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Estoppel in Life Insurance in New York (N.Y. Ins. Law § 58)

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reviewing the exercise of the more debatable powers of the OPA., *i.e.,* those enforced without express statutory authorization.

In our opinion one danger lurks in the practise of the grinding out of numberless rules and regulations. These affect so many of our people that each day sees the citizen innocently violating one or more of them. Of course it is highly impracticable to punish each and every violator, so OPA, assuming a common sense attitude, has not attempted to do so. But here lies the danger. "Though the law itself be fair on its face and impartial in appearance, if it is applied and administered by public authority . . . so as to make unjust and illegal discriminations between persons in similar circumstances, the denial of equal justice is still within the prohibition of the Constitution." [5]

In conclusion, it may be said that the OPA, born of necessity, through executive order and directive, and later sanctioned by statute, must be viewed in the light of the times in which it was enacted. It is wartime legislation. As such, we must consider it from the viewpoint of the objective to be attained—namely, economic stabilization during a period of great emergency. Upon the successful harnessing of economic forces at home depend our victories abroad.

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ESTOPPEL IN LIFE INSURANCE IN NEW YORK (N. Y. INS. LAW § 58)

The doctrine of equitable estoppel has been used to preclude insurers from defending on the grounds of breach of condition, and as a defense to insurers' actions to rescind for breach of condition. The doctrine operates when "one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert. Then he will not be permitted in a court of justice to avail himself of that advantage." [1]

Two factors control estoppel. The first is the common law parol evidence rule making inadmissible oral testimony to alter the terms of a written contract.[2] The second factor is New York Insurance Law § 58 [3] providing that insurance policies must contain the

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[5] Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220 (1886).

[1] Union Mut. Life Ins. Co. v. Wilkinson, 13 Wall. 222, 233, 236 (U. S. 1871).

[2] *See* comment of Johnson, Ch. J., regarding *Plumb v. Cattaraugus Co. Mut. Ins. Co.,* 18 N. Y. 392 (1858) as printed in VANCE, INSURANCE (2d ed.) 497–501 for a vigorous defense of the parol evidence rule.

[3] What cases commonly refer to as N. Y. INS. L. § 58 is now superseded by N. Y. INS. L. §§ 142, 149 and 150. The original § 58 is found in c. 690 of

entire contract; that applications not attached to the policy shall be excluded from evidence;[4] and that only material misrepresentations are grounds for avoidance.[5] This statute is not retroactive[6] and applies only to life insurance policies[7] and not to accident[8] or burglary[9] or fraternal society policies[10] or reinstatements.[11]

The following is a chart of New York life insurance cases listed in chronological order where the doctrine of equitable estoppel was invoked. A few of these cases deal with estoppel only indirectly, but each has a vital bearing on our discussion. Although in insurance cases "estoppel is inextricably interwoven with waiver",[12] we shall limit ourselves to estoppel. Each column describes an element which courts should consider to reach a decision. However, not every opinion devotes attention to every element.

[See Chart, page 50]

By far the most important fact in each case is whether the application was attached to, or copied on the policy.[13] Nowhere do we find a case which excludes an attached application from evidence.[14]

The application probes into the nature of the risk and misrepresentations therein often constitute a material breach of condition precedent or fraud in the inducement of the insurance contract or both. By statute,[15] such statements are never warranties. Clauses in the policy likewise often constitute conditions precedent. For

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the Laws of 1892; added to by Laws of 1906, c. 326; and revised by Laws of 1909, c. 33.

See 27 McKINNEY, CONS. L. 89.

[4] N. Y. INS. L. § 142(1) as amended Laws of 1940, c. 94. For exact citations of analogous laws in many other states see Hymen Knopf, *N. Y. Ins.* L. § 58, 16 CORN. L. Q. 238, n.20.

[5] N. Y. INS. L. § 149(2).

