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ANALYSIS OF MATERIAL DISCLOSURE IN INSURANCE: A CRITICAL LEGAL APPROACH

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Abstract

The aim of this legal research paper is to analyze material disclosure with respect to insurance law. The researchers aim to analyze the idea behind section 45 of the Indian Insurance act. It also aims to prove the ambiguity with respect to material disclosure as well as point of the issues that have been created by section 45 of the Insurance act. As the Indian Insurance Act is an act which are being in pari material with the Indian Contract Act the researchers also would like to prove the contradiction between Indian contract Act as well as the Indian Insurance act with respect to misrepresentation and fraud. The researcher would also tend to analyze the term material fact and understand how important of the Insurer it is in assessing the risk which is associated with the Insurance Policy.

The researcher would like to analyze the position of the Material disclosure with respect to the Insurance Contracts in other Jurisdictions and look into the problem solving assessments of those jurisdictions. The researcher would like to make the benefit of such analysis and then aim to suggest possible amendments to remove ambiguity as well as does not pose as a problem for the insurer.

Keywords:

- Material disclosure
- Ambiguity
- Misrepresentation
- Fraud
- Contradiction
- Amendments

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Introduction:

This section implemented by the Insurance act aims to state that if the person insuring themselves have given some Misstatements and if those statements come in light after three years (amendment of 2015) then in that case, the Misstatements shall not be grounds for repudiating the policy.

This section of the Insurance act may be in the favour of the person who is giving Misstatements with complete knowledge and is still being forgiven by the law.

This shall also be a loss for the Insurer. The paper aims to analyse the problems associated with this section and possibilities of repealing this section.

The primary purpose of insurance is to provide protection against future risk, accidents and uncertainty. Insurance cannot check the happening of the risk, but can certainly provide for the losses of risk. And the idea behind Insurance law is to see that there are proper guidelines that are enacted by the law so that none of the parties are going to be cheated.

Types of Insurance policies those are available in India –

1. General Insurance
    - Health insurance
    - Motor insurance
    - Fire insurance
    - Travel Insurance

2. Health Insurance
    - Term life insurance
    - Whole life insurance
    - Endowment plans
    - Unit – linked plans
    - Child plans
    - Pension plans

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Review of related Literature:

- An article titled as **"PLEADING MATERIAL FACTS"** was actually written by H.C. Downdall and it was published by University of Pennsylvania.[1] The author though this article initially established the definition of material facts in relation to Insurance. The author continued to explain the history behind the disclosure of all such material facts. And then concluded the same by comparing the practice of disclosure of material facts both in common law and civil law countries. The researcher used this Article to express the statutory obligation of the Insured to disclose the material facts in relation to the policy.
- An article titled **"Non-Disclosure and Misrepresentation in Insurance Contracts in France"**was actually written by Christian Bouckaert.[2] The author through his article tried to assess the performance and standards of filtering the cases on the basis of merit. So, the author through his article makes an attempt to explain how such important and helpful is assessing the same and taking into account the possibility of parties' behaviour as such. The researcher uses this article to understand the assessment followed prior to declare the liability of an individual in Non Disclosure of material facts.
- The other article titled as **"LIFE INSURANCE APPLICATIONS: OPINION ANSWERS OR MATERIAL MISREPRESENTATIONS"** was actually written by the William W. Maywhort.[3] The author in his article initially passed a questionnaire in relation to the Insurance and the same is basically done in order to delve into the crux of the ambiguity. The author then focuses upon the Western laws in relation to the Non disclosure of the material facts and also tried to link the same with the objective of the
- legislation as well. The researcher used this article in order to understand the objective and purpose of Insurance Laws and the interpretation which was followed by the same. The researcher also used this article in order to state upfront the obligations of both the parties at the time of entering into the policy.
- Another article titled **"The Duty of an Applicant for Insurance to Voluntarily Disclose Facts"**was actually written by John Dwight Ingram and it was published by

[1] H. C. Dowdall, Pleading Material Facts, 77 U. PA. L. REV. 945 (1928-1929).
[2] Christian Bouckaert, Non-Disclosure and Misrepresentation in Insurance Contracts in France, 14 INT'l Bus. LAW. 106 (1986).
[3] William W. Maywhort, Insurance -- Life Insurance Applications: Opinion Answers or Material Misrepresentations, 49 N.C. L. REV. 560 (1971).

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Journal of Maritime Law and Commerce.[4]The author in this article has initially explained the absolute duty of the party to disclose as per the Maritime Law. The author also has actually explained the genesis and the certain exponents behind the disclosure of the same material facts. The researcher used this article to understand the coefficient of "risk" in the context of Insurance Policy attained by the Insured person. The researcher also found some place of expressing the guilty intention in the process of the entering the Insurance Contract through this Article and also the importance of expressing the same.

