reasonable constructions would be given the one most favorable to the insured so as to avoid a forfeiture. A question, in an application for life insurance, as to under what policies the applicant had been accepted for insurance in the insuring company, followed by the further question, as to what other companies or associations the applicant was insured in, was ambiguous. The court held that this was sufficient to lead one to conclude that the information called for was life insurance, evidenced by policies in regular insurance companies and not insurance evidenced by certificates in fraternal orders, and accident policies. This reasoning followed that of the majority rule, for the inquiry, being in the language of the company, had to be given the interpretation most favorable to the insured. *Mutual Life Insurance Co. v. Ford*, 61 Tex. Civil App. 412, 130 S.W. 769 (1910).

In *Wright v. Fraternities Health and Accident Ass'n.*, 107 Me. 418, 78 Atl. 475 (1910), there was a question in an application for health and accident insurance to the effect, "has any company, society or association ever rejected your application or canceled your policy?" The plaintiff answered "no," while in fact his application for life insurance had been rejected. Plaintiff contended that the question did not call for an answer as to a life insurance policy but was limited to health and accident insurance companies. The court held, that when the phraseology of this question was construed in connection with the subject matter of the contract, it was evident that the ordinary prudent person would be authorized to imply the word "health" before the word "company" so that the question in the mind of the applicant would be; "has any health company rejected your application?" All doubt must be resolved in favor of the assured. It is incumbent upon the insurer who prepares the question to use language so plain and intelligent that an ordinary person under the usual circumstances can readily comprehend it.

Also, in an action on a life insurance policy the defendant contended that the policy provision—that if other policies of insurance are in force at the time of death, the amount payable should not exceed the amount specified in the table attached, less the total amount payable under other policies by whom ever issued,—should be construed to include an accident policy held by the deceased. Under the rule of strict construction and the deciding of ambiguities against the insurer, this language was construed as referring to life insurance contracts and does not include a policy of accident insurance. *Julius v. Metropolitan Life Ins. Co.*, 299 Ill. 343, 132 N.E. 435 (1921).

Although the courts hold that where an insurance policy is susceptible to two constructions the one most favorable to the insured should be adopted, the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are unambiguous the terms are to be taken in their plain, ordinary, popular sense. It does not follow that the terms of an insurance policy may be distorted from their natural meaning, or that the agreed liability of the insurer should be enlarged into one which only a new contract could have imposed. *Carpenter v. Continental Casualty Co.*, 95 F. (2d) 634 (C.C.A. 8th, 1938). In *National Automobile Ins. Co. v. Industrial Accident Commission*, 11 Calif. (2d) 689, 81 P. (2d) 926 (1938) a workman's compensation policy provided that if the policy provided that if the policy was issued to an individual, it should cover only his liability as an individual employer and not any liability as a member of a copartnership. Such a policy was issued to a restaurant owner, individually. It was held not to cover his liability for injuries sustained by a dishwasher, after the insured took in his sister as a partner in operating his restaurant business. The rule is, where the provisions of a policy are definite and certain, there is no room for interpretation, and the courts will not indulge in a forced construction to cast a liability upon an insurer which it has not assumed. Where life insurance policies unambiguously provided that on due proof of disability the insurer would waive payment of premiums and pay disability benefits, the conditions of furnishing due proof, were conditions precedent to waiver of premiums or payment of benefits. *Botts v. Equitable Life Assurance Society of the United States*, 78 P. (2d) 860 (1938). In *New York Life Ins. Co. v. Malloy*, 21 F. Supp. 1001 (D. N.H. 1938), a clause providing that the life insurance policy should be incontestable after two years except for non-payment of premiums and except as to provisions and conditions relating to disability and double indemnity benefits, did not preclude insurer, after expiration of two years from obtaining cancellation of double indemnity and disability clauses for fraud practiced by insured at the inception of the policy. The excepting clause in life policy must be construed in accordance with its language and the fair meaning expressed. Moreover, a fire insurance policy covering potatoes handled or used by insured growers association, its own or those held in trust or in storage, "if in case of loss the insured is legally liable therefor," was so unambiguous that the association could not set up insurer's conduct, after loss, where the association was not liable to members for loss. The terms of an insurance policy are to be taken and understood, in absence of ambiguity, in their plain ordinary and popular sense. *Miller's Mutual Fire Ins. Ass'n. of Ill. v. Warroad Potato Growers Ass'n.*, 94 F. (2d) 741 (C.C.A. 8th, 1938).

A. A. HINDIN.

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**Principal and Agent—Liability of Principal for Acts of Agent Involving Physical Force.**—Plaintiff, a boy of fifteen years, while attending a theatre of the defendant, was told by a substitute usher to remove his hat and on replying that he was about to leave, the substitute usher remarked, "You are leaving, and damned quick." Thereupon the usher seized the plaintiff and hurried him up the aisle. When they came to one of the plate glass doors the substitute usher gave the plaintiff a shove, and in an attempt to ward off injury, plaintiff put up his hands and struck the plate glass causing it to break and inflict serious injury upon him. The substitute usher was a helper who received