MISREPRESENTATION IN APPLICATION--FALSE ANSWER(S) INSERTED BY AGENT (ESTOPPEL).[1]

NOTE WELL: This issue assumes that the jury has already concluded that a false representation was made. If more than one alleged misrepresentation is involved, it may be helpful to describe the alleged misrepresentations or to refer, by number, to separate falsity issues. See Cato v. Hospital Care Ass'n, 220 N.C. 479, 484, 17 S.E.2d 671, 674 (1941). Only the appropriate bracketed paragraphs should be used.[2]

The (*state number*) issue reads:

"Was (Were) the false answer(s) inserted by the agent without the knowledge of the applicant?"

On this issue the burden of proof is on the [plaintiff] [defendant]. This means that the [plaintiff] [defendant] must

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[1]The legal issue is, essentially, whether the insurance company is estopped from asserting the falsity of a representation either because its agent knew the true facts or because the agent knew he did not have the true facts (*i.e.*, he inserted the answers to the questions without asking them of the applicant). See *Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co.*, 311 N.C. 62, 71, 316 S.E.2d 256, 262 (1984) (noting, it "is well established that an insurance company cannot avoid liability on a policy on the basis of facts known to it at the time the policy went into effect"); *Cox v. Equitable Life Assurance Soc'y*, 209 N.C. 778, 782, 185 S.E. 12, 15 (1936). Not all North Carolina cases have taken a consistent approach to the issue. Some cases have focused simply on whether the applicant made any misrepresentation (*see Chavis v. Home Sec. Life Ins. Co.*, 251 N.C. 849, 851, 112 S.E.2d 574, 576 (1960)); others have characterized the issue as one of "waiver" (*see Hicks v. Home Sec. Life Ins. Co.*, 226 N.C. 614, 617, 39 S.E.2d 914, 916 (1946)); and still others have focused on whether the agent inserted the false answers (*see Cato v. Hosp. Care Ass'n*, 220 N.C. 479, 484, 17 S.E.2d 671, 674 (1941)).

In view of this diversity of approaches, the fear that the use of the word "estoppel" in an instruction will be of little help to a jury, and the possibility that an appellate court would conclude that estoppel is warranted upon a finding of a specific set of facts, this suggested instruction focuses on the conduct of the agent.

[2]*See generally* 3-10 APPLEMAN ON INSURANCE 2D § 10.4 (2nd ed. 2005) (discussing insertion of false answers by agents); *Mathis v. Minnesota Mut. Life Ins. Co.*, 302 F. Supp. 998, 1001 (M.D.N.C. 1969) (interpreting North Carolina law); *Southeastern Asphalt & Concrete Co. v. American Defender Life Ins. Co.*, 69 N.C. App. 185, 190, 316 S.E.2d 311, 314 (1984) (citing *Mathis*).

prove, by the greater weight of the evidence, that the company's agent, and not the applicant, was responsible for the false answer(s), and that the applicant acted in good faith, and did not know or have reason to know, that the agent was making such (a) false answer(s).

The law provides that where an agent for an insurance company has incorrectly filled in an application, the applicant is not responsible for any false answer(s) inserted by the agent if the applicant is justifiably ignorant of the false answer(s) and has no actual or implied knowledge of the falsity of the answer(s).[3] The applicant is justified in not knowing the answer(s) [was] [were] false if *he* has acted in good faith in reliance on the agent and has no actual or implied knowledge of the falsity of the answer(s). If, however, the applicant knows or should have known that the agent was not reporting important facts, or was reporting false facts to the company, or if the applicant was not acting in good faith, or if *he* was acting in collusion with the agent, the company is not prevented from [denying liability] [rescinding the contract] because of the false answer(s).

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[3]In *Northern Nat'l Life Ins. Co.*, the Court explained, "where incorrect answers are inserted by an agent of the insurer without the knowledge of the applicant the answers will not vitiate the policy absent fraud or collusion on the part of the applicant." *Northern Nat'l Life Ins. Co.*, 311 N.C. at 74, 316 S.E.2d at 264 (citing *Heilig v. Home Sec. Life Ins. Co.*, 222 N.C. 231, 22 S.E.2d 429 (1942)).