- The Tash Bottum in his article titled **"Material Breach, Material Disclosure"[5]** which was published by Minnesota Law Reviewexplained the constituents of Material disclosure and what not constitutes the material disclosure. The author through his article also has explained the damage which ought to happen in case of Non-disclosure and also explained the scope of policy in case of Non-Disclosure. The author have adopted a different style of explaining the disclosure wherein he compared the same to the Company acquiring funds from public and the same has the duty to disclose all the same to the public. The researcher used this article in order to understand the status of the policy in case of Non-Disclosure of the Materiality of the Policy undertaken.
- The other article titled "Insured's Duty of Disclosure in Canadian and English Law" which was actually written by Islam Ahmad Siddique and it was published by the Journal of Alberta Law Review. The author in this article mainly stressed upon the position of the material disclosure with respect to the Insurance Contracts. The author even continued to explain the duty which is owed by the Insured towards the Insurer in various ways and then also explained the methodology which shall be followed in order to repudiate the contract. The researcher used this article to understand the law of various jurisdictions and then ended up suggesting few measures in relation to the Indian Insurance Act. The researcher also got the opportunity to interpret few case laws wherein the substantiation given by the courts to deal with the law in this way is mentioned and that really aided the following research.[6]
- Another article titled "The Law Commission Working Paper No. 73: Non-Disclosure and Breach of Warranty in Insurance Law" which was written by Robert Merkin and

[4] John Dwight Ingram, The Duty of An Applicant for Insurance to Voluntarily Disclose Facts, 40 J. MAR. L. & COM. 125 (2009).
[5] Tash Bottum, Material Breach, Material Disclosure, 103 MINN. L. REV. 2095 (2019)
[6] Islam Ahmed Siddiqui, Insured's Duty of Disclosure in Canadian and English Law, 13 ALTA. L. REV. 242 (1975).

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the same published by the Modern Law Review. The author through this article mainly focused upon the status of the Parliamentary discussion and view point upon the Material Disclosure in the Insurance law. The author through the whole commission report has actually summed up the various areas which the Commission is focusing into. The author expressed his dissatisfaction where the goals set up by the Commission were not even half way through as the initial focus was upon aspects upon the disclosure along with misrepresentation but later on the same focus was diminished as the misrepresentation was no more looked into. The researcher used this article to understand the radical approach behind the whole Insurance Contracts and it supported the research by actually analyzing the ambiguity in the definition of the Material fact disclosure.[7]

Statement of the Problem:

The basis and the development of the Insurance Law are purely from the fundamentals of a contract and the same contract shall be defined as contract under Indian Contract Act, 1872.

The Section 19 of Indian Contract Act, 1872 actually deals with the concept of Misrepresentation and it is interpreted as it would be void on such basis. Upon comparison of the same there is Section 45 of the Insurance Act.Section 45 of the Insurance Act, 1938 actually deals with the same objective wherein it says that misrepresentation after 3 years of recognition would be not void and the same so this provision is aiding the Insured and making the individual stand under the shade.

The provision is actually turning out of ambiguous as it contradicting the fundamentals which were framed under the Parent Act and the period of 3 years which was mentioned doesn't serve any purpose for the Insurer.

The Insured is bound to follow the fundamentals and in case if there is a violation of the same the Insured is still protected. This is actually a win-win situation for the Insured.

Research objectives:

[7] Robert Merkin, The Law Commission Working Paper No. 73: Non-Disclosure and Breach of Warranty in Insurance Law, 42 MOD. L. REV. 544 (1979).

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I) The primary objective is to analyse section 45 and to show the possible problem that the insurer can face if the section is taken advantage of by the insured.

II) The show how section 45 can pose as a contradiction to the Indian Contract Act, 1872.

III) The find possible case laws where section 45 was held valid and to show the kind of law loss the insurer had faced.

IV) To suggest possible reforms instead of upholding section 45 valid.

Research Question:

Whether the provision in relation to the Material Disclosure is ambiguous in its nature and aiding the Insured person for whatsoever?

Whether the Non-Disclosure of the Material facts is a hardship to the Insurer in assessing risk and in fixation of rate?

Whether the provision with respect to the Material Disclosure seeks an amendment in order to close doors for such forth coming?

Research Methodology:

The methodology used in this research paper is a traditional method of research that is Doctrinal research. It involves the systematic analysis of provisions which deal with Disclosure of Material facts and then understanding the ambiguity in the provision and explaining the need for a proper regulation. And analysis of certain cases in such sector the researcher actually used secondary sources like journal articles, books and case briefs for the entire process of research.

Scope and Limitation of the Study:

I) This study aims to focus upon the importance of Material Disclosure of facts in assessing the risk associated to it.

II) This study mainly looks into various provisions in relation to the Insurance Law, 1938 and on comparison with the Indian Contract Act, 1872.

III) This study aims to remove the ambiguity which it is creating and then propose few measures in order to curb the practice.

