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# THE DUTY TO READ AN INSURANCE POLICY IN WASHINGTON\*

WILLARD J. WRIGHT†

## THE CONTRACT RULE

In general, the law of contracts asserts that, in the absence of fraud or mutual mistake, a person, who accepts a writing known by him to be contractual with an intention to become a party thereto, is conclusively bound by all of its terms and will not be permitted in any action thereafter arising on such instrument to deny that he had knowledge of its terms.<sup>1</sup> It will not do for a man to enter into a contract and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. "If this were permitted contracts would not be worth the paper on which they were written. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission."<sup>2</sup> The rigor and harshness of this rule is at times apparent, but, it is said to be a matter of policy and that the integrity of contracts demands that the rule be rigidly enforced by the courts.<sup>3</sup> However, this is the rule only in the absence of fraud or mutual mistake or where the other party to the contract knew of the signer's ignorance and fraudulently induced it or took advantage of it.<sup>4</sup>

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<sup>1</sup>5 WILLISTON AND THOMPSON, CONTRACTS (Rev. ed. 1937) § 1577, p. 4408, citing Long v. McAvoy, 133 Wash. 472, 233 Pac. 930, 44 A. L. R. 483 (1925). Also VANCE, INSURANCE (2d ed. 1930) § 71, p. 215, citing Boylan v. Hot Springs Railroad Co., 132 U. S. 146 (1889).

<sup>2</sup>Upton v. Tribilcock, 91 U. S. 45, 51 (1875), wherein defendant was a shareholder in plaintiff corporation and was held bound to the contract in his share certificate upon his acceptance thereof, whether he read it or not. RESTATEMENT, CONTRACTS (1932) § 70, p. 73, states the rule that: "One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation."

<sup>3</sup>Furst v. Merritt, 190 N. C. 397, 130 S. E. 40 (1925).

<sup>4</sup>Rosenbaum v. Evans, 63 Wash. 506, 115 Pac. 1054 (1911), which allowed reformation of a deed where mutual mistake of the parties was established by "clear and convincing evidence". Carlson v. Druse, 79 Wash. 542, 140 Pac. 570 (1914), where the plaintiff had delayed bringing any action for two years to reform a deed which did "not correctly state the agreement which the parties actually made"; the court again allowed reformation because "there has been a material and mutual mistake". (In Note (1926) 45 A. L. R. 700, 704, it is said that this latter case "practically denies the doctrine that negligence will bar reformation.") See generally, 5 WILLISTON AND THOMPSON, CONTRACTS (Rev. ed. 1937) §§ 1535 to 1600F inclusive; RESTATEMENT, CONTRACTS (1932) §§ 504, 505.

Washington follows this general contract rule<sup>5</sup> but the court appears willing to mollify its hardship in some instances by liberally construing the term "fraud". Thus in *Stone v. Moody*<sup>6</sup> the plaintiffs signed a contract without reading it and the court allowed them a rescission on the ground that the contract contained such an "unconscionable" clause that it was plain the plaintiffs would never have agreed to it if they had known of it.<sup>7</sup> Unless it can be said that the defendant—who read the contract to the plaintiffs and omitted to read the clause in question—induced the plaintiffs not to read the contract, the result of the case seems contrary to the proper rule. But under the Washington view this would probably constitute fraud, since facts or circumstances tending to show fraud or mistake have been enumerated in Washington as "inability to read or understand the language of the contract, a relation of trust or confidence between the parties, or some artifice used to obtain the signature of the party or prevent him from reading the contract."<sup>8</sup>

When it is shown that there has been no fraud practiced by the other party and that the contract was not founded on a mutual mistake of the parties, one who has failed to read the contract is bound thereby at law and in equity. He will not be able to obtain a reformation.<sup>9</sup> He

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<sup>5</sup>In the leading Washington case, *Washington Central Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366 (1895), the court rendered the following much quoted phrase: "If people having eyes refuse to open them and look, and having understanding refuse to exercise it, they must not complain, when they accept and act upon the representation of other people, if their venture does not prove successful. Written contracts would become too unstable if courts were to annul them on representations of this kind." See also *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216 (1901); *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613 (1898); *West Seattle Land & Imp. Co. v. Herren*, 16 Wash. 665, 48 Pac. 341 (1897); *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180 (1902); *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117 (1902); *Lake v. Churchill*, 39 Wash. 318, 81 Pac. 849 (1905); *Walsh v. Meyer*, 40 Wash. 650, 82 Pac. 938 (1905); *Hubenthal v. Spokane & Inland Ry. Co.*, 43 Wash. 677, 86 Pac. 955 (1906).

<sup>6</sup>41 Wash. 680, 84 Pac. 617 (1906).

<sup>7</sup>This view of the court seems based wholly on sympathy in disregard of the strict rule. The court said: "(the plaintiffs) were people of, or above, average intelligence . . . Ordinarily, when people of average intelligence sign instruments which they have an opportunity to read, but do not, they should not be afterwards permitted to say that they did not know what they were signing. If this contract did not contain a provision which we deem to be absolutely unconscionable and one which no intelligent vendor would have subscribed to, we would not be disposed to listen to any claim on the part of these appellants (plaintiffs) that they did not know of the contents of this contract."

<sup>8</sup>*Hubenthal v. Spokane & Inland Ry. Co.*, 43 Wash. 677, 687, 86 Pac. 955, 959 (1906).

