

THE STANDARD OF MATERIALITY FOR MISREPRESENTATIONS UNDER NEW YORK INSURANCE LAW – A STATE OF UNWARRANTED CONFUSION

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Under New York law, an insurer generally is entitled to rescind an insurance policy if an insured makes a material misrepresentation in the insured's application for insurance. But determining whether or not a misrepresentation is "material" can depend on a variety of questions. This article focuses on materiality from the perspective of the insurer, and how courts, arbitrators and juries are required under New York law to determine if a misrepresentation is material to an insurer in any particular case. In short, in whose eyes does the misrepresentation have to be material? Is the test one of *subjective* materiality — that the *particular* insurer at issue would not have issued the same policy under the same terms had it known the truth, regardless of what any other insurer might have done? Or is the test an *objective* one focused on what a "reasonable insurer" would have done in a similar situation?¹

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¹ As discussed in some of the case law cited in this note, other considerations sometimes analyzed in deciding whether a material misrepresentation has been made—none of which are addressed in this article—might include whether a question on an insurance application called for subjective knowledge of an insured or an objective fact; whether a misrepresentation was innocently or knowingly

In 1937, the New York Court of Appeals directly answered that question in *Geer v. Union Mut. Life Ins. Co.*, making clear that a misrepresentation “is material where it appears that a reasonable insurer would be induced by the misrepresentation to take action which he might not have taken if the truth had been disclosed.”² Thus, New York’s highest court has determined that the test is an *objective one*, not dependent on what the particular insurer at issue would have done.

The subjective-objective distinction has significant ramifications on issues of proof in litigation (including in confidential arbitrations, where the question often arises), and very often has the potential to be case determinative. Under a subjective standard, the insurer claiming there is a material misrepresentation must prove through witness testimony (such as the testimony of its claims representative or underwriter who handled the specific policy at issue), specific language in its own claims manuals, or other similar evidence, that *it* would not have issued the policy on the same terms but for the misrepresentation, regardless of industry practice or what any other insurer would have done. By contrast, under an objective standard, the test of materiality is whether a “reasonable insurer” would have offered the same insurance on the same terms if there had been no misrepresentation. Evidence regarding the particular insurer’s practices (or vagaries) may be one piece of proof in determining the “reasonable insurer” standard, but a “reasonable insurer” test also can be satisfied without any evidence at all of the individual insurer’s practices.

Issues such as these become particularly significant if there are missing witnesses or evidence about the particular insurer’s practices, including evidence lapses that routinely arise with the passage of time. If the underwriter who negotiated the specific policy is no longer with the company, is deceased, or cannot be located, or if claims manuals from years (or often decades) earlier cannot be located, an insurer will have a very difficult time proving what *it* would have done in a specific situation, with respect to a specific policy, if it had known a particular piece of information. Similarly, given that claims often arise years after a policy is written, written communications between the insured and the insurer/underwriter—whether electronic or in hard copy—may no longer exist, once again defeating any chance that an insurer can prevail if a subjective test is applied. By contrast, where evidence of industry practice

made; or whether there is a causal connection between the misrepresentation and later events, among other issues.

² *Geer v. Union Mut. Life Ins. Co.*, 7 N.E.2d 125, 130 (1937).

can be introduced through the testimony of experts who have years of experience in the industry at issue, these issues of proof can be overcome.

With such significance riding on this issue, it is not surprising that the New York Court of Appeals—over 65 years ago—took pains through its decision in *Geer* to make clear that under New York law, an objective, “reasonable insurer” test is to be applied when determining if a misrepresentation is material to an insurer in any particular case. Since then, however, beginning with the subsequent 1939 enactment of New York Insurance Law Section 149 (now codified as New York Insurance Law Section 3105),³ the issue has devolved into a murky quagmire, with disputed interpretations of legislative intent and inconsistent and usually unreasoned pronouncements by lower courts, even though the Court of Appeals has never veered from its “reasonable person” standard and New York’s legislature has never clearly abrogated it. This article explores the wayward history resulting in the current confusion among New York’s lower courts. Despite this wayward history, however, given the clear and unwavering direction from the New York Court of Appeals, which has not been abrogated by any subsequent legislation, courts are obligated to use an objective standard when applying New York law to determine if a misrepresentation is material to an insurer in any particular case.

I. THE COURT OF APPEALS SETS THE STANDARD FOR MATERIALITY IN THE *GEER* CASE

In 1937, the New York Court of Appeals directly addressed the question of what standard governs the question of whether a misrepresentation in an application for insurance is material to an insurer in any particular case. In *Geer*, the plaintiff sought recovery under a life insurance policy after her husband died of carbon monoxide poisoning. The insurer denied coverage on the grounds that the decedent had failed to disclose certain material information in his application for insurance. The application had required the decedent to state whether he had had any treatment at any hospital within the past five years and to list all physicians

³ N.Y. INS. LAW § 3105 (McKinney 1984). In 1984, Insurance Law § 149 was re-enacted as Insurance Law § 3105 but its provisions remained unchanged. For purposes of simplicity, and because many of the cases cited in this article were issued prior to 1984 and thus refer to § 149 rather than § 3105, this article will refer to the statute as § 149. A fuller discussion of the specific provisions of Insurance Law § 149 (now Insurance Law § 3105) is set forth in Part IV below.

he had consulted over the past ten years.⁴ The decedent listed only one physician on his insurance application and failed to disclose that, four years earlier, he had visited another physician and was briefly hospitalized with flu symptoms, after which he was temporarily diagnosed with paratyphoid and ultimately with nervousness.⁵

The plaintiff-insured prevailed at trial, after the jury concluded that the misrepresentation was not material to the risk because the fact that the decedent visited a physician and was diagnosed with nervousness had no effect on the risk of dying of carbon monoxide poisoning.⁶ On appeal, the insurer took issue with the jury instruction on materiality, arguing that it is entirely reasonable for an insurer to inquire into the medical history of an insured and that the mere fact that such an inquiry was made on the application establishes its materiality.⁷ The Appellate Division affirmed, concluding that in light of the evidence, the trial court properly presented the question of materiality to the jury as a question of fact and that the jury's determination was not against the weight of the evidence.⁸ In its decision, the Appellate Division focused on the fact that decedent had been forthcoming with information and that the evidence did not reflect any intent "to suppress the truth or to conceal or evade facts."⁹

The Court of Appeals (New York's highest court) reversed, concluding that the failure to disclose the information was a material misrepresentation and, further, that the misrepresentation was material *as a matter of law*. The Court reasoned that:

[W]here an applicant for insurance has notice that before the insurance company will act upon the application, it demands that specified information shall be furnished for the purpose of enabling it to determine whether the risk should be accepted, any untrue representation, however innocent, which either by affirmation of an untruth or suppression of the truth, substantially thwarts the purpose for which the information is demanded and induces action

⁴ Geer, 7 N.E.2d at 126.