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(1) [Thus, where the agent has the applicant sign the application before asking questions of the applicant, the agent thereafter fills in the answer(s) without asking the questions, and the applicant does not know or have reason to know that the answer(s) filled in by the agent [was] [were] false, the company cannot [deny liability] [rescind the contract] because of the falsity of the answer(s).][4]

(2) [Thus, where the agent has the applicant sign the application before asking questions of the applicant, the applicant truthfully answers the question(s), and the agent incorrectly records the answer(s), and the applicant, acting in good faith, does not know or have reason to know that the agent did not truthfully report the answer(s), the company cannot [deny liability] [rescind the contract] because of the falsity of the answer(s).][5]

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[4]The applicant's signature raises the possibility of a defense that he is estopped from denying the representations. *See, e.g., Jones v. Home Sec. Life Ins. Co.*, 254 N.C. 407, 413, 119 S.E.2d 215, 219 (1961). However, several cases have clearly allowed an estoppel to operate against the insurance company where the signature came before the application was filled out. *See Mathis*, 302 F. Supp. 998, 1004 (reconciling apparently conflicting North Carolina decisions on that basis).

[5]In contrast to fact situation #1, in fact situation #2 the agent actually propounded questions to the applicant. In both situations, however, the application is assumed to have been signed before any answers were written on the form. On the basis of the cases cited in *Mathis*, the result should still be the same.

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(3) [Where an agent has incorrectly filled in an application and the applicant thereafter signs it, the applicant is responsible for any false answer(s) inserted by the agent unless the applicant was justifiably ignorant of the untrue answer(s) and had no actual or implied knowledge of the untrue answer(s). The applicant is justified in not determining that the answer(s) [was] [were] false if *he* has acted in good faith in reliance on the agent and has no actual or implied knowledge of the false answer(s).][6]

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[6]Fact situation #3 contemplates that the application was signed by the applicant after it was filled in by the agent. Although North Carolina authorities are less clear on this issue, the cases seem to provide sufficient groundwork to support estoppel in this situation.

Several cases illustrate justifiable ignorance (although not expressed in precisely those terms), especially *Cato*, 220 N.C. at 483, 17 S.E.2d at 673 (poor eyesight of applicant known to agent and dim light in room) and *Follette v. United States Mutual Accident Ass'n*, 110 N.C. 377, 379, 14 S.E. 923, 924 (1892) (deafness of applicant known to agent: "We cannot give the sanction of this Court to the doctrine that a local agent may scream into the ear of a deaf person solicitations to apply for an accident policy, write for him an answer, which he knows at the time to be untrue . . . procure the policy, [and] receive the premiums. . . ."). However, other cases in which estoppel was applied do not involve such egregious circumstances. *See, e.g.*, *Heilig*, 222 N.C. at 231, 22 S.E.2d at 429 (agent failed to inquire about prior hospitalization of insured, and parents responding to agent's inquiry lacked knowledge of insured's recent hospitalization); *Cox*, 209 N.C. at 781, 185 S.E. at 14 (medical examiner failed to write in details of insured's responses on application). On the other hand, in *Jones v. Home Security Life Ins. Co.*, the Court cited *Cuthbertson v. Home Ins. Co.*, for the proposition that where the applicant could read and write and signed the application, evidence that some questions were not asked of him was inadmissible because he was bound by what he signed. *See Jones*, 254 N.C. at 413, 119 S.E.2d at 219. However, in *Cuthbertson*, the application form contained a provision *warranting* the answers to be true, and the Court found that where the parties have made a matter material, its materiality is not open to be tried by the jury. *Cuthbertson v. North Carolina Home Ins. Co.*, 96 N.C. 480, 484, 2 S.E. 258, 260 (1887). Moreover, even *Jones* leaves some leeway for cases of erroneous recording by

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Finally, as to this (*state number*) issue on which the [plaintiff] [defendant] has the burden of proof, if you find, by the greater weight of the evidence, that the company's agent, and not the applicant, was responsible for the false answer(s) and that the applicant acted in good faith and did not know or have reason to know that the agent was making such false answer(s), then it would be your duty to answer this issue "Yes" in favor of the [plaintiff] [defendant]. If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the [plaintiff] [defendant].[7]

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the agent. According to the Court the evidence supported a jury finding that the agent wrote the answers with total indifference to their truth or falsity, but there was "no evidence whatever that the company or its agent knew the answers . . . were in fact false."

[7] *NOTE WELL*: The mandate should be tailored to the particular fact situation, and the above is given only as a guide.