<sup>9</sup>*Kearns-Gorsuch Bottle Co. v. Hartford Co.*, 1 F. (2d) 318 (S. D. N. Y. 1921); *Burt v. Los Angeles Olive Growers Assn.*, 175 Cal. 668, 166 Pac. 993 (1917); *Grieve v. Grieve*, 15 Wyo. 358, 89 Pac. 569, 9 L. R. A. (n.s.) 1211 (1907). But see *Gilroy v. Strauss Building & Realty Co.*, 157 N. Y. Supp. 162 (Sup. Ct. 1915), where the court said: "The established law in this state is that the negligence of the party who seeks the reformation of the instrument, whether in failing to read the instrument before he signed it

cannot successfully rescind.<sup>10</sup> Nor will equity give him relief when the other party seeks specific performance.<sup>11</sup> In actions at law the non-reading party is bound in silence by the parol evidence rule.<sup>12</sup>

Since an insurance policy is a contract the question at once presents itself whether this rigid contract rule will be or is applied to it.<sup>13</sup> As opposed to such application, writers have suggested that since the insurance contract is unique in character, the ordinary rigid contract rules should not be strictly applied. One writer contends that an insurance contract is not essentially a "bargaining" agreement customary in trade, since the terms of the contract are fixed by the expert insurer alone and the "bargaining" amounts to no more than determining whether the inexperienced applicant will take it or leave it.<sup>13</sup> Another writer calls it a contract of "adhesion", as the insured merely "adheres" to it with little choice as to its terms.<sup>14</sup>

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or in failing thereafter to note the error for a long period of time is no bar to a suit for the reformation of the instrument."; citing *Smith v. Smith*, 134 N. Y. 62, 31 N. E. 258 (1892); *Wilcox v. American Tel. & Tel. Co.*, 176 N. Y. 115, 68 N. E. 153 (1903).

<sup>10</sup>*McElroy v. Maxwell*, 101 Mo. 294, 14 S. W. 1 (1890).

<sup>11</sup>*Kearns-Gorsuch Bottle Co. v. Hartford Co.*, 1 F. (2d) 318 (S. D. N. Y. 1921); *Heyward v. Bradley*, 179 Fed. 325 (C. C. A. 4th, 1910), where the court allowed specific performance even though defendant's intention was different from that actually expressed in the contract. *Harrington v. Heder*, 109 N. J. Eq. 528, 158 Atl. 496 (1932), where a clause in a land sale contract was not completely understood yet the vendor was entitled to specific performance. However, this equitable remedy of specific performance is quite discretionary with the court and may be denied in a case where the mistaken party would not be allowed to reform or rescind his agreement. See generally, 5 WILLISTON AND THOMPSON, CONTRACTS (Rev. ed. 1937) § 1427.

<sup>12</sup>See Note 46, *infra*.

<sup>13</sup>VANCE, INSURANCE (2d ed. 1930) p. 215. In *Foster v. Pioneer Mutual Ins. Assn.*, 37 Wash. 288, 292, 79 Pac. 798, 799 (1905), the court said: "People are as a rule not informed concerning the technical rules governing insurance contracts. In the nature of things, they must and do rely largely upon the agents, not only because of the latter's superior knowledge upon the subject, but also, because they regard the agents as coming from their principals clothed with authority. For these reasons the cases are numerous which held that, when an agent acts with knowledge of the facts, he is the agent of the insurer, and that his knowledge becomes, in law, that of his principal, and binds the latter when the insured has no knowledge of the limitations upon the agent's authority."

Thus it is suggested by "W. S. A." in Note (1932) 81 A. L. R. 833, 874: "In many respects, insurance is contracted for in a manner unlike that followed in the making of ordinary commercial contracts. This is especially true of life, health and accident policies, which are sold usually under the high pressure of effective salesmanship. Furthermore, experience would justify a statement that, to many persons, the purchase of insurance is, like the purchase of any ordinary commodity, a matter involving other considerations than those entering into the closing of a contract . . . These are the reasons which have led a majority of the courts to take the position that the insured will be given protection notwithstanding the fact that if he had been less trustful, less gullible, or more alert, the insurer would have been prevented from paying a loss under a risk which it would never have assumed if it had known the facts."

<sup>14</sup>*Patterson, The Delivery of a Life Insurance Policy* (1919), 33 HARV. L. REV. 198, 222.

A more persuasive argument is made by one court which compares the sale of an insurance policy to the sale of an article of merchandise.<sup>15</sup> It is suggested that the contract rule is in result the same as the outmoded doctrine of *caveat emptor* when applied to the sale of insurance. The court asserts that the doctrine of *caveat emptor* should not apply, but that the insured has a right to rely on the presumption that the policy he receives is in accordance with his application whether oral or not. Pursuing this theory, one writer has suggested<sup>16</sup> that an action by the insured for reformation or rescission or a defense by the insured to an action for a premium payment is analogous to a claim by a vendee in the law of sales of a breach of an implied warranty of reasonable fitness for an intended purpose.<sup>17</sup> Hence, should the policy delivered not conform to the oral statements of the insured made to the insurer's agent concerning the coverage desired or should it contain alterations which the agent may make in his zeal to sell the policy, the insured should have the remedies accorded to a vendee under the Uniform Sales Act and case law.