Hypothesis:

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The hypothesis used by the researchers is that section 45 can be easily being taken advantage by the Insured from the Insurer companies and the aim of the researchers is to prove the same.

CHAPER 2: ANALYSIS OF SECTION 45

Section 45 in the Insurance Act, 1938

45. Policy not to be called in question on ground of mis-statement after two years.—No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement [was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made] by the policy-holder and that the policy-holder knew at the time of making it that the statement was false [or that it suppressed facts which it was material to disclose]: [Provided that nothing in this section shall prevent the insurer from calling for proof of age at any time if he is entitled to do so, and no policy shall be deemed to be called in question merely because the terms of the policy are adjusted on subsequent proof that the age of the life insured was incorrectly stated in the proposal.][8]

Section 45 of the Insurance Amendment Act 2015

Whatsoever after the expiry of three years from the date of the policy, i.e., from the date of issuance of the policy or the date of commencement of risk or the date of revival of the policy or the date of the rider to the policy, whichever is later. (2) A policy of life insurance may be called in question at any time within three years from the date of issuance of the policy or the date of commencement of risk or the date of revival of the policy or the date of the rider to the policy, whichever is later, on the ground of fraud: Provided that the insurer shall have to communicate in writing to the insured or the legal representatives or nominees or assignees of the insured the grounds and materials on which such decision is based.[9]

Section 45 of the act tells that any life insurance company only has the right to question an insurer on the basis of suspicion or fraud within 3 years. The insurance company cannot terminate the policy and claims if the policyholder or his beneficiaries (in the event the

[8] Section 45, Insurance Act, 1938
[9] Section 45, Insurance Amendment Act, 2015

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policyholder is deceased) can demonstrate that there was no conscious attempt to conceal the information or that the policyholder was not aware of it.

The life insurer can only question a policy within three years to question a policy on the ground that any statement or suppression of a fact material to the life expectancy of the insured was incorrectly made on the basis of which the policy was issued or revived or issued.

The period of three years has to be from:

1. The date of issuance of the policy, or
2. The date of commencement of the policy, or
3. The date of revival of the policy (lapsed policy due to non-payment of premium)
4. The date of rider to the policy, whichever is later[10]

The life insurance company has the right to raise a claim for fraud against the policy in writing, along with the supporting evidence. This will be delivered to the policyholder, his or her appointed nominees, or assignees.

The insurance company cannot deny the claim if the alleged parties can substantiate it with the necessary documents and state that there was no intentional attempt to conceal the truth.
Meaning of Mis-representation:

The interpretation of the court actually makes it clearer that even the partial disclosure or the in complete disclosure would actually amount to misrepresentation of the facts.

The court held that failure to disclose in response to the particular question would actually amount to the misrepresentation of the material of material facts as that is a mistruth.

"The failure to disclose is as much a misrepresentation as a false affirmative statement.'
"Incomplete answers or a failure to disclose material information on an application for insurance may constitute a misrepresentation when the omission prevents the insurer from adequately assessing the risk involved."
"A 'fraudulent misrepresentation' may be made by statements of half truth or the concealment

[10] https://www.wishpolicy.com/articles/section-45-of-the-insurance-act/If-a-Policy-is-Called-in-Question-on-the-Ground-of-Life- Expectancy-of-Policyholders.

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of material facts, as well as by affirmative statements or acts.[11]

The general rule is that if in case if upon the information given by the insured in relation to the particular policy the insurer is under no obligation to actually investigate upon the wellness or the facts stated by the Insured. But the obligation is created upon the Insurer when the insured on the face of it is not answering to the question posted by the policy and the same is the subject matter of the whole policy and also even in case if there is a wrong answer to it then it shall be the duty to conduct the reasonable investigation.[12]

However when the applicant is actually giving the sufficient information to alert an insurance company to a possible material factor such as his particular medical condition or history, the company is bound to make such further inquiry as is reasonable under the circumstances in order to ascertain the facts surrounding the information given.'

Meaning of fraud:

Any of the following actions taken by the policyholder or his or her agent with the intent to deceive the insurance company or persuade it to issue a life insurance policy are considered to be fraud.

The assertion of what is false and what policyholders do not believe to be true as fact.

Any other act designed to deceive the insurance company Specific acts or omissions declared fraudulent by the law.

Any actively concealed fact by the insured with knowledge or belief.