[6] § 58 applies only to policies issued on or after January 1, 1907. *See* Perry v. Prud. Ins. Co. of Amer., 144 App. Div. 751, 129 N. Y. Supp. 751 (1911).

[7] Minsker v. John Hancock Mut. Life Ins. Co., 254 N. Y. 333, 173 N. E. 4 (1930).

[8] Baumann v. Preferred Acc. Ins. Co., 225 N. Y. 480, 122 N. E. 629 (1919).

[9] Satz v. Mass. Bonding Co., 243 N. Y. 385, 153 N. E. 844 (1926).

[10] Garrett v. Supreme Tribe of Ben Har, 219 App. Div. 413, 219 N. Y. Supp. 345 (1927).

[11] N. Y. Life Ins. Co. v. Rosen, 227 App. Div. 79, 236 N. Y. Supp. 659 (1929).

[12] Stephen I. Langmaid, *Waiver and Estoppel in Insurance Law in California,* 20 CALIF. L. REV. 1–41. For example, in *Heffron v. Aetna Life Ins. Co.,* 233 App. Div. 534 (1931) plaintiff-beneficiary proceeded on the theory of waiver, although the elements of estoppel also existed.

[13] N. Y. INS. L. § 142(1), *ibid.*

[14] Case "j" in the chart is interesting in this respect for the admission of the application is predicated on the assumption that it would have been attached in due course to the policy if the insured had not died before the policy was issued. The *Bible* case, "e" in chart, states: "Controversy is foreclosed if the application is annexed."

[15] N. Y. INS. L. § 142(3).

example, the sound health clause usually provides the contract is ineffective if on the date thereof the insured be not in sound health. The breach of condition usually relates to the insured's health. The scope of authority of the insurer's agent is also an important element.[16] A general agent solicits business, receives applications, delivers the policy and collects premiums. Agents often assist in filling out applications; and the insurer's medical examiner fills out the medical questions. The general rule of agency is that knowledge of the agent is imputed to the principal-insurer who is bound thereby.

Anything not part of the written insurance contract is extrinsic evidence, whether it be parol testimony or an unattached application. The identity of the party who offers such evidence and the purpose thereof are essential to deciding whether it will be admitted.

The elements of estoppel as applied to insurance are: a breach of condition by the insured, knowledge of such breach by the insurer's agent,[17] and delivery of the policy and collection of premiums. Under such circumstances it would be a fraud on the insured not to pay benefits to the beneficiary.

The case study outlined in the chart yields the general principle that extrinsic evidence, be it an unattached application or parol testimony, will not be admitted. With respect to unattached applications, this principle is illustrated by the *Mees* case,[18] the *Archer* case [19] and the *Bluestein* case.[20] The *Mees* case also illustrates the conflicts rule that the law of the state where the insurance contract is made will govern the contract.[21] The *Archer* case shows that in 1916 a liberal construction was given to § 58 to protect the insured; for in that case the court excluded from evidence an unattached application introduced by the defendant-insurer to prove fraud as a defense.[22] The court leaves open the question, however, whether proof of fraud from sources outside the application will be admitted.

With respect to unattached applications, the general principle above stated, finds its exceptions in the *Abbott* case [23] and the *Hill* case.[24] In both instances, the defendant-insurer was allowed to

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[16] *See* Stephen I. Langmaid, *Waiver and Estoppel in Insurance Law; the Agency Problems* (1933) 21 CALIF. L. REV. 91–116.

[17] "What is known to an agent with apparent authority to issue an effective policy is known also to the company." Cardozo, Ch. J. in the *Bible* case, "e" in Chart.

[18] Case "a" in Chart.

[19] Case "b" in Chart.

[20] Case "i" in Chart.

[21] *John Hancock Mut. Life Ins. Co. v. Yates,* 299 U. S. 178, 57 Sup. Ct. 129 (1936) holds that § 58, excluding from evidence an unattached application, is a rule of substance in New York, to which full faith and credit must be given in other states.