A third theory suggests that in a suit for reformation, the insured cannot be found so negligent as to warrant a denial of relief for a failure to read his policy because "the prevailing business custom is for the insured to rely upon the accuracy, skill and good faith of the agent of the insurer"<sup>18</sup> and that it is not necessary to examine either the application or the policy in order to detect any mistake on the part of the insurer.<sup>19</sup>

#### THE RULE OF THE HAYES CASE

Despite the plausibility of the arguments advanced to deny the application of strict contract rules to the insurance policy, the Washington Court has clearly stated its view on this question in *Hayes v. Automobile Insurance Exchange*.<sup>20</sup> There, the insured applied for automobile insurance, and the agent of the insurer orally asked him

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<sup>15</sup>Northwestern Nat. Ins. Co. v. Chambers, 24 Ariz. 86, 206 Pac. 1081 (1922).

<sup>16</sup>Comment (1925), 35 YALE L. J. 203, 208.

<sup>17</sup>REM. REV. STAT. § 5836-15 (1); 1 WILLISTON, SALES (2d ed. 1924) §§ 227, 235.

<sup>18</sup>Pfiester v. Missouri State Life Ins. Co., 85 Kan. 97, 116 Pac. 245 (1911), where the court said: "It is not carelessness or imprudence in fact, as people in general understand those terms, for the applicant to take it for granted that the agent will accurately and truthfully set down the result of the negotiations. If he fail to do so, good sense and common justice regard the company as responsible, and not the insured. The subject, therefore, is *sui generis*, and the rules of a legal system devised to govern the formation of ordinary contracts between man and man cannot be mechanically applied to it."

<sup>19</sup>VANCE, INSURANCE (2d ed. 1930) p. 215.

<sup>20</sup>126 Wash. 487, 218 Pac. 252 (1923), *aff'd on rehearing*, 129 Wash. 202, 224 Pac. 594 (1924).

several questions which he answered truthfully. The agent, however, unknown to the insured, then filled in the written application with certain false statements to the effect that: the automobile had not been in a wreck prior to the application; another company had not refused or cancelled insurance on the automobile; and there existed no unmentioned incumbrance on the automobile. The policy was issued on this application which also contained a warranty of the truth of the statements in the policy "on acceptance of this policy" by the insured. The policy further cautioned the insured to "read your policy", which the insured failed to do. The court found that the insured did not act in good faith and denied recovery in an action on the policy, reversing the trial court's findings, saying:

"Whether he read it or not is immaterial. It was his duty to read it, and the law says that he did read it. It showed statements which he knew were untrue and without which he could not have obtained the insurance. It becomes immaterial whether or not originally in the application the blanks were filled in by the appellant's agent without respondent's knowledge; in effect, they were the respondent's own statements when he received the policy containing the instruction 'Read your policy' and retained it."<sup>21</sup>

This ruling may be attacked on several grounds. In the first place the facts show that the policy was issued and delivered to a bank to secure an indebtedness on the automobile, and the insured actually never saw the policy or application after he had signed the latter in blank form. This alone would seem to cast sufficient doubt on the question of the knowledge of the insured such as to require a remand for new trial rather than a reversal of the finding of the trial court, since the question seems to be wholly one of fact for the jury and not one of law.

In the second place, this ruling bases an intent to deceive upon the mere constructive knowledge of the insured. It is to be remembered that in 1911, the legislature passed a statute which declared that a misrepresentation or false warranty will not avoid or defeat the policy unless made with the intent to deceive.<sup>22</sup> In the absence of proof of actual knowledge of the insured, it would seem highly undesirable to predicate an intent to deceive upon a mere failure to read the policy and the presumption of knowledge alone. It is submitted that the purpose of the legislature in passing this statute was aimed at the subjective intent of the insured and not an implied intent.<sup>23</sup>

Thirdly, although the court might possibly substantiate its position

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<sup>21</sup>Hayes v. Automobile Insurance Exchange, 126 Wash. 487, 488, 218 Pac. 252, 253 (1923).

<sup>22</sup>REM. REV. STAT. § 7078.

<sup>23</sup>For a full discussion see Bloch, *Intent to Deceive in Applications for Insurance Policies* (1935), 10 WASH. L. REV. 78.

on the ground of fraudulent concealment of material facts, this point was not considered. Furthermore, there is a line of Washington decisions which holds:

“that a policy will not be held void nor the warranty clause in a policy held to have been breached for acts known to the agent before the application for the policy was signed, where the insured fully and truthfully related the facts to the solicitor and false answers were written in the application by the agent.”<sup>24</sup>

In answer to this it may be argued that in the *Hayes* case the insured did not “fully relate the facts”, but the reply to this contention is that the insured did answer *all* the questions put to insured by the agent and answered “fully and truthfully”. The Washington court has not required more and in fact has expressly held that the failure of the insurer’s agent to inquire as to material facts will constitute a “waiver” thereof.<sup>25</sup> Therefore, under these holdings if the agent had knowledge of the falsity it will estop the insurer from setting up the alleged breach; or where the agent failed to inquire the insurer will not be allowed later to question the truth of a statement in the policy. On either holding it would seem that the *Hayes* case could well have reached the opposite conclusion. This is the position taken by the dissenting judges.<sup>26</sup>

Nevertheless, assuming that the facts in the *Hayes* case were such as to deny a waiver by or estoppel of the insurer, the rule in that case seems to be that the insured is chargeable with knowledge of the contents of the policy whether he has read it or not, since he has a duty to read it and is presumed to have done so. It is seen that this is the contract rule applied to the insurance contract. On what basis does the Washington court justify this application to the insurance cases? In the rehearing of the *Hayes* case,<sup>26</sup> the majority opinion depends largely on the decisions rendered by four other jurisdictions, which, in the last analysis, appear to give rather slender support to the Washington holding.