Mere silence is not considered as an act of fraud unless it is the duty of the policyholder or his/her agent to keep silent to speak, or silence is in itself equal to speaking. It will also depend on the circumstances of a particular case.[13]

The principle of Uberrima Fides:

[11] Mutual Benefit Life Ins. Co. v. Morley, 722 F. Supp. 1048
[12] Friedman v. Prudential Life Ins. Co., 589 F. Supp. 1017
[13] Section 19, Indian Contract Act, 1872

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The above stated is a legal maxim which means "Principle of utmost good faith"

This principle is one of the founding stones on the basis of which insurance law is based on. This is because a person purchasing the insurance policy has the obligation to disclose truthfully and correctly the information about the subject matter of insurance.[14]

Extent of bad faith:

The intent of the insured person is actually not required but the very necessity for the Insurer is that the applicant should have known that the fact would be material enough but did non disclose the same even though the insurer did not actually inquire about it . Under the above situation if that is the case then the insurer can actually void the policy even though the information was unintentional or mistake but still the contract would be rescinded so long as the fact is material.[15]

However the every insurance contract shall have a clause which states that if in case it is being decided that there is misrepresentation of the facts which would hamper the decision of the insurer then in such a scenario the policy would be void. Provided the same shall be proved that the insured have willfully not disclosed the material fact by the Insurer.[16]

Both the parties to an insurance contract which are the insurer and the policy holder have an obligation towards each other. As the duty of the insurer is to verify each detail before deciding upon the premium of the insurance policy it is also the duty of the to be policy holder to exercise care and caution while disclosing the details required in application forms, especially the personal details concerning health, family history, previous insurance policies, occupation, and income, etc. These facts are highly important in nature for the assessment of risk on a life insurance application.[17]

Applicability of section 45 for age:

Section 45 shall not be applicable for questioning age or adjustments based on proof of age submitted subsequently.

[14] Srinivasan Rangarajan, The relevance of MithoolalNayak's case after amendments to Section 45 of the Insurance Act, 1938, LAWYERSCLUBINDIA (April 08, 2023) https://www.lawyersclubindia.com/articles/the-relevance-of-mithoolal-nayak-s- case-after-amendments-to-section-45-of-the-insurance-act-1938-733.asp

[15] Methodist Med. Ctr. Of Ill. v. American Med. Security Inc., 38 F.3d 316 (7th Cir. 1994)

[16] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955)

[17] Advocate Association Team, Section 45 of Insurance Laws Amendment Act 2015, Advocatetanmoy Law Library (April 8th, 2023, 11:05 AM), https://advocatetanmoy.com/2019/11/29/section-45-of-the-insurance-laws-amendment-act-2015/

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The insurance company has the right to ask for proof of age anytime. However, the policy will not be considered in question only because the terms of the policy are adjusted based on subsequent proof of age of the policyholder.[18]

Section 19 of the Indian Contract act, 1872 talks about voidability of agreements without free consent, which includes misrepresentation, fraud, etc.

It states that "A party to a contract whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true."[19]
The contradiction that the researchers would like to prove with respect to the situation of India is that there has been a chance given to the parties of the contract for performance in the case a Mis- representation or fraud has come to light but as per section 45 of the Indian Insurance act, the party would not get a chance to make the contract void even if they wish to do so.[20]

Though one can argue that this is the statute of limitations that has been set up by the law. But limitations are based on one principle called "*vigilantibus non dormientibus Jura subveniunt"* which means the law shall assist only those who are vigilant with their rights and not those who sleep upon it.

But with respect to section 45, the case is not about the insurer sleeping on their rights but this about one party not disclosing information so in this case there is no defined timeline as to when information can come to light. So putting a limitation upon those is unfair from the point of view of the insurers.

There can be no defined extent up to where the policy holder might to hide the facts that are important are mandatorily to be presented to the insurer while deciding upon the price of the insurance premium.

[18] Wish Policy Articles, Section 45 of the Insurance Act, WISHPOLICY (April 22, 2021), https://www.wishpolicy.com/articles/section-45-of-the-insurance-act/
[19] Sahin, Misrepresentation under Indian Contract Act, Legal services India, (April 9th, 2023, 12.00 pm), https://www.legalserviceindia.com/legal/article-7817-misrepresentation-under-the-indian-contract-act-.html
[20] Kshiti Shetty, Analysis of section 45 of the Insurance Act 1938, Bnw Journal, 21st November 2021.

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Indian case laws with respect to upholding section 45:

In the case of Reliance Life Insurance v. Rekhaben Nareshbhai Rathod after deeply studying the requirements of Section 45 the hon'ble court had held that every fact of the material must be disclosed, otherwise, this constitutes a reason for the termination of the contract. If facts are [21]withheld, the policy can be called into question. A medical claim policy is intended to protect the insured against expenses in connection with injuries, accidents, or hospital stays. It is non-life insurance, but it is an insurance contract and falls into the contract.

The court supported the appellants and did not agree with the rulings of NCDRC. The respondent was also permitted to withdraw 50 percent of the amount.

In this case, the court took a clear stand about Section 45 of this act and where it is applicable.

In the case of Mithoolal Nayak v. LIC, The court held that the policy is void and contestable because the insured person replied in the negative to the question that he was never treated for an illness. Not only did the deceased fail to report that he had received medical treatment, but also made a false claim that he had not received medical treatment, suggesting that the intent was to deliberately suppress the material circumstances.