⁵ *Id.* at 126-27.

⁶ *Id.* at 127.

⁷ *Id.* at 131.

⁸ Geer v. Union Mut. Life Ins. Co., 288 N.Y.S. 359, 363 (N.Y. App. Div. 1936).

⁹ *Id.* at 360-62.

which the insurance company might otherwise not have taken, is material as a matter of law.¹⁰

Central to the Court's analysis was its determination that an insurer is free to choose the risks it will assume. As the Court explained:

[The] question in such case is not whether the insurance company might perhaps have decided to issue the policy even if it had been apprised of the truth, the question is whether failure to state the truth where there was duty to speak prevented the insurance company from exercising its choice of whether to accept or reject the application upon a disclosure of all the facts which might reasonably affect its choice.¹¹

Significantly, however, the Court did not limit its decision to the question of whether a misrepresentation was or could be material as a matter of law. Rather, the Court went on to address the central topic of this article: whether materiality of a misrepresentation to the insurer should be judged by an objective or subjective standard. The Court held that "misrepresentations cannot defeat or seriously affect the insurance company's right to reject the application where a disclosure of all the facts could not 'reasonably' affect the choice of the insurer."¹² The Court further explained that "a misrepresentation through concealment of fact in regard to a condition of health or physicians consulted . . . is material where it appears that a *reasonable insurer* would be induced by the

¹⁰ *Geer*, 7 N.E.2d. at 127.

¹¹ *Id.*

¹² *Id.* at 129. It was then and is now settled law in New York that "[r]easonable belief" is an objective standard." *Donovan v. Kaszyski & Sons Contractors, Inc.*, 599 F. Supp. 860, 871 (S.D.N.Y. 1984); *see also* *Agway v. Travelers Indem. Co.*, No. 93-CV-557, 1993 WL 771008, at *12 (N.D.N.Y. Dec. 6, 1993) (holding that policy notice provision formulated in terms of reasonableness gives rise to an objective standard); *Unigard Sec. Ins. Co. v. North River Ins. Co.*, 762 F. Supp. 566, 591 n.9 (S.D.N.Y. 1991), *rev'd in part on other grounds*, 4 F.3d 1049 (2d Cir. 1993) ("Although North River's expert stated that standard should be subjective, his description of the test, based on reasonableness, clearly indicated an objective one."); *People v. Perretta*, 228 A.D. 420, 423 (N.Y. App. Div. 1930) (noting that the use of an objective standard would require an examination of the actions of a reasonable man).

misrepresentation to take action which he might not have taken if the truth had been disclosed.”¹³

In reaching this holding, the Court of Appeals acknowledged that its test was formulated “somewhat different from that approved in *Penn Mut. Life Ins. Co v. Mechanics’ Sav. Bank & Trust Co.* and *Mutual Life Ins. Co. v. Ontario Metal Products Co.*” but that the test was nonetheless “essentially the same” as in those cases.¹⁴ In *Penn Mut. Life Ins. Co.*, the court discussed extensively the admission of evidence on the issue of materiality through “witnesses who had been long engaged in the . . . insurance business,”¹⁵ and a long line of cases handed down by English courts on this question. The *Penn Mutual* court cited numerous instances in which evidence was admitted through industry practitioners and experts with significant knowledge on general underwriting practices, and while various courts rejected the ability of an expert to opine on the ultimate issue of whether a misrepresentation was “material”—a question the courts most frequently determined had to be decided by the jury—few if any of the courts questioned the propriety of admitting evidence of industry practice through these experts.¹⁶ Thus, the *Penn Mutual* court determined as follows:

A fair test of the materiality of a fact is found, therefore, in the answer to the question whether reasonably careful and intelligent men would have regarded the fact, communicated at the time of effecting the insurance, as substantially increasing the chances of the loss insured against. The best evidence of this is to be found in the usage and practice of insurance companies in regard to raising the rates or in rejecting the risk on becoming aware of the fact. If the rates are not raised in such a case, it may be inferred that reasonably careful men do not regard the

¹³ *Geer*, 7 N.E.2d at 130 (emphasis added).

¹⁴ *Id.* (citing *Penn Mut. Life Ins. Co. v. Mechanics’ Sav. Bank & Trust Co.*, 72 F. 413, 423 (6th Cir. 1896), and *Mutual Life Ins. Co. v. Ontario Metal Prod. Co.*, [1925] A.C. 344 (P.C.) 351-52 (appeal taken from Can.)) (internal citations omitted).

¹⁵ *Penn Mut.*, 72 F. at 423.

¹⁶ *See id.* at 427-31. The *Penn Mutual* court also considered whether the rule should be different among fire, health, life, or other types of insurance, ultimately concluding that there was no reason for the rule to differ among these types of insurance. *See id.* at 430.

fact as material. If the rates are raised, or the risk is rejected, then they do.¹⁷

And in *Ontario Metal*, the Privy Council, substantially concurring with the lower court on most issues, stated the rule as whether “had the facts concealed been disclosed, they would not have influenced a reasonable insurer so as to induce him to refuse the risk or alter the premium.”¹⁸

Both the *Penn Mutual* and *Ontario Metal* courts applied an objective, “reasonable insurer” test, which the *Geer* court then explicitly endorsed in determining that an objective test governs under New York law.

II. THE COURT OF APPEALS REAFFIRMS GEER IN SUBSEQUENT YEARS

In the years following *Geer*, the New York Court of Appeals passed over numerous opportunities to revisit, amend, or overturn *Geer*’s objective standard. Just two years after the decision in *Geer*, the New York state legislature re-codified the insurance law. Section 149 of the re-codified insurance law, (which amended and replaced the former New York Insurance Law Section 58 (1906)), included new provisions governing materiality for misrepresentations in insurance contracts,¹⁹ and some have suggested that these new provisions abrogated the holding in *Geer* and provide that whether a misrepresentation is material to an insurer must be determined using a subjective standard. These new insurance law provisions and the cases that arose under them potentially set the stage for a re-evaluation of the objective standard. Yet the New York Court of Appeals never regarded the re-codification as a mandate to depart from the objective standard. In each of the cases it considered following the passage of Insurance Law Section 149, the Court of Appeals continued to cite *Geer*

¹⁷ *Id.* at 429. In reaching this holding, while the court stated that “[m]ateriality of fact, in insurance law, is subjective,” this was because “it concerns rather the impression which the fact claimed to be material would reasonably and naturally convey to the insurer’s mind before the event, and at the time the insurance is effected, than the subsequent actual causal connection between the fact, or the probable cause it evidences, and the event.” *Id.* at 428. In other words, “subjectivity” as used in this context, meant what could or might have happened if events had happened differently, rather than something that could be objectively determined after the fact.