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<sup>24</sup>*Mesterm v. Home Mut. Ins. Co.*, 5 Wash. 524, 32 Pac. 458 (1893); *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213 (1894); *Foster v. Pioneer Mut. Ins. Assn.*, 37 Wash. 288, 79 Pac. 798 (1905); *Staats v. Pioneer Ins. Assn.*, 55 Wash. 51, 104 Pac. 185 (1909); *Bothell v. Nat. Casualty Co.*, 59 Wash. 209, 109 Pac. 590 (1910); *Turner v. American Casualty Co.*, 69 Wash. 154, 124 Pac. 486 (1912)—where insured told agent of insurer that he had an “atrophied leg” but agent wrote in application warranting “no bodily infirmity except a slight weakness in ankle”. Insured in all other respects also gave full and correct answers and afterwards signed the application. *Held*: For the insured.

<sup>25</sup>*Dooley v. Hanover Fire Ins. Co.*, 16 Wash. 155, 47 Pac. 507 (1896); *Pioneer Savings & Loan Co. v. Providence Wash. Ins. Co.*, 17 Wash. 175, 49 Pac. 231 (1897), 38 L. R. A. 397 (1898); *Neher v. Western Assur. Co.*, 40 Wash. 157, 82 Pac. 166 (1905); *Gregerson v. Phenix Fire Ins. Co.*, 99 Wash. 639, 170 Pac. 331 (1918).

<sup>26</sup>129 Wash. 202, 224 Pac. 594 (1924).

The first case is one from the United States Supreme Court, *Lumber Underwriters v. Rife*.<sup>27</sup> In rendering the decision, Mr. Justice Holmes used the following language which the Washington court incorporated in the *Hayes* case:

"No rational theory of contract law can be made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other part."<sup>28</sup>

These words were applied to a set of facts wherein it appeared that the insured had *actual* knowledge of the discrepancy between the truth and the warranty in the policy. Since the *Hayes* doctrine is based upon constructive knowledge, the actual knowledge in this case would seem to destroy its authority for the Washington holding.

The second case and the one on which the Washington court mainly relies is a Missouri decision, *Modern Woodmen of America v. Angle*,<sup>29</sup> in which the insurer instituted the action to cancel the policy before any loss had occurred. The court permitted cancellation, using language which the Washington court adopted verbatim,<sup>30</sup> as follows:

"Now it is well established in the law of insurance that, when the agent has written down untrue answers to such questions, even though it be done without the knowledge of the insured, and the insured is furnished a copy of the application containing such untrue answers annexed to the policy, he is afterwards estopped from denying knowledge thereof. The doctrine, of course, proceeds upon the theory that it is the duty of the insured to use reasonable diligence in discovering the contents of the contract, and it is said, upon discovering the same it becomes his duty to notify the company of such fraud perpetrated upon both himself and the insurer. At any rate, if he held the policy, referring in apt terms to the warranties contained in the application annexed, for a reasonable time, he is *conclusively presumed* to know the contents of the contract and the untruthful answers plainly written in the application, and is thereby estopped to assert that he had no knowledge on the subject."<sup>31</sup>

The distinction between the Missouri and Washington cases is that in the former no loss of the property covered by the policy had been suffered by the insured, while in the *Hayes* case the loss had been incurred. Hence, to follow the contract rule in the Missouri case would impose no real hardship on the insured except a mere loss of coverage by one particular insurer. This distinction seems to be of importance to the Missouri court for in the later cases<sup>32</sup> involving facts similar

<sup>27</sup>237 U. S. 605 (1915).

<sup>28</sup>*Id.* at 606.

<sup>29</sup>127 Mo. App. 94, 104 S. W. 297 (1907).

<sup>30</sup>In *Hayes v. Automobile Insurance Exchange*, 129 Wash. 202, 203, 224 Pac. 594, 595 (1924).

<sup>31</sup>127 Mo. App. 94, 104 S. W. 297, 303 (1907).

<sup>32</sup>*La Font v. Home Ins. Co.*, 193 Mo. App. 543, 182 S. W. 1029 (1916);

to those in the *Hayes* case, where the insured is suing to recover on the policy, the Missouri court has permitted recovery and refused to apply the rule of the *Angle* case.

The third case cited and quoted by the *Hayes* case, *Moore v. State Insurance Co.*,<sup>33</sup> an Iowa decision, ignores the issue raised in the *Hayes* case and involves the question of "assent" of the insured to the conditions of the policy without his signing. There was no evidence or allegation that the insured was unaware of the presence of this provision in the policy nor that insured failed to read his policy. Hence, on the facts and allegations, this case furnishes meager support, if any at all, for the Washington holding.