On the second issue, it was held because of company policy, money was paid as a bonus. The policy has been annulled for the suppression of facts. If a contracting party violates its contractual promise, the other contracting party is released from fulfilling its part of the contract. The court ruled in the favour of the insurance company.[22]

Chapter 3 CALCULTAIONOF RISK COEFFICIENT:

ASSESSMENT OF PREMIUM IN INSURANCE CONTRACTS:

1. Age – age is the most important factor while calculating life insurance premium. This is because people who are of a younger age are less likely to catch a disease. People who are of young age are generaly considered as a low- risk category and the premium

[21] Reliance Life Insurance v. Rekhaben Nareshbhai Rathod (2001) 2 S.C.C. 160.
[22] Mithoolal Nayak v. LIC 1962 SC Supl. (2) 571.

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for such people is comparatively lower.

2. Medical History – when purchasing of a life insurance policy, the insurer shall always go through the medical history of the person who has applied for life insurance. Medical history would help the insurer in ascertaining the current health status of the person who has applied for life insurance. This is because if there had been an illness in the past might also affect the current status of the health which is why it is necessary for insurers to go through the medical history.
3. **Personal Habits:** Personal habits like the consumption of tobacco/alcohol or any other bad habits can affect the calculation of premiums for a life insurance policy. Consumption of tobacco and alcohol is considered harmful to any person's health. People who consume tobacco/alcohol are more likely to catch different kinds of which may be harmful on different level. People who consume high level of alcohol or tobacco are considered as a high-risk category. Therefore, the premium rates for non-tobacco/alcohol consumers are low and rather high for people who consume tobacco/alcohol.
4. **Medical Records:** When an individual is purchasing a life insurance plan it is necessary to go through medical examinations. These medical examinations help in determining the current health status and help in determining any potential diseases that might occur in the future. Obtaining the results from the medical examination helps in calculating premiums for life insurance plans.
5. Obesity: Obesity is one of the key factors while calculating insurance premium. Obesity carries several high risk diseases such as cancer, hear stroke, high blood pressure, coronary heart problems, etc. People who are obese are likely to have high insurance premiums.
6. Profession: profession has become a key factor in calculating the life insurance premium. This is because the field or profession the person is working in might also affect the health of an individual. For example if a person is working in a mining industry or an oil & gas company, then in that case their profession is only affecting their health majorly because of which the life insurance premium might also be high.
7. **Policy Term:** The policy term or policy duration is also one of the main factors that affects the life insurance policy premium. It is to be noted that the longer the tenure of the policy will be, the larger will be the amount of the benefit at the time of the policyholder's death. This shall because is because the policyholder would be paying the premium for that time period. On the topic of short term policies, they are more

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expensive as compared to those that have a long term.[23]

Some of the above mentioned factors make a huge impact on the price of the insurance premium, such as age, personal habits, medical history, etc. so putting a timeline would affect the insurer.

Definition of Material Disclosure:

In the case of Garvey V. Old Colony Insurance Company, the Court held that the ignorance of the material fact or the ignorance of the disputed fact would actually influence the judgment of the insurer in assessing the risk and fixing the premium of the Insurance policy.[24]

In the case of Pan Atlantic Co Ltd and Another V. Pine Top Insurance Co Ltd, the House of Lords have come to conclusion and defined the meaning of the word "Material disclosure" as any every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.[25]

In the case of Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd the court have actually interpreted the definition of the material disclosure where it held that if any misrepresented fact or the un disclosed fact turns out to be a influential one and it is dictating the conduct of the Insurer then it is a material fact and if in case the disclosure of the same fact is not influencing the conduct i.e. the insurer would have acted in a same way in which he is presently acting then it is considered as not a material fact.[26]

In the case of Stecker V. American Home Fire Insurance Company, it was observed that the Insurance Companies rely upon the full and honest disclosure from the side of insurer and then assess the risk in association to the kind of policy for which the Insured have claimed for.[27]

The Insurance Companies shall necessarily calculate the risk involved on the basis of the applicant's submissions and disclosures, and must come to an assumption that there is nothing

[23] Julia Kagan, Insurance Premium Defined, How It's Calculated, and Types, Investopedia database (April 10th 2023), https://www.investopedia.com/terms/i/insurance-premium.asp.
[24] Garvey v. Old Colony Ins. Co., 153 F. Supp. 755
[25] Pan Atlantic Co Ltd and Another V. Pine Top Insurance Co Ltd [1994] 3 All ER 581.
[26] Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1984] 1 Lloyd's Rep 476.
[27] Stecker v. American Home Fire Assurance Company, 86 N.E.2d 182 (N.Y. 1949).

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undisclosed that would materially affect the risk.[28]

Life insurance covers the risk of an unexpected death and provides the nominees of the insured person with the sum assured upon the death of the life insured, it is important that insurer is able to properly assess the risk and on the basis of which ca decide on the terms of the coverage, and for this, disclosure about the customer's health, family history, ('material facts'), etc become important.