¹⁸ *Mutual Life Ins. Co.*, [1925] A.C. 344 (P.C.) at 351-52.

¹⁹ N.Y. INS. LAW § 149(3) (McKinney 1939).

as good law. To this day, the Court of Appeals has not departed from the objective standard for the materiality of misrepresentations it established in *Geer*.

Since the enactment of Section 149, the Court of Appeals has engaged in a decades-long discussion on the merits of finding materiality *as a matter of law*, without ever changing its position that an *objective*, or “reasonable insurer” test, should be applied in determining whether a misrepresentation is material to an insurer. In *Glickman v. New York Life Ins. Co.*, 50 N.E.2d 538 (N.Y. 1943), decided just four years after the enactment of Insurance Law Section 149, neither the majority nor the dissent even suggested that Section 149 had the effect of replacing the objective standard endorsed by *Geer* with a new subjective standard. The opinions instead focused on whether the omission of a condition unrelated to the insured’s death ought to be found material as a matter of law. The majority affirmed an appellate division reversal of the trial court’s decision in favor of the plaintiff-insured, reasoning that any non-trivial ailment that goes undisclosed should be found material as a matter of law.²⁰ Although the dissent referenced Section 149 as intended “to overcome the legal affect” of *Geer*, it did so only with specific reference to whether materiality should be determined as a matter of law or a question of fact, making clear that this, and not any change to the objective standard test set out in *Geer*, was the purpose of amending Section 149:

The purpose of the Legislature [in passing Insurance Law § 149] is not open to debate Whether a false representation or suppression of a fact for which information is requested by the insurer as a condition antecedent to the completion of a contract of insurance tends to diminish or increase the risk of loss and is material to the risk or whether a breach of warranty, if one such exists, materially increases the risk of loss are no longer questions for the court but *are now questions of fact* which must be determined as such²¹

Equitable Life Assur. Soc. v. Milman, 50 N.E.2d 553 (N.Y. 1943), a case decided the same day as *Glickman*, reversed a lower court decision approving the rescission of a life insurance policy where the insured did not disclose that he had consulted physicians for minor health issues. The

²⁰ *Glickman*, 50 N.E.2d at 540.

²¹ *Id.* at 541 (emphasis added).

Court ruled that a “reasonable construction of the scope of the disclosure required” does not include minor ills that “do not impair [the insured’s] general health.”²² The Court then explicitly reaffirmed the central holding in *Geer*: that the relevant inquiry for materiality is whether the undisclosed facts were ones which “might *reasonably* affect the choice of the insurance company as to whether to accept or reject the application.”²³

Thirty years later, in *Vander Veer v. Continental Casualty Co.*, the Court narrowly ruled to reverse a jury verdict in favor of the insured based on a determination by the jury that there had been no material misrepresentation.²⁴ The questions presented to the *Vander Veer* Court centered on (1) whether the plaintiff misrepresented his health as a matter of law and (2) whether the misrepresentation was material as a matter of law.²⁵ The Court of Appeals found that each question should have been decided as a matter of law, rather than be submitted to the jury.²⁶ In reaching its holding, the Court cited with approval to *Geer* for the proposition that a failure to disclose is equivalent to a false affirmative statement.²⁷ The court did not comment or veer in any way, however, from its holding in *Geer* that whether a misrepresentation is material to an insurer must be determined by an objective or “reasonable insurer” standard.²⁸

The Court took similar action two years later in *Leamy v. Berkshire Life Ins. Co.* where once again it ruled narrowly on the facts in determining that the insured had made two material misstatements by failing to disclose persistent fainting and dizziness, as well as a recent trip to the hospital.²⁹ The *Leamy* Court cited *Geer* for the proposition that the question of whether there has been a material misrepresentation may sometimes be answered by the trier of fact.³⁰ The *Leamy* court never commented, however, on the endorsement of an objective standard in *Geer*, and the *Leamy* ruling focused exclusively on the holding that the insured’s misrepresentations were material as a matter of law.³¹

²² Equitable Life Assur. Soc. v. Milman, 50 N.E.2d 553 (N.Y. 1943).

²³ *Id.* at 554 (emphasis added).

²⁴ *Vander Veer v. Cont’l Cas. Co.*, 312 N.E.2d 156, 157 (N.Y. 1974).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See id.*

²⁹ *Leamy v. Berkshire Life Ins. Co.*, 347 N.E.2d 889, 890 (N.Y. 1976).

³⁰ *Id.*

³¹ Through its decisions in *Vander Veer* and *Leamy*, the Court of Appeals clarified that although the materiality of a misrepresentation is typically treated as

In *L. Smirlock Realty Corp. v. Title Guarantee Co.* the New York Court of Appeals again reaffirmed *Geer* without directly reaching the issue of the standard of materiality, citing to *Geer* with approval in support of the majority's finding that it was "manifest" that certain information "would have affected defendant's choice of insuring the risk covered by the policy issued to plaintiff."³²

Although the Court of Appeals, since *Geer* and since the enactment of Section 149, has not provided further detailed analysis regarding whether materiality should be judged from an objective or subjective standard, it never has disavowed the objective standard it so clearly articulated and established in *Geer*. The Court instead has embarked on a lengthy debate about whether materiality can be decided as a matter of law, and repeatedly has cited *Geer* as good law.

III. THE *GEER* DISSENT SETS THE STAGE FOR UNCERTAINTY

The *Geer* court was not unanimous, with Judge Edward Ridley Finch writing a vigorous dissent. Judge Finch voiced concern that the majority's test for determining materiality improperly treated nearly all

a matter of fact for the jury's consideration under Section 149, materiality can be a matter of law under certain circumstances. Without any further insight from the Court of Appeals, the Appellate Division has construed these cases as allowing the court to decide materiality as a matter of law "where the evidence concerning materiality is clear and substantially uncontradicted." *Kroski v. Long Island Sav. Bank*, 689 N.Y.S.2d 92, 93 (N.Y. App. Div. 1999); *see also Aguilar v. U.S. Life Ins. Co.*, 556 N.Y.S.2d 584, 585 (N.Y. App. Div. 1990). The Appellate Division recently has treated this as a subjective inquiry, finding materiality to be clear and substantially uncontradicted when the insurer presents "documentation concerning its underwriting practices, such as underwriting manuals, bulletins or rules pertaining to similar risks, to establish that it would not have issued the same policy if the correct information had been disclosed in the application." *Precision Auto Accessories, Inc. v. Utica First Ins. Co.*, 859 N.Y.S.2d 799 (N.Y. App. Div. 2008); *see also Shirmer v. Penkert*, 840 N.Y.S.2d 796, 799 (N.Y. App. Div. 2007); *Curanovic v. N.Y. Cent. Mut. Fire Ins. Co.*, 762 N.Y.S.2d 148, 151 (N.Y. App. Div. 2003). Thus, while a subjective standard may be applied in determining materiality for purposes of summary judgment — *i.e.*, that there is uncontroverted evidence that the particular insurer at issue would not have issued the particular policy at issue under the same terms and conditions — a court or jury still is obligated to apply an objective standard if the case proceeds past summary judgment.