The fourth and final case on which the Washington court relies is the California case of *Fidelity & Casualty Co. v. Irrigation Co.*<sup>34</sup> It is submitted that this case is not in point, since it does not involve a claim by the insurer of a breach of warranty by the insured. Moreover, subsequent California cases involving the particular point of the *Hayes* case wherein the insured failed to read the policy, have held in favor of the insured.<sup>35</sup>

#### THE APPLICATION OF THE RULE OF THE HAYES CASE

Regardless of the questionable grounds for the rule of the *Hayes* case, it is apparent that the Washington court is not inclined to alter its position, and it accordingly becomes necessary to investigate the effect of that rule upon actions for reformation upon the policy. When the insured seeks reformation the effect of that rule would be, as under the strict contract rule, to presume that the insured knew the terms of his policy and to deny the relief of reformation. Thus, in the recent Washington case of *Carew, Shaw & Bernasconi v. General Casualty Co.*,<sup>36</sup> the agent of the insurer made an oral agreement to insure the insured's safe against burglary. Pending the issuance of the policy, the agent issued a temporary binder which covered the entire safe. When the policy was issued it covered only an inner chest thereof, and the insurer refused to pay when a burglary of the contents of the safe occurred and the inner chest was untouched. The insured sought a reformation of the policy which he did not read. In

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*Shockey v. Fidelity Ins. Co. of N. Y.* —Mo. App. —, 191 S. W. 1049 (1917); *Zeilman v. Central Mut. Ins. Assn.*, 224 Mo. App. 145, 22 S. W. (2d) 88 (1929)

<sup>33</sup>72 Iowa 414, 34 N. W. 183 (1887).

<sup>34</sup>161 Cal. 466, 119 Pac. 646 (1912).

<sup>35</sup>*Pacific Employers Ins. Co. v. Arenbrust*, 85 Cal. App. 263, 259 Pac. 121 (1927); *Ames v. Employers Casualty Co.*, 16 Cal. App. (2d) 255, 60 P. (2d) 347, 352 (1936), which declared in an action for reformation: "An insured has the right to rely on the presumption that the policy he receives is in accordance with his application, and his failure to read it will not relieve the insurer or its agent from the duty of so writing it."

<sup>36</sup>189 Wash. 329, 65 P. (2d) 689 (1937).

denying relief, the court said:

"Appellant (insured) is presumed and is required to know the provisions of the insurance contract, as it would any other written contract into which it enters. It will not do . . . to say that he did not read the policy. Whether he read the policy is immaterial. It was appellant's duty to read the policy and the law says that it was done. (Citing the *Hayes* case.)"<sup>37</sup>

This language is used to support a dictum of the court to the effect that even if there had been fraud or mutual mistake in this case, reformation would still be denied on the ground that the insured was negligent in not reading his policy.<sup>38</sup> Such a rule is decidedly a harsh one and not supported by the great weight of authority.<sup>39</sup> It is well to note the language of one Washington decision on this point which held that "mere failure of either party to a deed to read it" is *not* a bar to an action for reformation.<sup>40</sup> It seems that if the Washington court is willing to overlook the failure of a party to read his deed, that it would be justified in allowing reformation under similar circumstances in insurance cases. Moreover, it is said to be the uniform rule in insurance cases that the failure of the insured to read his policy is not considered to be such negligence or laches as to deprive him of the remedy of reformation.<sup>41</sup> In view of the above holdings, it would seem that the dictum of the Washington court in the *Carew* case is erroneous to the extent of denying reformation of a mutual mistake in an insurance policy where the insured failed to read his policy.<sup>42</sup>

Applied to waiver and estoppel, the effect of the *Hayes* doctrine is yet to be determined, since no case directly involving either has been before the court. Despite the failure of the court to make a distinction between the operation of a waiver and the operation of an estoppel

<sup>37</sup>*Id.* at 341, 65 P. (2d) at 694.

<sup>38</sup>*Carew, Shaw & Bernasconi v. General Casualty Co.*, 189 Wash. 329, 340, 65 P. (2d) 689, 694 (1937), the court said: "Even if we did not agree with the trial court that the policy truly reflects the quotation made to Shaw, the negligence of appellant would defeat its action for reformation."

<sup>39</sup>"It has certainly never been announced as the law in this state that the mere omission to read or know the contents of a written instrument should bar any relief by way of a reformation of the instrument on account of mistake or fraud." *Lewitt & Co. v. Jewelers' Safety Fund Soc.*, 249 N. Y. 217, 164 N. E. 29 (1928); see also *West v. Suda*, 69 Conn. 60, 38 Atl. 1015 (1897); *Boulton v. Wood*, 96 Md. 332, 53 Atl. 911 (1903); *Bradshaw v. Provident Trust Co.*, 81 Ore. 55, 158 Pac. 274 (1916).

<sup>40</sup>*Rosenbaum v. Evans*, 63 Wash. 506, 115 Pac. 1054 (1911).

<sup>41</sup>VANCE, *INSURANCE* (2d ed. 1930) p. 218: "Assuming that the circumstances are such as to entitle the insured to reformation, it seems to be uniformly held that the insured may, by parol evidence, show what actually occurred in the making of the contract, and that he may introduce evidence to the effect that he has not read the policy in support of his allegation that it had been accepted under mistaken apprehension as to its terms."