[22] *See also* Vozzella v. Prudential Ins. Co. of America, 242 App. Div. 800 (1934); Murphy v. Colonial Life Ins. Co. of Amer., 83 Misc. 475, 145 N. Y. Supp. 196 (1914).

[23] Case "m" in Chart.

[24] Case "o" in Chart.

I Title of Case (Citations Below)	II Was Application Attached to Policy?	III Representations in Application	IV Clauses in Policy	V Scope of Agency	VI Breach of Condition
a. Mees v. Pittsburgh Life & Trust Co.	No	Health habits; other insurance			Health habits; other insurance
b. Archer v. Equitable Life Assur. Soc. of the U. S.	No	Prior physical condition; cause of parents' Death			
c. Bollard v. N. Y. Life Ins. Co.	Yes	Insured read policy; statements about physical condition and insurance history are material to risk and insurer relies thereon		Medical examiner filled out application	Physical conditions; other insurance
d. Minsker v. John Hancock Mut. Life Ins. Co.	Yes	Medical advice and treatments in past five years		Medical examiner filled out application	Insured had nephritis and endocarditis
e. Bible v. John Hancock Mut. Life Ins. Co.	No		Sound health on date; void if treated in institutions within two years; agent cannot waive conditions	General	Insured had manic depressive psychosis; in institution
f. Salamida v. John Hancock Mut. Life Ins. Co.	No	Sound health; prior illness	Sound health; void if treated within two years; insured warned to read policy	General agent filled out application	Insured had chronic nephritis; material to risk
g. Levic v. Metrop. Life Ins. Co.	No	No written application	Agent cannot waive; void if treated by physician for serious illness within two years.		Insured had coronary thrombosis and glomerulo nephritis
h. Fortunato v. Metrop. Life Ins. Co.	No		Void if insured not in sound health on date.	Medical examiner was told false answers	Hospitalization and medical treatment
i. Bluestein v. Prud. Ins. Co.	No	Sound health		General	Stomach cancer
j. Stone v. Prud. Ins. Co. of Amer.	Application would have been attached in due course	Physical defects; illnesses prior accidents	Sound health		Unsound health

	I Title of Case (Citations Below)	II Was Application Attached to Policy?	III Representations in Application	IV Clauses in Policy	V Scope of Agency	VI Breach of Condition
k.	Hurley v. John Hancock Mut. Life Ins. Co.	No		Agent cannot alter; sound health; void if hospitalized or visited physician for serious illness in two years	General	Insured had tuberculosis
l.	Lampke v. Metrop. Life Ins. Co.	No	Sound health; not treated by physician in three years	Avoidance for unsound health or treatment for serious illness	General	High blood pressure
m.	Abbott v. Prud. Ins. Co. of Amer.	No	Clause: agent cannot bind insurer by receiving extrinsic information	Sound health	General	Chronic myocarditis
n.	Tumelli v. Prud. Ins. Co. of Amer.	Yes	Clause: limitations on agent's authority			Illness
o.	Hill v. Metrop. Life Ins. Co.	No	False answers on kidney disease, unsound health, care of physician	Agent cannot waive	General	Nephritis

a. 169 App. Div. 86, 154 N. Y. Supp. 660 (1915)
b. 218 N. Y. 18, 112 N. E. 433 (1916)
c. 228 N. Y. 521, 126 N. E. 900 (1920)
d. 254 N. Y. 333, 173 N. E. 4 (1930)
e. 256 N. Y. 458, 176 N. E. 838 (1931)
f. 241 App. Div. 636, 266 N. Y. Supp. 253 (1933)
g. 242 App. Div. 595, 275 N. Y. Supp. 908 (1934)
h. 160 Misc. 918, 290 N. Y. Supp. 955 (1935)