³² *L. Smirlock Realty Corp. v. Title Guarantee Co.*, 418 N.E.2d 650, 653 (N.Y. 1981).

misrepresentations, even those innocently made, as material.³³ The dissent flatly rejected the insurer's contention that all misrepresentations or omissions concerning health and consultations with physicians were material as a matter of law.³⁴ According to Judge Finch, such a test unfairly prevented recovery by the insured and vitiated Section 58 of the New York Insurance Law (the precursor to Section 149), which had been enacted to protect insureds by providing that statements in an insurance policy are, in the absence of fraud, representations and not warranties.³⁵ Thus, Judge Finch viewed the majority's holding that a material misrepresentation could be proven as a matter of law simply by demonstrating that the insurer had asked for the information violated Section 58 and unfairly and unjustifiably give too much power to insurers to determine materiality.

Notably, however, Judge Finch did not take issue with the majority's use of an objective, "reasonable insurer" standard for deciding materiality of a misrepresentation. In fact, in his dissent, Judge Finch cited with approval language from the same Sixth Circuit decision cited by the *Geer* majority which held that "[a] fair test of the materiality of a fact is found . . . in answer to the question whether reasonably careful and intelligent men would have regarded the fact, communicated at the time of effecting the insurance, as substantially increasing the chances of the loss insured against."³⁶ The dissent also cited with approval the Privy Council's *Ontario Metal Products* decision referenced by the majority which set forth a "reasonable insurer" standard as the proper test for materiality.³⁷ A close look at the opinions in *Geer* thus reveals that the conflict between the

³³ *Geer v. Union Mut. Life Ins. Co.*, 7 N.E.2d 125, 132 (N.Y. 1937).

³⁴ In so doing, the dissent distinguished cases relied upon by the defendant-insurer on the grounds that they involved instances in which the insured or beneficiary refused to waive the doctor-patient privilege, reasoning that "[o]bviously the courts could not permit the insured or the beneficiary to argue that the omission or misrepresentation was not material while he prevented the insurance company from showing its materiality." *Id.* at 134.

³⁵ *Id.* at 126.

³⁶ *Id.* at 132 (citing *Penn Mut. Life Ins. Co. v. Mechanics Sav. Bank & Trust Co.*, 72 F. 413, 429 (6th Cir. 1896)).

³⁷ *Id.* at 133 (citing *Ontario Metal Products Co. v. Mutual Life Ins. Co.* [1925] A.C. 344 (P.C.) [351–52] (appeal taken from S.C.C.) ("[I]t is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a *reasonable insurer* to decline the risk or to have stipulated for a higher premium.") (emphasis added)).

majority and dissent was limited to the extent to which materiality could be considered a matter of law. By contrast, with respect to the question addressed in this article—what standard should be applied in determining whether a particular misrepresentation was material to an insurer in any particular case—both the majority and the dissent agreed that an objective or “reasonable insurer” standard applies.

IV. A NEW INSURANCE STATUTE RESULTS IN FURTHER CONFUSION

In 1937, the same year that *Geer* was decided, the Insurance Department of New York began an effort to re-codify the existing insurance law and released tentative drafts of several proposed statutes. This included an initial draft of what later would become Insurance Law Section 149, which, while it was a new statutory provision, essentially restated long-standing common law principles, including those set out in its precursor, Section 58. In the two years between the issuance of *Geer* and the enactment of Section 149, several New York courts cited *Geer*, but without any substantive discussion of whether to apply an objective or subjective standard to determine materiality of a misrepresentation to an insurer.³⁸ As enacted into law two years later, Section 149 provided in relevant part as follows:

(a): A representation is a statement as to past or present fact, made to the insurer by or by the authority of the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof. A misrepresentation is a false representation, and the facts misrepresented are those facts which make the representation false.

³⁸ See e.g., *Wersba v. Equitable Life Assur. Soc. of U.S.*, 1 N.Y.S.2d 677, 679 (N.Y. App. Div. 1938) (citing *Geer* to support its conclusion that a misrepresentation was material as a matter of law); *Equitable Life Assur. Soc. of U.S. v. Schusterman*, 5 N.Y.S.2d 368, 371 (N.Y. App. Div. 1938) (quoting *Geer* to frame the issue of materiality as a determination of “whether the company has been induced to accept an application which it might otherwise have refused,” and not as a determination of “whether the company might have issued the policy even if the information had been furnished.”); *Woodworth v. Prudential Ins. Co.*, 13 N.Y.S.2d 145, 150 (N.Y. Sup. Ct. 1939) (citing *Geer* for the position that an insured can “avoid the policy on the ground of misrepresentation as to a material fact even though such misrepresentation was innocently made.”).

(b): No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.

(c): In determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible.³⁹

While the legislature is empowered to overrule unpopular or problematic court decisions if it so desires, it has become a subject of some debate among legal commentators and certain lower courts whether the enactment of Section 149 was, indeed, intended to overrule the two-year old *Geer* decision and, if so, whether in whole or in part.

Those arguing that the legislature intended to overrule *Geer* point to two factors. First, the statute refers throughout to “the insurer,” rather than referring to “an insurer” or “the reasonable insurer.” Second, while an early draft of the statute provided for admissibility of the practices of other insurers (in addition to the practices of the particular insured at issue) for the purpose of determining whether a misrepresentation was material to an insurer, the statute as enacted only refers in subsection (c) to the admissibility of the practices of “the insurer which made such contract,” which some argue makes clear, or at least suggests, that only the practices of the particular insurer at issue are relevant to determining materiality.

A. “THE INSURER” AND “A REASONABLE INSURER”

The repeated use throughout the statute of the phrase “the insurer,” rather than “a reasonable insurer” or “a prudent insurer,” might suggest that the legislature intended to impose a subjective standard for materiality, rather than the objective standard established by the Court of Appeals in

³⁹ N.Y. INS. LAW § 149 (McKinney 1939). Section 149 also contains a subsection (d), which provides that misrepresentations that fail to disclose previous medical treatment by applicants for life or accident and health insurance are deemed to misrepresent that the applicant has not had the disease or ailment for which he or she received treatment. If the insurer proves such a misrepresentation in an action to rescind the insurance contract, then under certain circumstances the misrepresentation is presumed material.