<sup>42</sup>However, the court probably reached the correct result since it was unwilling to find a mutual mistake proved by clear, cogent and convincing evidence.

in the insurance cases,<sup>43</sup> it is clear that before there can be any waiver by the insurer's agent, he must have either actual or apparent authority to waive.<sup>44</sup> In order to protect itself from a waiver made by any agent, the insurer generally inserts a *non-waiver* clause in the application which usually states that only certain officials at the home-office may waive or alter the terms of the policy or that no waiver or alteration will be valid unless added in writing to the policy with the approval of the home-office.<sup>45</sup> It is generally held in conformance with the rule in the *Hayes* case, that such a clause in the application must be considered as communicated to the insured whether actually known to him or not.<sup>46</sup> Hence, in the case of a claim of waiver it is quite possible to have the *Hayes* doctrine prevent the assured from asserting a waiver on the ground that he had presumed knowledge of the agent's lack of authority. But it is held that if, in fact, the agent does have the power to waive, the non-waiver clause will not bind the insured whether he read it or not.<sup>47</sup> There are also other situations beyond the scope of this paper, where the non-waiver clause is ineffective.<sup>48</sup> Out-

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"One Washington decision appears to give the proper definition in saying: "A waiver is the voluntary relinquishment of a known right and may be either express or implied. It is effected by any words that express or acts that imply an intention to give up the power to rescind the contract or the privilege of asserting a known defense to an action brought thereon. An estoppel is a preclusion by act or conduct from asserting a right which might otherwise have existed, to the detriment and prejudice of another who in reliance on such act or conduct, has acted upon it."—per Steinert, J., in *Reynolds v. Travelers Ins. Co.*, 176 Wash. 36, 45, 28 P. (2d) 310, 314 (1934).

It has been said that a true waiver is a consensual arrangement between insurer and insured in the nature of a contract, while an estoppel is founded in tort rather than on contract. *VANCE, INSURANCE* (2d ed. 1930) pp. 469, 519. Hence the application of the parol evidence rule to a waiver will exclude all waivers made prior to or contemporaneous with the insurance contract. *Union Mutual Ins. Co. v. Mowry*, 96 U. S. 544 (1877); *Colmenson v. Ins. Co.*, 92 Minn. 390, 100 N. W. 88 (1904); *PATTERSON, ESSENTIALS OF INSURANCE LAW* (1935) p. 450. But in attempting to raise an estoppel, however, the insured does not contradict the terms of the policy and it is said that "the so-called parol testimony rule has no application to estoppel, which is a remedial process of equitable origin, grounded upon inequitable conduct and collateral to the contract." *VANCE, supra*, at 528. The leading case on the subject of estoppel is *Union Mut. Life Ins. Co. v. Wilkinson*, 13 Wall. 222 (U. S. 1871). Hence the distinction appears to be vital where the parol evidence rule is concerned. Necessity for further distinction between the operation of waiver and estoppel will appear *infra*.

<sup>43</sup>*PATTERSON, ESSENTIALS OF INSURANCE LAW* (1935) p. 415.

<sup>44</sup>*McElroy v. Met. Life Ins. Co.*, 84 Neb. 866, 122 N. W. 27 (1909); *Black v. Atlantic Home Ins. Co.*, 148 N. C. 169, 61 S. E. 672 (1908).

<sup>45</sup>*N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519 (1886); *Gould v. Ins. Co.*, 90 Mich. 302, 51 N. W. 455 (1892).

<sup>46</sup>See discussion on this point in *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234 (1877).

<sup>47</sup>Generally the clause is not broad enough to prevent knowledge acquired by the agent from being imputed to the company. Also the non-waiver clause will not apply to the post-casual conditions. See *PATTERSON, op. cit. supra*, note 44, at 463.

side of the question of the limited authority of the agent, the rule in the *Hayes* case has little bearing in cases of waiver, for ordinarily both parties have actual knowledge of the right waived.<sup>49</sup>

But this will not follow in a claim of estoppel by the insured, since in estoppel the limitations upon the agent's power to bind the insurer have no necessary application. It is said that in the estoppel situation the agent is not making agreements for his principal, but is serving him ministerially, doing acts which the principal has undertaken to perform, so that if the acts of the agent alleged to create an estoppel were done in the course of his employment in the conduct of his principal's business, the principal is legally bound by them even though they were expressly forbidden.<sup>50</sup> Hence, if the agent is authorized to talk or act for the insurer in *any* capacity, he may estop the insurer. Thus, while there may not be a waiver asserted in certain situations where the application contains a non-waiver clause, there still may be an estoppel, since even actual knowledge by insured of the limited authority of the agent should not prevent the insured from raising an estoppel.<sup>51</sup>

The *Hayes* rule is important in the estoppel situation because an essential requirement in the assertion of estoppel is the justifiable reliance of the insured. If he has actual knowledge that the representation made by the insurer, or his agent, is untrue, he will be precluded from relying thereon and hence cannot raise an estoppel against the insured.<sup>52</sup> The cases, however, require an actual knowledge and it is said generally that constructive or imputed knowledge is not sufficient,<sup>53</sup> the mere fact that the insured has the means of learning the truth for himself does not deprive him of the privilege of relying upon the insurer's representation.<sup>54</sup> This rule brings one face to face with the doctrine invoked by the *Hayes* case that the insured is presumed to know the contents of his policy. Will such presumed knowledge preclude the insured from setting up an estoppel of the insurer?

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<sup>49</sup>BOWERS, LAW OF WAIVER (1914) pp. 256-341.

<sup>50</sup>*Southern States Ins. Co. v. Vann*, 69 Fla. 549, 68 So. 647 (1915), L. R. A. 1916B 1189; *Phenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. 990 (1894); *Wood v. Amer. Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80 (1896). See also VANCE, *op. cit. supra*, note 44, at 534.