VII Extrinsic Evidence			VIII Do Elements of Estoppel Exist?	IX Does Court Admit Extrinsic Evidence?	X Remarks
Type	Who Offers It?	For What Purpose?			
Application	Defendant-insurer	To show breach		No	§ 58 excludes application; court assumes contract was made in New York.
Application	Defendant-insurer	To show fraud (intentional deception) as a defense		No	§ 58 liberally construed to protect insured as legislature intended
Parol	Plaintiff-beneficiary	To show truth was told to medical examiner who wrote the wrong answer; that insured did not read policy	Yes: But proof is excluded	No	Court intimates parol could be allowed as defense to fraud.
Parol	Plaintiff-beneficiary	To show truth was told to agent who wrote wrong answers	Yes: But proof is excluded	No	§ 58 construed to protect insurer also
Parol	Plaintiff-beneficiary	To show agent knew truth	Yes: General agent of insurer delivered policy and collected premiums with knowledge of breach of condition	Yes	Agent entered mental institution to sell insurance
Parol	Plaintiff-beneficiary	To show insurer's agent knew of illness	Yes: General agent of insurer delivered policy and collected premiums with knowledge of breach of condition	Yes	Insured was illiterate and relied on agent
Parol	Plaintiff-beneficiary	To show waiver condition by agent	No: Insured concealed serious illness and told agent only of minor ills. Estoppel limited to facts of each case	No	Court excludes parol evidence of plaintiff-beneficiary trying to show waiver. Evidence of estoppel very weak
Parol	Plaintiff-beneficiary	To show business agent knew truth	Yes: If business agent is considered. No: If medical examiner is considered	No	When insurer tried to find facts for itself, insured told outright lies
Application	Defendant-insurer	To show breach of condition	Yes: Agent told of ulcers and kidney trouble, although illness was really cancer	No	Unsound health known to insurer; true illness immaterial
Application	Defendant-insurer	To show breach of condition	Court intimates parol evidence to show estoppel would be excluded	Yes	Insured died before policy issued

VII Extrinsic Evidence			VIII Do Elements of Estoppel Exist?	IX Does Court Admit Extrinsic Evidence?	X Remarks
Type	Who Offers It?	For What Purpose?			
Parol	Plaintiff-beneficiary	To show agent knew truth	Yes: Agent knew insured confined in institution for tuberculosis, delivered policy and collected premiums	Yes	Court says estoppel can be shown; but appeal centered about jury instructions
Parol	Plaintiff-beneficiary	To show agent beneficiary knew truth	Yes: Agent delivered policy and collected premiums with knowledge of breach	Yes	Disapproves Fortunato case; court says if jury finds illness is serious then parol permitted to show estoppel
Application	Defendant-insurer	An admission that insured knew agent's limited authority	No: Insured not lulled to sleep; had notice in application of agent's limited authority	Yes	Notice precludes estoppel
Parol	Plaintiff-beneficiary	To show agent knew illness and made representations	No: Notice in application of agent's limited authority	No	§ 58 protects insurer; notice precludes estoppel
Application	Defendant-insurer	To show agent lacked knowledge of illness	No: Beneficiary proceeds on theory of waiver	Yes	When beneficiary sued, defendant elected to avoid. Agent's knowledge is fact question

i. 157 Misc. 122, 282 N. Y. Supp. 440 (1935)
j. 268 N. Y. 91, 196 N. E. 754 (1935)
k. 247 App. Div. 547, 288 N. Y. Supp. 199 (1936)
l. 279 N. Y. 157, 18 N. E. (2d) 14 (1938)
m. 281 N. Y. 375, 24 N. E. 87 (1939)
n. Not officially reported; 24 N. Y. S. (2d) 306 (1940)
o. 259 App. Div. 278, 18 N. Y. S. (2d) 753 (1940)

submit unattached applications into evidence. This can be explained by the purpose for which the evidence was given. In the *Abbott* case it was submitted as an admission on the part of the insured that he knew the agent's authority was limited against receiving extrinsic information to bind the insurer. It would seem from this case that if the insured is given notice in the application that the agent cannot bind his insurer-principal, then the insured cannot win on the theory of estoppel. In the *Hill* case the insurer was allowed to introduce the unattached application to show its agent lacked knowledge of the insured's illness, such knowledge being a fact question for the jury. It seems the insurerer, by raising such a question, can thus introduce the application.