Geer.⁴⁰ And, indeed, some of the legislative history surrounding the enactment of Section 149 suggests as much. A Historical Note to the draft legislation asserts that “[s]ubsection 2 makes the ultimate test the effect of the misrepresentations in inducing the particular insurer.”⁴¹ The Historical Note directly addresses *Geer*, stating that “the majority opinion contains language inconsistent with the rule of subsection 2 above, but the decision in that case was based upon peculiar facts.”⁴²

Notably, however, the Historical Note is internally inconsistent. The Note states that the rule proposed in the draft legislation “is in accord with the able dissenting opinion by Judge Finch” in *Geer*, in which he “relie[d] upon the decision of the Privy Council of England.”⁴³ The commentators appear to suggest by this language that the statute conforms with the *Geer* dissent but not the *Geer* majority. As discussed above in Part I, however, the Privy Council decision cited approvingly by Judge Finch (*Ontario Metal*) applied an *objective* standard of materiality, just like the *Geer* majority.⁴⁴ Moreover, since the *Geer* dissent did not take issue with the majority’s imposition of an objective standard, but rather with the majority’s determination that materiality could be determined as a matter of law, the statement referenced in the Historical Note might be better read as relating to the latter point.

Significantly, the leading commentary on Section 149, published in 1940 and endorsed by the then New York Superintendent of Insurance, explains that the drafters intended Section 149 to codify existing “common law principles long established in the field of insurance.”⁴⁵ As an example of the existing common law, the Commentaries cite to the following holding in *Cox v. C.G. Blake Co.*, 166 N.Y.S. 294 (N.Y. Sup. Ct. 1917):

The duty on the part of the assured to disclose material facts is not limited to facts which have a direct bearing on

⁴⁰ See *Geer*, 7 N.E.2d. at 127.

⁴¹ N.Y. INS. LAW § 149 (McKinney 1939) (Historical Note).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Ont. Metal Prod. Co. v. Mutual Life Ins. Co. of N.Y.*, [1925] A.C. 344 (P.C.) [352] (appeal taken from S.C.C.) (“In this finding their Lordships substantially concur, although they would have expressed the finding somewhat differently and would have preferred to say that had the facts concealed been disclosed, they would not have influenced a reasonable insurer so as to induce him to refuse the risk or later the premium.”).

⁴⁵ ABRAHAM KAPLAN & GEORGE I. GROSS, COMMENTARIES ON THE REVISED INSURANCE LAW OF NEW YORK (“Commentaries”) 338 (1940).

the extent of the risks or dangers, to which the subject of the insurance will be exposed. *All facts are material which would affect the mind of a rational underwriter, governing himself by the principles on which underwriters in practice act*, as to either of the following points: First, whether he will take the risk at all; second, at what premium he will take it.⁴⁶

The test set out in *Cox*, phrased in terms of whether a fact would “affect the mind of a rational underwriter,” clearly is objective in nature.

B. SUBSECTION (3) OF SECTION 149

While repeated references to “the insurer” in Section 149 have raised questions, subsection (3) and its legislative history have raised even more. As noted above, subsection (3) provides that in determining materiality, “evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible.”⁴⁷ This differs from the language originally proposed, which allowed a court to admit evidence “of the practices of the insurer which made such contract *and of other insurers* in reference to the making of similar insurance contracts.”⁴⁸

Some have argued that the omission in the enacted version of the “and of other insurers” language precludes a court from admitting evidence regarding industry custom and practice, thus negating an objective or “reasonable insurer” standard.⁴⁹ The Historical Note following the enacted text provides some support for this argument, stating that “[u]nder the rule laid down by the Privy Council of England the ultimate test is the effect of the misrepresentation upon a ‘prudent insurer.’ Under subsection 3 above,

⁴⁶ Commentaries at 340, citing *Cox v. C.G. Blake Co.*, 166 N.Y.S. 294, 297 (N.Y. Sup. Ct. 1917) (emphasis added) (internal quotation marks omitted).

⁴⁷ N.Y. INS. LAW § 149(3) (McKinney 1939).

⁴⁸ LOUIS H. PINK, INS. DEP’T OF N.Y., INSURANCE LAW REVISION OF THE STATE OF NEW YORK, TENTATIVE DRAFT § 63(4), at 143 (1937) (emphasis added) (the italicized language, subsequently omitted, originally was released in a draft under Art. VII § 63(4)).

⁴⁹ See, e.g., Edwin W. Patterson, *Misrepresentations by Insured under the New York Insurance Law*, 44 COLUM. L. REV. 241, 243 n.16 (1944) (arguing that the “and of other insurers” language “was eliminated in order to avoid possible confusion of the ‘individual insurer’ test, here adopted, with the ‘prudent insurer’ test”).

proof of what a prudent insurer would have done . . . is not the conclusive test.”⁵⁰

However, once again the Historical Note does not clearly rule out an objective test, saying only that a “prudent insurer” analysis is “not . . . conclusive,”⁵¹ and in fact the Historical Note raises more questions than it answers. The Historical Note provides that “proof of what a prudent insurer would have done is merely evidence to show what the insurer in question would have done,”⁵² although as just noted the enacted text makes no reference to the admissibility of evidence relating to industry custom and practice. The Historical Note also provides: “Subsection 3 gives the plaintiff an opportunity to rebut the insurer’s evidence that it would have rejected the application if the misrepresentation had not been relied upon, by permitting the insured to show the practices of other insurers.”⁵³ It is interesting to consider why the Historical Note refers to the admissibility of evidence relating to “practices of other insurers” when the enacted text makes no such reference. Does this indicate that the insured can provide evidence of industry practice only to rebut an insurer’s subjective showing of materiality? One possible explanation is that the Historical Note relates to the earlier draft of the subsection, and does not actually explain the intent behind the statute as finally amended.

Another explanation may be found in the change from the use of the word “may” to the use of the word “shall” in Subsection (3). Draft statute Section 63 (a draft precursor to Section 149) provided that evidence of the practices of other insurers “*may* be admitted in the discretion of the trial court.”⁵⁴ As enacted, the statute only provides the type of evidence that “*shall* be admissible.”⁵⁵ It is very possible that the legislature removed reference to evidence of the practices of other insurers because they wanted to keep its admission at the discretion of the trial court, but chose to ensure the admissibility of evidence of the practices of the individual insurer by making a definitive statement that it “shall be” admissible under all circumstances.

⁵⁰ N.Y. INS. LAW § 149 (McKinney 1949) (Historical Note).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ PINK, *supra* note 48, at § 63(4) (emphasis added).

⁵⁵ N.Y. INS. LAW § 149(3) (McKinney 1949) (emphasis added).