<sup>51</sup>This is true since the insurer may be estopped by his agent who is simply acting within the course of his employment regardless of the fact that his authority to do certain specific acts is limited. See note 50, *supra*.

<sup>52</sup>*Mutual Life Ins. Co. v. Hilton Green*, 241 U. S. 613 (1916); *Mudge v. Sup. Ct. I. O. F.*, 149 Mich. 467, 112 N. W. 1130, 14 L. R. A. (N. S.) 279 (1907); *Haapa v. Met. Life Ins. Co.*, 150 Mich. 467, 114 N. W. 380 (1907); *Bratley v. B. O. A. Y.*, 159 Minn. 14, 198 N. W. 128 (1924).

<sup>53</sup>*Back v. Peoples Nat. Fire Ins. Co.*, 97 Conn. 336, 116 Atl. 603 (1922); *Roe v. Nat. Life Ins. Assn.*, 137 Iowa 696, 115 N. W. 500, 17 L. R. A. (N. S.) 1144 (1908); *Pfiester v. Missouri State Life Ins. Co.*, 85 Kan. 97, 116 Pac. 245 (1911); *Arneberg v. Cont. Gas. Co.*, 178 Wis. 428, 190 N. W. 97, 29 A. L. R. 93 (1922).

<sup>54</sup>VANCE, *op. cit. supra*, note 44, at 525.

In view of the general rule that there must be actual knowledge, it is submitted that the *Hayes* rule should not go this far. Although there are no Washington cases directly raising this issue, there are decisions rendered by the Washington court which may shed some light on the question. In the case of *Turner v. American Casualty Co.*<sup>55</sup> the applicant for accident insurance told the agent that he had an "atrophied leg", the agent, however, wrote in the application that he had "no bodily infirmity". All the answers given by the insured were truthful and complete. The court permitted recovery by the insured on this policy on the ground that a policy will not be held void for a cause known to the agent before the application was signed, citing many Washington cases and concluding:

"The underlying principle of these cases is that the knowledge of the agent is the knowledge of the principal, without regard to whether the agent communicates the facts to it; that where the insured makes full and truthful statements to the agent who procures the policy of insurance, the insurer will be held to have 'waived' the written warranties in so far as they are not in harmony with the facts disclosed. . ."<sup>56</sup>

Whether the insurer "waived" the written warranties or was estopped to assert them seems of no concern to the court here, but the result was an equitable estoppel and not a true waiver. The court ignored the possibility that the insured might have had implied knowledge of the breach in the application and, in the absence of actual knowledge, seemed perfectly willing to estop the insurer from setting up a defense of fraudulent concealment or a breach of warranty. In a later decision,<sup>57</sup> the court clarified its position, somewhat, in a case involving substantially similar facts, saying:

"the respondent (insured) and his agents were wholly without knowledge of what the application contained on the subject, were entirely without responsibility for the misrepresentation . . ."<sup>58</sup>

The facts in this case were similar in one particular to those in the

<sup>55</sup>69 Wash. 154, 124 Pac. 486 (1912).

<sup>56</sup>*Id.* at 160, 124 Pac. at 489. The Washington court has often held that the knowledge of the agent is the knowledge of the company under these circumstances and has denied the insurer the use of these false statements as a defense on the basis of estoppel. See *Mesterman v. Home Mutual Ins. Co.*, 5 Wash. 524, 32 Pac. 458 (1893); *Foster v. Pioneer Mut. Ins. Assn.*, 37 Wash. 288, 79 Pac. 798 (1905); *Staats v. Pioneer Ins. Assn.*, 55 Wash. 51, 104 Pac. 185 (1909); *Brigham v. Mutual Life Ins. Co.*, 95 Wash. 196, 163 Pac. 380 (1917); *Workman v. Royal Exchange Assur.*, 96 Wash. 559, 165 Pac. 488 (1917); *Robbins v. Milwaukee Mech. Ins. Co.*, 102 Wash. 539, 173 Pac. 634 (1918); *Stebbins v. Westchester Fire Ins. Co.*, 115 Wash. 623, 197 Pac. 913 (1921); *Eaton v. Nat. Cas. Co.*, 122 Wash. 477, 210 Pac. 779 (1922); *Small v. Standard Acc. Ins. Co.*, 144 Wash. 523, 258 Pac. 33 (1927); *Tison v. American Nat. Ins. Co.*, 163 Wash. 522, 1 P. (2d) 859, 3 P. (2d) 998 (1931).

<sup>57</sup>*Small v. Standard Acc. Ins. Co.*, 144 Wash. 523, 258 Pac. 33 (1927).

<sup>58</sup>*Id.* at 526, 258 Pac. at 34.

*Hayes* case in that the insured never had actual possession of the policy, yet in this case the court indulged in no presumption of knowledge of the contents of the policy and application attached and permitted the insured to raise an estoppel.