We now consider how the principle, that extrinsic evidence will not be admitted, applies to parol testimony. In the *Bollard* case,[25] the *Minsker* case,[26] the *Fortunato* case,[27] and the *Tuminelli* case,[28] the plaintiff-beneficiary submitted parol testimony to prove the insurer's agent knew that the insured had breached conditions respecting illness. Such testimony was excluded, thus illustrating how the courts interpret § 58 to protect the insurer as well as the insured.[29] The exceptions to the principle are the *Bible* case,[30] the *Salamida* case,[31] the *Hurley* case,[32] and the *Lampke* case [33] wherein the plaintiff-beneficiary was allowed to submit parol testimony to establish estoppel by showing the insurer's general agent delivered the policy and collected premiums with knowledge of the insured's illness. Under such facts the insurer is estopped from pointing to the breach of condition by the insured.

Let us see why these cases were made exceptions to the rule. In the *Bible* and *Hurley* cases, the over-zealous insurance agent invaded institutions confining mental and tuberculosis patients, respectively, and sold insurance to the inmates. In the *Salamida* case an illiterate applicant relied on the agent who filled out the application wrongly. In the *Lampke* case, the court, after holding that whether high blood pressure is material to the risk is a fact question for the jury, intimated that parol would be admitted to establish estoppel.

These cases show that only in extraordinary factual circumstances, where the insurer's agent takes an extremely unfair advantage of the insured, will the courts allow parol to estop the insurer despite § 58. This seems to be the present state of the law in New York and it illustrates how reluctant the courts are to extend the doctrine

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[25] Case "c" in Chart.
[26] Case "d" in Chart.
[27] Case "h" in Chart.
[28] Case "n" in Chart.
[29] *See also* case "g" in Chart.
[30] Case "e" in Chart.
[31] Case "f" in Chart.
[32] Case "k" in Chart.
[33] Case "l" in Chart.

of estoppel. It is ironical to recall that § 58 was intended to benefit the beneficiary.[34]

As has been shown, § 58 will not apply against the insurer if the insured is notified in the application of the agent's limited authority, or if the insurer seeks to establish an admission, or if the insurer tries to show lack of knowledge on the part of its agent of the breach of condition. On the other hand, § 58 will not apply against the insured unless exceptional facts exist. But the average set of facts is not exceptional. When the insured seeks to establish estoppel his usual case is that he told the agent he was sick and the agent nevertheless sold him insurance, telling him everything is all right. The insurer is even entitled to charge the jury that if the insured had reasonable cause to believe the agent would not relate the truth to his principal (*i.e.*, the insurer) then the insurer is not bound by the agent's knowledge.[35] In the ordinary case, therefore, it is impossible for the beneficiary to introduce extrinsic evidence to establish estoppel. Through the process of judicial legislation, § 58 has put beneficiaries at such a disadvantage that they would rather see it ended or amended.[36]

As stated in the *Levic* case,[37] estoppel should be limited to the facts of each case; but the court should relax its stringent requirements. We now expect policyholders to read their long, small-typed, mystifying contracts drawn up by the insurer's legal experts;[38] still the theory of estoppel is forceful enough to override this consideration. If the insured tells outright lies as in the *Fortunato* case, or conceals a serious illness as in the *Levic* case, and the evidence of estoppel is generally weak, the court is justified in excluding. When, however, the insurer picks an agent who fails to transmit information about the risk, and evidence of estoppel is fairly strong—albeit lacking in exceptional and extraordinary equities—the courts should, in the interests of justice, admit parol testimony offered by the beneficiary to estop the insurer from asserting a breach of condition known to the agent.[39] If the courts will not do this then let the legislature clarify its intent by adding to § 142 (1) of the insurance law that

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[34] Chief Justice Cardozo said in the *Bible* case, "e" in Chart that § 58 was intended to relieve the insured and beneficiaries claiming under him; that the legislature had no design to make their situation harder.