V. PRACTICES OF OTHER STATES IN APPLYING AN OBJECTIVE OR SUBJECTIVE TEST

The same issues of interpretation present in the New York courts also exist in other jurisdictions. Several states have statutes with language similar to New York's, and courts in those states have interpreted their statutes to support the use of an objective test in determining materiality. While the statutory language in these states, as in New York, ostensibly suggests a subjective test by focusing on the actions of "*the insurer*" in question, the highest courts in these states nevertheless have concluded their statutes support an objective test.⁵⁶

The Supreme Judicial Court of Maine has provided the most thorough analysis on the issue in *York Mutual Insurance Co. v. Bowman*, 746 A.2d 906, 909 (2000). Maine's statutory text finds a misrepresentation to be material when "the insurer in good faith" would have acted differently "if the true facts had been known to *the insurer* as required" by the policy or contract.⁵⁷ Notwithstanding this language, Maine's highest court explicitly held that the test of materiality is whether disclosure by the insured "would have influenced a *reasonable insurer* in deciding whether to accept or reject the risk of entering into the contract, fixing the premium rate, in fixing the amount of insurance coverage, or in providing coverage with respect to the hazard resulting in the loss."⁵⁸ According to the Supreme Court of Maine, the relevant inquiry did not involve the particular instances of the loss in question, but rather an objective examination from the point of view of the "reasonable insurer."⁵⁹ Indeed, the court noted that while there is disagreement among jurisdictions with similar statutes as to other issues relating to materiality, they all used an objective test, stating that the "common factor [among these states] is that materiality is treated as an objective test."⁶⁰

⁵⁶ For the most part, these statutes do not contain a provision similar to § 149(3), regulating the admissibility of evidence of the practices of "the insurer." As discussed below, Michigan is a notable exception.

⁵⁷ ME. REV. STAT. ANN. tit. 24-A, § 2411(2) (1990) (emphasis added).

⁵⁸ *York Mut. Ins. Co. v. Bowman*, 746 A.2d 906, 909 (Me. 2000) (emphasis added).

⁵⁹ *Id.*

⁶⁰ *Id.* (citing *Woods v. Independent Fire Ins. Co.*, 749 F.2d 1493, 1497 (11th Cir. 1985); *Singer v. Nationwide Mut. Fire Ins. Co.*, 512 So.2d 1125, 1128–29 (Fla. Dist. Ct. App. 1987); *Central Nat'l Life Ins. Co. v. Peterson*, 529 P.2d 1213, 1216 (Ariz. Ct. App. 1975); *Massachusetts Mut. Life Ins. Co. v. Allen*, 416 P.2d 935, 941 (Okla. 1965); *John Hancock Mut. Life Ins. Co. v. Conway*, 240 S.W.2d

Arizona's insurance statute governing misrepresentations employs a similar substantive form as that of Maine, also utilizing the phrase "the insurer."⁶¹ Consistent with Maine's highest court, Arizona's Court of Appeals explicitly has held that the statutory language supports an objective rather than a subjective test. The court in *Valley Farms, Ltd. v. Transcontinental Insurance Co.*, 206 Ariz. 349, 353 (Ct. App. 2004) stated that the test for materiality "is whether the facts, if truly stated, might have influenced a reasonable insurer in deciding whether to accept or reject the risk."⁶² The Ninth Circuit, in applying Arizona insurance law in *Mutual Life Insurance Co. of New York v. Morairty*, 178 F.2d 470, 474 (9th Cir. 1950), also explicitly held that the test for materiality under Arizona law is an objective one, explaining that the inquiry is to be examined from the perspective of a "reasonable insurer."⁶³ More recently, in 2008, the Arizona federal district court in *Medical Protective Co. v. Pang*, 606 F. Supp. 2d 1049, 1058 (D. Ariz. 2008) reiterated the previous endorsement of an objective test by holding that "materiality exists if the facts, if truly stated, might have influenced a reasonable insurer in deciding whether to accept or reject the risk."⁶⁴

Florida and West Virginia also have followed suit behind Maine and Arizona in interpreting their respective statutory provisions regarding materiality of misrepresentations as requiring an objective test, despite references to "the insurer" and not "an insurer" or "reasonable insurer" in the statutory language of each state.⁶⁵ Courts in each of these states have interpreted the provision as focusing on how a reasonably prudent insurer

644, 646 (Ky. Ct. App. 1951); *Massachusetts Mut. Life Ins. Co. v. Allen*, 416 P.2d 935, 941 (Okla. 1965); *Powell v. Time Ins. Co.*, 382 S.E.2d 342, 349-50 (W.Va. 1989)).

⁶¹ ARIZ. REV. STAT. ANN. § 20-1109(3) (2010) ("The insurer in good faith would either not have issued the policy, or would have not issued a policy in as large an amount, or would not have provide coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise.").

⁶² *Valley Farms v. Transcontinental Ins. Co.*, 78 P.3d 1070, 1074 (Ariz. Ct. App. 2003).

⁶³ *Mutual Life Ins. Co. v. Morairty*, 178 F.2d 470, 474 (11th Cir. 1949) ("The test of materiality is whether the facts, if truly stated, might have influenced a reasonable insurer in deciding whether to accept or reject the risk; the insurer need not show that it would have rejected the applicant had it known of the falsity of the claim.").

⁶⁴ *Med. Protective Co. v. Pang*, 606 F. Supp. 2d 1049, 1058 (D. Ariz. 2008).

⁶⁵ See FLA. STAT. § 627.409 (2005); W. VA. CODE § 33-6-7(c) (2006).

would have proceeded if not for the misrepresentation.⁶⁶ Georgia's statutory language mirrors that of New York, Florida, Maine, Arizona and West Virginia in its use of the phrase "the insurer."⁶⁷ Both the Eleventh Circuit applying Georgia law and the Court of Appeals of Georgia definitively characterize the standard by which materiality is examined as objective, stating that the "standard has been interpreted to be an objective one."⁶⁸

Michigan is the only state which appears to use language similar to Subsection (3) of New York's Section 149 in its statute governing materiality of misrepresentations.⁶⁹ While historical decisions by Michigan courts have interpreted M.C.L.A. § 500.2218 to require a subjective test, the more recent trend is towards an objective test for determining materiality. Older Michigan case law is explicit in its support of a subjective test, describing the analysis as focused on the "reliance or non-reliance of the particular insurance company involved" and excluding evidence of what other insurers, similarly situated, may have done.⁷⁰ However, more recently, the highest court in Michigan has employed plainly objective language, describing the inquiry as one analyzing the decisions of a "reasonable" insurer.⁷¹ Thus, with respect to language in the

⁶⁶ See *Singer v. Nationwide Mut. Fire Ins.*, 512 So.2d 1125, 1128-29 (Fla. Dist. Ct. App. 1987) ("A misrepresentation is material if it does not enable a reasonable insurer to adequately estimate the nature of the risk in determining whether to assume the risk."); *Powell v. Time Ins. Co.*, 382 S.E.2d 342, 350 (W. Va. 1989) (adopting a test for materiality of "whether a reasonably prudent insurer would consider the misrepresentation material to the contract").