There is, furthermore, a line of Washington cases which holds that where the insurer's agent fails to inquire as to some material fact and writes in a false answer in respect thereto, the insurer will thereafter be estopped from asserting a breach of warranty by the insured.<sup>59</sup> In these cases the court, in each instance, permitted the operation of an estoppel even though the insured had failed to read his policy and application attached, whereby he would have discovered the untruthful statements. In one of these cases so holding the issue of the *Hayes* case was brought squarely before the court by the dissenting judge, contending:

"It was his legal duty to read his policy, to know what it contained. If a party may escape the obligation of one kind of a written contract to which he is a party by saying he never read it and didn't know its contents, why may he not likewise escape the binding force of any written contract?"<sup>60</sup>

Unfortunately, whatever clarification that may be derived from the language of the court in these cases, the question has been put in utter confusion by a recent holding of the Washington court in the case of *Perry v. Continental Insurance Company*.<sup>61</sup> There, the insured recovered a verdict of the jury and judgment in the lower court on evidence that although in applying for fire insurance on her dwelling house in Anacortes she told the agent that she never had had a fire in Anacortes, but had suffered one in a dwelling house in Grays Harbor,

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<sup>59</sup>*Gregerson v. Phenix Fire Ins. Co.*, 99 Wash. 639, 170 Pac. 331 (1918), where the agent failed to inquire at all as to the state of the title of property to be insured against fire. The policy, however, contained a clause avoiding the coverage if the insured did not have fee simple title. Insured's house was on leased ground. Insured did not make any misrepresentation or intentionally conceal the state of title; he failed to read the policy and yet was allowed to recover on the ground that the insurer was required to ask about the title or be estopped from asserting the clause. This ruling goes far, it seems, since it is difficult to find the requisite knowledge in the insurer for the basis of the estoppel.

*Neher v. Western Assurance Co.*, 40 Wash. 157, 82 Pac. 166 (1905), wherein the insured's title was covered by a mortgage and again the policy contained an avoidance clause. The insurer's agent failed to inquire and the insured made no misrepresentation. *Held*: For insured since insurer was estopped.

*Foster v. Pioneer Mutual Ins. Assn.*, 37 Wash. 288, 79 Pac. 798 (1905), where the insured stated the exact truth to the agent who inserted false answers in the application, which the insured signed on the agent's assurance that it was correct. The insured did not read the policy, yet the court raised an estoppel against the insurer even though the insured would have discovered the false answer if he had read the policy.

<sup>60</sup>*Neher v. Western Assurance Co.*, 40 Wash. 157, 159, 82 Pac. 166, 167 (1905).

<sup>61</sup>178 Wash. 24, 33 P. (2d) 661 (1934).

nevertheless the agent wrote in the application that insured had had no prior fire loss. She signed the application, failed to read it, and on a subsequent loss by fire sued on the policy. The supreme court reversed the lower court's finding and dismissed the action, citing the *Hayes* case, saying:

"It is the general rule and the same is applicable to the case at bar, that a party to a contract or representation to which he has affixed his signature will not be permitted to urge that he did not read it and that he was ignorant of its contents, and supposed them to conform to what he had agreed with or represented to the adverse party or her agent."<sup>82</sup>

It seems, after the long line of Washington decisions stating that the knowledge of the agent is that of the insurer,<sup>83</sup> that this holding of the court, reversing as a matter of law the finding of the jury, is an unwarranted extension of the *Hayes* rule. While the court did not specifically mention an estoppel of the insurer, in substance it denies the raising of such an estoppel solely on the implied and constructive knowledge of the insured. The court found that the insured made the "misrepresentation" with intent to deceive in the face of the fact that insured had told the agent the true nature of the facts, which seems a remarkable result in view of previous holdings. Such a holding seems to give preference to the constructive knowledge derived from the presumption that the insured read his policy, over the fact that actually there was no knowledge in the mind of the insured at all!

It is submitted that this view is contrary to the purpose and spirit of estoppel which is founded purely on equitable principles of fairness. While it would be unconscionable for the insured to "rely" on a known false statement, such reliance is not unconscionable unless there is actual knowledge of the falsity. Unconscionable conduct depends upon the state of mind of the actor, and it cannot be said that imputed knowledge will create that necessary state of mind. This doctrine of imputed knowledge is a fiction at best and when applied to estoppel often substitutes the fiction for truth in that a person is frequently conclusively presumed to know what in fact he actually did not know.

What the future holds for the *Hayes* rule is a matter of conjecture. In view of the recent decisions the court seems well on the way to confusion. Although the court has not expressly declared a denial of former rulings, in substance and result this is what it has done. But in the absence of an express commitment, it seems that there is yet time for the Washington court to retrace its recent steps and enunciate a rule that will fall in line with the uniform and the more sensible

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<sup>82</sup>*Id.* at 28, 33 P. (2d) at 662.

<sup>83</sup>See note 56, *supra*.

rule. Perhaps it is not so much the rule itself as the application of it, that should be remedied. The Contract Rule should be properly applied to the insurance contract as in any contract. However, this application must be cautiously made in at least four instances. Firstly, in view of the Washington statute avoiding a policy when based on a representation or warranty made with an intent to deceive, the presumption that the insured knows the contents of his contract should not alone form the basis for this inference of intent. Only actual knowledge should be the criterion. Secondly, in the reformation cases, failure to read the policy should not constitute such negligence as to deny reformation. Reformation should be denied in these cases only when the insured's failure to read has resulted in injury to insurer or prejudiced the insurer in some way that would make the relief inequitable. Thirdly, the *Hayes* rule will not or should not have any substantial bearing in the cases of waiver. Finally, in the cases of estoppel, there is the same problem of implied knowledge as raised in the intent to deceive situation. Here the *Hayes* rule clearly should not be applied to deny an estoppel, since, as pointed out, the result is to deny equity rather than do equity. It is submitted that if the contract rule applied to the insurance cases were subjected to these limitations, it would have a salutary effect on this field of insurance law in Washington.