[35] Case "k" in Chart.

[36] If the beneficiary can prove fraud, accident or mistake he can get reformation: *see* Stark v. Masonic Life Ass'n, Supreme Court, N. Y. County, Feb. 3, 1920, 180 N. Y. Supp. 235 (1920); Metropolitan Life Ins. Co. v. Trilling, 194 App. Div. 178, 184 N. Y. Supp. 898 (1920).

[37] Case "g" in Chart.

[38] *See* Robert Mays Hennessy, *Insurance: Waiver and Estoppel* (1933) 18 CORN. L. Q. 605–607.

[39] This proposal is mild when we consider how it can be counteracted by the insurer with the jury charge in the *Hurley* case. See note 29 *supra;* case "k" in Chart. In the *Archer* case, "b" in Chart, the court said on page 25, "An unreasonable and unjust result was, presumptively, not intended by the legislature and will be avoided through legitimate construction."

the rule excluding information not attached to the policy does not apply to an insured who makes a full disclosure to the insurer or its agent of all facts material to the risk, and pays premiums in good faith.

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NEW CONCEPTS OF "ENEMY" IN THE "TRADING WITH THE ENEMY ACT"

The purpose of economic warfare is to use any enemy-owned property available to our advantage, and to prevent the enemy, so far as possible, from deriving any advantage from foreign trade. The idea of economic warfare as a vital complement to military-naval war is not purely a modern development in United States policy. The cases significant of the early legal problems involved in economic warfare arose through the activities of our privateers in enforcing prohibitions against trading with the enemy.[1] Those decisions clearly indicate our country's vital concern with "trading with the enemy" ever since its first wars.

When the United States entered the World War in 1917, Congress did not rely on the case law and procedure developed in and since the War of 1812. It passed the Trading With the Enemy Act,[2] which, as amended and expanded,[3] is the same act governing economic offense and defense in the present war.

The United States from the beginning had adopted as a test of enemy character, the idea that the "commercial domicile of a merchant at the time of capture of his goods determines the character of those goods, whether hostile or neutral." [4] In the Trading With the Enemy Act, residence and the place of doing business, rather than nationality, are continued as the measure of enemy status.[5] Both,

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[1] The San Jose Indiano, Fed. Cas. No. 12,322 (C. C. Mass. 1814), *aff'd* 14 U. S. (1 Wheat.) 208, 4 L. ed. 73 (1816); The Mary and Susan, 14 U. S. (1 Wheat.) 46, 4 L. ed. 32 (N. Y. 1816); The Mary, Fed. Cas. No. 9,184 (C. C. R. I. 1813), *aff'd in part and rev'd in part*, 12 U. S. (8 Cranch) 388, 3 L. ed. 599 (1814); The Frances, 12 U. S. (8 Cranch) 335, 3 L. ed. 581 (R. I. 1814); The Venus, 12 U. S. (8 Cranch) 253, 3 L. ed. 553 (Mass. 1814); The St. Lawrence, Fed. Cas. No. 12,232 (C. C. N. H. 1813); The Ann Green, Fed. Cas. No. 414 (C. C. Mass. 1812).

[2] Act Oct. 6, 1917, c. 106, 40 STAT. 411, 50 U. S. C. A. App.

[3] FIRST WAR POWERS ACT, 55 STAT. 839, 50 U. S. C. A. App. § 616 *et seq.* (1941)).

[4] The Frances, 9 Fed. Cas. No. 5034, 673, *aff'd*, 8 Cranch 363, 3 L. ed. 590 (1814).

[5] Sec. 2, *supra* note 3. "The word 'enemy' as used herein, shall be deemed to mean for the purposes of such trading and of this act—(a) Any individual, partnership, or other body of individuals of any nationality, resident within the