⁶⁷ GA. CODE ANN. § 33-24-7(b)(3) (2003) ("The insurer in good faith would either not have issued the policy or contract or would not have issued a policy or contract in as large an amount or at the premium rate as applied for or would not have provided coverage with respect to the hazard resulting in the loss of the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.").

⁶⁸ *Am. Gen. Life. Ins. Co. v. Schoenthal Family L.L.C.*, 556 F.3d 1331, 1340 (11th Cir. 2009); *Lively v. S. Heritage Ins. Co.*, 568 S.E.2d 98, 100 (Ga. Ct. App. 2002).

⁶⁹ See MICH. COMP. LAWS. § 500.2218 (2008) ("In determining questions of materiality, evidence of the practices of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible.").

⁷⁰ See *Mannino v. Dominion Life Assurance Co.*, 539 F. Supp. 323, 327 (E.D. Mich. 1982); *Clark v. John Hancock Mut. Life Ins. Co.*, 447 N.W.2d 783, 785 (Mich. Ct. App. 1989).

⁷¹ See *Oade v. Jackson Nat'l Life Ins. Co. of Mich.*, 632 N.W.2d 126, 131 (Mich. 2001) (The "inquiry under the statutory 'materiality' test is whether a

Michigan statute similar to Subsection (3) of Section 149, the current trend in Michigan law supports the conclusion that Michigan courts read their statutory language as requiring an objective test when determining materiality.

It therefore is clear from a survey of the case law of various other states that courts in those states have applied an objective test when determining materiality despite references to “the insurer” in their statute.⁷²

VI. POST-*GEER* APPLICATION OF A SUBJECTIVE STANDARD BY LOWER COURTS IN NEW YORK

A. POST-*GEER* RULINGS APPLYING NEW YORK LAW

Since the enactment of Section 149, many lower courts in New York have departed from *Geer*'s objective standard, and instead have determined materiality based on how the specific insurer at issue would have acted if it had known the true facts. It is entirely unclear, however, how these courts have determined which standard to apply, and even less clear that they collectively could or have established a new regime of subjectivity in New York. No court in New York, either appellate or otherwise, has ever expressly stated that *Geer* no longer is good law on the

reasonable underwriter would have regarded [the plaintiff's revised answers to the health questionnaire] sufficient grounds for rejecting the risk or charging an increased premium . . .”).

⁷² It is important to note that California courts, cited for their steadfast adherence to the subjective test in determining materiality, have interpreted vastly different statutory language when making that determination. Rather than leaving the interpretative burden to their courts, the California legislature specifically defined materiality as a subjective test inquiry. *See* CAL. INS. CODE § 334 (2005) (“Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.”); *Superior Dispatch, Inc. v. Ins. Corp. of N.Y.*, 181 Cal. App. 4th 175, 191 (2010) (explaining that the test of materiality is a “subjective test view from the insurer’s perspective”); *Coca Cola Bottling Co. v. Columbia Cas. Co.*, 11 Cal. App. 4th 1176, 1189 n.4 (1992). The only other state which appears to use language similar to that in the California statute is North Dakota. *See* N.D. CENT. CODE § 26.1-29-17 (2010) (“Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due in forming the party’s estimate of the disadvantages of the proposed contract or in making the party’s inquiries.”). While still good law, the North Dakota statute has been cited only a handful of times.

issue of applying an objective standard for determining whether a misrepresentation is material to an insurer.

In fact, not one lower New York court appears to have conducted a thorough analysis into Section 149's ambiguous and inconsistent legislative history.⁷³ The lower court dockets frequently have encountered cases, however, that involved the use of or reference to a subjective or objective standard, even in cases where the standard itself was not at issue. Without additional guidance from the highest court, the lower courts have wandered and sometimes departed from the objective standard precedent of *Geer*. The lower courts often wander and depart from *Geer* by using phrases like "the insurer" instead of "an insurer," but without even realizing they have made a choice between two very different standards. Indeed, in many cases, the lower courts have assumed the standard to be subjective without actually justifying that assumption. Despite arguments from some commentators, however, these lower court rulings do not amount to an abrogation of *Geer*, nor do they constitute a justifiable shift away from the objective standard.

There are several prominent examples among these cases. In *Metropolitan Life Ins. Co. v. Goldberger*, the trial court rejected plaintiff insurance company's action to rescind defendant's insurance policies when it ruled as a matter of law that the misrepresentations made on plaintiff's applications were not material.⁷⁴ The court opined that misrepresentations could be material only if "knowledge by the insurer of the facts misrepresented would have led to its refusal to issue the policy."⁷⁵ In support of using a subjective standard, the court cites a 1944 note in the *Columbia Law Review* entitled *Misrepresentation by Insured Under the New York Insurance Law*.⁷⁶ This note clearly is not an authoritative source on the meaning of Section 149 and most certainly does not trump the law set down by the New York Court of Appeals in *Geer*.

Other more recent New York cases where lower courts appear to embrace a subjective test for materiality include rulings in *Zilkha v. Mut. Life Ins. Co. of N.Y.* ("A misrepresentation is material if *the* insurer would

⁷³ Of course, the Court of Appeals, the highest court in New York, also has not conducted a thorough analysis of this issue since the enactment of Section 149.

⁷⁴ *Metro. Life Ins. Co. v. Goldberger*, 155 N.Y.S.2d 305, 306 (N.Y. Sup. Ct. 1956).

⁷⁵ *Id.*

⁷⁶ *Id.* (citing Edwin W. Patterson, *Misrepresentation by Insured Under the New York Insurance Law*, 44 COLUM. L. REV. 24 (1944)).

not have issued the policy had it known the facts misrepresented.”⁷⁷ and *Feldman v. Friedman* (“A fact is material so as to avoid ab initio an insurance contract if, had it been revealed, *the* insurer or reinsurer would either not have issued the policy or would have only at a higher premium.”),⁷⁸ both appellate level decisions handed down in 2001 and 1997, respectively.⁷⁹ Because the courts fail to offer robust explanations of their rulings, it is not particularly clear whether they have endorsed or applied a subjective standard based on a thorough examination of the legislative history and case law. In fact, in each of these cases—as appears to be the case in decisions by many other courts—references to “the” insurer, which arguably imply subjectivity, may simply be a loose choice of words not intended to have any precedential or substantive meaning. Indeed, these two appellate court decisions provide only a cursory quotation to the term “the insurer” in the statutory text or cite to past decisions that also use subjective language without explanation. None of these sources constitutes a binding interpretation of the statute, and none of them amounts to an abrogation of the standard set forth by the Court of Appeals in *Geer*.