Disclosure of Material facts by Insured:

The basic phenomenon for any Insurance Contracts is the subject matter which actually decides the probability of happening of an event. For instance taking into consideration the for example taking into consideration the age in Life Insurance Contracts. So, as age keep on increasing it also increases the probability of happening of an event. So, there is a chance of happening of an ever in near future so the Insurer would actually tend to impose higher premiums than usual. So, in case if it is exactly the opposite way then the premiums would be usual because there is no immediate risk.

And in case if the situation is in a way that the Insured have disclosed the wrong age to the Insurer then the whole assessment of risk would fail to work. As in the Insured would be paying the lesser premiums but end up getting the sum of money which is as per the policy. If the happening of an event is genuine enough then the obligation is upon the Insurer but if it is the other way around that the Insured tried to misrepresent then the whole problem lies in. And in order to curb such practices the Insurance Companies shall be given an opportunity to express that the act of the Insured amounts to Misrepresentation and a contract which was entered shall be void for that matter.

As mentioned before the extent of disclosure shall be actually be restricted to all the facts which were known to the Insured at the time of the Insurance Contract that would actually influence the contract and assess the risk which would be the subject matter for the whole insurance policy.

Not surprisingly, the onus of proof is upon the insurer seeking to avoid liability to demonstrate that the insured had knowledge of the facts and circumstances to be disclosed. Even less

[28] Seaman v. Fonerau, 93 Eng. Rep. 1115 (1743).

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surprisingly, such burden is in practice frequently difficult to meet. The absence of any duty to disclose owing to the insured's unawareness of facts or circumstances which may have an influence on the insurer's opinion of the risk should be distinguished from the rules concerning non-disclosure in good faith. An insured can, of course, have knowledge of such facts and circumstances but not disclose them to the insurer while acting in good faith. The Insurer would be subjected to penalties under other penal provisions when it is being decided that Insured is aware of such material facts at the time of policy but did not disclose the same.

The concept of proportionality:

As the general Insurance Contract is entered between the two parties the Insurer and the Insured. The subject matter for the thing insured can be of anything such as one's life, property or any other. So, the interest which one has to protect the property from any external peril is actually the insurable interest which the concerned is having. In order to do the same there shall be timely premiums which shall be paid by the insured to the insurer in lieu of the contract. So, the fixation of the premium and the extent of the loss which shall be covered is decided through the disclosure.

But in case if the same is actually not presented and there is involvement of misrepresentation of facts then the extent of the misrepresentation shall not be proportional to the risk which was assessed by the Insurer if in case of the extent of facts is proportional then the risk also increases with the disclosure of such non disclosed facts as earlier. Then the only alternative to prove for the insured to the claims of the Insurer is that to prove the conduct of the Insurer would have changed even if the Insurer is aware of that fact or he is not aware and wouldn't have acted differently upon the notice of such information.

Response of Law Commission:

The Law Commission Working Paper 73 it actually deals with Non Disclosure and Breach of Warranty and its main focus was to actually deal with two important aspects:

a) Non-disclosure by the insured;
b) Misrepresentation by the insured;
c) Breach of warranty by the insured;

It was addressed to solve the problems of all three terminals but the focus was mainly upon the

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Non-disclosure by the Insured and also the breach of warranty by the Insured. It was also criticized that the focus being mainly None disclose by the Insured but the same is not being backed up the misrepresentation by the insured. The assumption was that there is a chance of solving the problem by actually discussing the first element without any furtherance of the second element as such.

In the case of Woolcott v. Sun Alliance in which the insured was given a policy for house insurance on the strength of his mortgage application form-the fact that this would happen was not expressed as such on the form. It was held that the failure to disclose one particular criminal conviction rendered the policy voidable, but the treatment of the duty to disclose in general is disturbing.[29]

First, the question "Are there any other matters which you wish to be taken into account?" could easily have been construed as imposing only a subjective duty, at best it was ambiguous.

Secondly, given that mortgages do not require disclosure beyond the questions, and given that the insurer was willing to issue insurance on that basis, could not waiver have been argued.

The approach which came through all away is that during the time of entering into contract there is always a question which is being asked by the Insurer to the Insured is that is there any other material information which would actually alter upon the assessment of risk. And it is a duty upon the Insured to disclose any such information if in case there is possession of any such material then. So, then on such basis and responsiveness towards the proposal the Insurer would be in a position to actually decide upon policy either it has to repudiated or not.

Further it is being actually suggested from the law report that the insure shall actually plead the Non disclosure only if in case there is fulfillment of the condition mentioned below as such:

No proposal form was completed, in accordance with the established practice of the insurer in the insurance involved.

(i) The insured was a company;

(ii) The insured had actual knowledge (either because of oral warning or previous

[29] Woolcott v. Sun Alliance [1978] 1 All E.R. 1257.

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dealings) of the duty to disclose;

(iii) The information withheld was of a type that would normally be disclosed in the ordinary course of the insurance in question;

(iv) The information was material to the particular risk.

The Report which is being working ng on the above issue laid down few recommendation in relation to the misrepresentation that the Insured shall not be let down if in case though it amounts to the misrepresentation but still according to his knowledge and if in case it is true to the best conscience of his. And the other suggestion which was brought in and suggested is that an overriding test of "contra proferentem" for ambiguous questions on the proposal. This is to be welcomed because it restricts the previous right of the insurer to have the best of both worlds in the matter, and because it is a much needed reassertion of an ordinary contractual principle which the courts have seemingly been unwilling to apply to contracts of insurance.[30]

In the case of Schoolman v. Hall it was relied upon a test of materiality that rarely lets the insurer down. One possibility, altering the test from that of the reasonable insurer to that of the reasonable insured, might have a marginal effect but cases such as Home v. Poland case actually do suggest that insured's may fare little better under this more liberal test.[31]

So, it is basically that if in case the Insurer pleads that the same that there is material non disclosure then a test of materiality shall be proposed so it actually decides the extent of the material damage have actually happened to the Insurer upon the disclosure of the same as such.

And if in case if the Insurer are many then the particular material test shall be done individually to that particular Insurer who is claiming that there is misrepresentation and it shall be confined to only that Insurer and cannot include all other insure this is done for the betterment of Insured if in case the policy from the insurer is void ab initio then he shall have the benefit from the other policy as such.

It is very much important for that matter to actually recognize that reform must meet the requirements of the industry as well as those of policyholders. If the changes to the law of disclosure had been wider in their scope, the danger might have been that insurers would

[30] Young. V. Sun Alliance [1976] 3 All E.R. 561,
[31] [1922] 2 K.B. 364. Cf. MacGillivray and Parkington, para. 750.

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withdraw from parts of the market. There is also a risk of demonizing the industry and forgetting its significance to the economy in terms of spreading risk, invisible earnings, tax revenues and investment. At the same time, insurance law must keep up to date with the market.[32]

Position of Disclosure at Alberata:

The general practice of the Life Insurance Contracts as per the Alberta Insurance Contract is that the innocent misrepresentation shall not be actually entertained and shall not end up by making the policy void rather there shall be proof of bad faith to deceive the insurer.

A life insurance contract under section 241 of the Alberta Insurance Act becomes uncontestable after a period of two years. If the insured, which is guilty of non-disclosure or misrepresentation, dies one day short of two years, the claim of the beneficiary is prejudiced, but if he dies at any time after the said period, the beneficiary's interest is fully protected unless the insurer can prove fraud on the part of the insured.

And the interpretation is that if here the facts withheld or misrepresented would have resulted in a higher premium if properly disclosed, and the insured dies within two years, it is mandated that there shall be the differential premium be charged for a full two years for which the Insured paid the premium which actually amounted to lesser amounts and that the contract be made uncontestable vis-a-vis a claim by the beneficiary. This would bring to an end and actually solve the problem of any inequality between the position of innocent Insured, and the Insurer whether the policy has been in effect for less or more than two years, save in the event of fraud provable against any party under a duty of disclosure.

When determining the materiality from the perspective of a reasonable insured, it is stated that only a nondisclosure or a misrepresentation of material information made in bad faith by the insured should render the claim of Insurance.

Position of Material Disclosure at US:

The status of the Insurance Contracts in the State of United States is also very much similar

[32] Law Commission, Insurance Contract Law: Issues Paper 1: Misrepresentation and Non-Disclosure September 2006, Part 5 at http://lawcomnission.justice.gov.uk/docs/ICLlvlisrepresentation andNon-disclosure.pdf (last visited 2 August 2012).

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wherein in case if the Insurance Contracts involves the elements of misrepresentation and the non disclosure then in such a scenario there is complete policy can be ended up turning to be void provided that the situation shall be backed by the intent of the insured to deceive the insurer in order to pay lesser premium but end up getting higher policy amount. And it defined the term tact as a material if its misrepresentation has deprived the insurer of its freedom of choice to accept or reject the risk. And also pointed out that the same disclosure of the fact would have actually increased the risk of the insurer unless made with the intent to deceive or unless the matter misrepresented increases the risk of loss or contributes to the event or contingency upon which the policy becomes payable.

And in case upon the event of an innocent non disclosure of the material fact and the same shall not be proved by the Insured then in such a scenario the Insurer would have grounds for rescission of the insurance contract, but not damages because rescission based on innocent misrepresentation is an equitable remedy. The insurer must rely to its detriment on the misrepresentation. The misrepresentation shall not be the only sole ground for the action by the insurer, but it should have contributed to the conduct of the insurer in issuing the policy. So, the intent behind such a statement is that if in case if there is proper disclosure then there reasonable apprehension to the Insured that the Insurance policy shall be or should have been rejected.

Generally the status of the Insurance Contracts in United States is that the disclosure shall be the absolute. If the disclosure is mentioned as absolute then it is very much needed for Insured to maintain the good faith.

In the case of Gates V. Madison County Mutual Insurance Company, the court held that exclusively in Marine Insurance cases it is very much needed and the Insured is bound to although there is no enquiry from the side of Insurer to disclose every fact which is needed and within its knowledge.[33]

But the situation with respect to the other Insurance contracts it is not so absolute it is restricted to the disclosure of the facts which were asked and the same is relaxed as because there is no enquiry which is being conducted from the end of the Insurer. The disclosure is restricted only

[33] Gates V. Madison County Mutual Insurance Company 2 N.Y. 43 (N.Y. 1848)

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to the extent of what is asked as such.

The status of the United States is that it is not essential that what is not asked shall also be disclosed. And any misrepresentation of all such facts would be a problem and a violation of the principle of the good faith for which the Insurer actually believe upon.

Position of Material Disclosure at France:

The situation of the disclosure was that prior to 1930 if in case if there is any misrepresentation or the non-disclosure the nit can actually give rise to call the whole contract as null and void without any consideration upon the good faith or it is in bad faith. But still after the 1930 statute enactment the situation is that the Insurance companies shall prove that there is involvement of bad faith and only then there is actually a chance of calling the whole policy as void as such.

The extent of bad faith shall be proved only in following conditions juts mere non-disclosure of a fact which would not tend to impact the policy would not be amounted to bad faith but in case if there is any element which is the Insured is aware at the time of policy but did not disclose to the Insurer in order to deceive him or end up paying lesser premiums would be actually amount t to and constitute bad faith as such. The courts have tried to overturn the decision form the good faith to the bad faith if in case upon satisfaction it is felt that there is voluntary non-disclosure of the material facts which would tend to influence the decision of the insurer for that matter.

The remedy when the insurer has shown that the insured had acted in bad faith in not disclosing a circumstance which would have had an influence on the insurer's appreciation of the risk, then there exists necessary provisions which provides that the insurance policy is null, and then the same would cancelled ab initio.

The above stated sanction would apply regardless of whether the misrepresentation or non-disclosure had an influence on the loss at issue. The ab initio cancellation of the policy is applicable to cases of misrepresentation or non-disclosure at the time of conclusion of the contract but where it is a matter of nondisclosure of an increase in risk subsequent to the conclusion of the contract, cancellation would be effective at the time when the change in the nature of the risk should have been disclosed. And when any such policy is called in as void ab initio then the Insurer can actually any such sum of money which was paid in lieu of

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indemnity during the policy period. The insurer for that matter can also have claim upon the premiums which ought to be paid as per the [policy and is not under any obligation to return the sums collected as a policy amount but still can continue retain the policy amount as such. The claims for any special damages can also be asked for if the matter is related to the misrepresentation and the same would be nothing but the premiums which are due from the Insured.

CHAPTER 4: CONCLUSION

Conclusion:

It can also be observed that in other countries, if there has been an issue with disclosure of information to the insurer or there has been misrepresentation or fraud then in that case it is a common practice for insurance companies in other countries to invalidate the contract completely as void, if it is proved by the insurer that has been bad faith, or with the involvement of material facts.

With reference to the research questions that were taken by the researchers, the below points have been interpreted by the researchers –

- The provision related to material disclosure is ambiguous in nature
- The non- disclosure of material facts by the policy holder does make it hard for the insurer in assessing the risk as well as fixing the insurance premium
- Yes the provision with respect to material disclosure does seek an amendment and the researchers have also suggested a way to approach ahead and are mentioned below.
- Yes the disclosure which yet to happen and if happened after a period of 2 years or 3 years as per the 2015 amendment would be amounted to alteration of risk.

Suggestions:

The researcher after the analyzing the position of material disclosure in Insurance Contracts with the laws of other countries would like to suggest and recommend that there shall be no bar in the time limit which is being expressly mentioned as three years in the Section 45 of the Insurance Contracts. Rather there shall be a mechanism which shall be adopted by the legislature for that matter to actually impose the burden upon the Insurer that there is Non-disclosure of the Material facts and that actually made the Insurer to alter the risk coefficient provide the mala fide intention shall also be proved in furtherance to the Insurance policy.

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And in addition the researcher would also tend to suggest few tests in order to determine the liability of the Insurer and the Insured for that matter;

- A material test which would actually assess the risk coefficient before the disclosing of material facts by the Insured and also after the disclosure or after the Insurer knowing the information the undisclosed information. So, alteration of risk is so much that it is directly proportional with the disclosure of the information then the Insurer would be in a position to substantiate the argument.
- A decisive test wherein it would actually decide the conduct of the Insurer wherein it would actually aid the court in deciding the fact that whether the conduct of the Insurer would change upon the knowing the information which is actually unknown to him at the policy. And it would even aid the court to understand the degree of such change in conduct.

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