Another case which has engendered significant confusion among lower courts is the Appellate Division’s decision in *Aguilar v. U.S. Life Insurance Company*.⁸⁰ In *Aguilar*, the court encountered an appeal of summary judgment entered in favor of the insurance company, which had moved to rescind the life insurance policy of plaintiff for failure to disclose certain mental disorders.⁸¹ The court actually cited *Geer* throughout, yet

⁷⁷ *Zilkha v. Mut. Life Ins. Co. of N.Y.*, 732 N.Y.S.2d. 51, 52 (N.Y. App. Div. 2001) (emphasis added).

⁷⁸ *Feldman v. Friedman*, 661 N.Y.S.2d. 9, 10 (N.Y. App. Div. 1997) (quoting *Christiana Gen. Ins. Corp. v. Great Am. Ins. Co.*, 979 F.2d 268, 278 (2d Cir. 1992)) (emphasis added).

⁷⁹ For further examples see *Penn Mut. Life Ins. Co. v. Remling*, 268 A.D.2d 572, 573 (N.Y. App. Div. 2000) (citing Insurance Law § 3105(b) and *Gugleotti v. Lincoln Sec. Life Ins. Co.*, 234 A.D.2d. 514 (N.Y. App. Div. 1996), to support the proposition that “for a misrepresentation to warrant the voiding of an insurance policy, the misrepresentation must be material, meaning that had *the insurer* known the truth, it would not have issued the policy.”) (emphasis added); *Gugleotti*, 234 A.D.2d. at 514-15 (finding that revelation of scuba diving activities would have resulted in a different classification of the insured by *the insurance company* and permitting the insurance company to rescind the policy) (emphasis added).

⁸⁰ *Aguilar v. U.S. Life Ins. Co.*, 162 A.D. 209, 211 (N.Y. App. Div. 1990).

⁸¹ *Id.* at 209-10.

also repeatedly referred to what “the insurer” would have done, seemingly applying, based on *Geer*, a subjective test on materiality. Thus, the *Aguilar* case quotes *Geer* for the proposition noting that a showing that the misrepresentation “substantially thwarts the purpose for which the information is demanded and induces action which the insurance company might otherwise not have taken.”⁸² The court also includes the following cite from *Geer*: “The question in such case is not whether the company *might have issued* the policy even if the information had been furnished; the question in each case is whether the company had been induced to accept an application which it *might otherwise have refused*.”⁸³ The *Aguilar* court then “appl[ies] this test” and affirms the lower court.⁸⁴ But what test did the court apply, exactly? The language from *Geer* cited in *Aguilar* cannot resolve the issue because it only tells half the story. Gone from *Aguilar* is the language of the “reasonable” or “prudent” insurer that featured so prominently in *Geer* and that is critical to the quotations lifted out of context by the court in *Aguilar*. And deciding whether an objective or subjective standard applies was not central to the issue decided by the *Aguilar* court.

Even more problematic and egregious is the ruling in *Greene v. United Mut. Life Ins. Co.*,⁸⁵ in which the trial court rejected the jury’s findings and granted a directed verdict in favor of the insured as to whether material misrepresentations had been made. Here, the trial court directly took on the question of “[w]hat constitutes a material misrepresentation sufficient to justify an avoidance of the policy.”⁸⁶ The trial court referred to the Corpus Juris Secundum which stated “the test to be ‘whether knowledge of the true facts would have influenced a prudent insurer in determining whether to accept the risk or in fixing the amount of premiums.’”⁸⁷ The *Greene* court then continued, reaching a shocking conclusion:

However, the test in New York has been laid down by its Court of Appeals in *Geer v. Union Life Ins. Co.* It gives a narrower test, it is not the test of what any other

⁸² *Id.* at 210-211 (quoting *Geer v. Union Mut. Life Ins. Co.*, 273 N.Y. 261, 271) (1937)).

⁸³ *Id.* at 211 (quoting *Geer*, 273 NY at 269) (emphasis in original).

⁸⁴ *Id.*

⁸⁵ *Greene v. United Mut. Life Ins. Co.* 38 Misc. 2d 728 N.Y.S. 2d 809, 815-16 (N.Y. Gen. Term 1963).

⁸⁶ *Id.* at 731, 813.

⁸⁷ *Id.* (citing 45 C.J.S. *Insurance* § 595).

insurance company would have done, but what the particular insurance company might have done. It is not the test stated in the dissenting opinion of that case, quoting from an opinion in the Federal reports of Judge, later Chief Justice TAFT, i.e. “whether reasonably careful and intelligent men would have regarded the fact, communicated at the time of effecting the insurance, as substantially increasing the chances of loss insured against.” Judge LEHMAN, speaking for the court, declared the test to be “The question . . . is not whether the company *might have issued* the policy even if the information had been furnished; the question in each case is whether the company *might have issued* the policy even if the information had been furnished; the question in each case is whether the company has been induced to accept an application which it *might otherwise have refused*.”⁸⁸

One has to wonder if the *Greene* court simply stopped reading the *Geer* opinion after a few pages, and how it completely missed the fact that both the majority AND the dissent cite to the decision by Justice Taft for the same purpose, i.e., that an *objective* test applies in determining materiality.⁸⁹ Thus, as held in *Geer* and agreed by the *Geer* dissent, but completely ignored by the *Greene* Court, under New York law:

[M]ateriality is a matter of degree and a misrepresentation through concealment of a fact in regard to a condition of health or physicians consulted, is material where it appears that a reasonable insurer would be induced by the misrepresentation to take action which he might not have taken if the truth had been disclosed.⁹⁰

While the *Green* court ultimately found enough evidence that the insured’s misrepresentation was material and directed verdict in favor of the insurer, its reference to *Geer* for application of a subjective standard is entirely inexplicable.

⁸⁸ *Id.* (citing *Geer*, 273 N.Y. at 269, 277) (emphasis in original; internal page citations omitted).

⁸⁹ *Penn. Mut. Life Ins. Co. v. Mechanics’ Sav. Bank & Trust Co.*, 72 Fed. Rep. 413 (1896).

⁹⁰ *Geer*, 273 N.Y. at 272.

B. COMMENTATORS

One group of commentators has suggested that New York lower courts are correct to assume that Section 149 overrules the legal effect of *Geer* in every capacity, including the use of a “prudent insurer” (or objective) test for determining materiality of misrepresentations.⁹¹ These commentators refer in a footnote, for example, to seven New York Appellate Division decisions which purportedly “disregard *Geer*” and incorporate a subjective test.⁹² In reaching their conclusion, the commentators also rely heavily on the Appellate Division’s decision in *Giuliani v. Metropolitan Life Insurance Co.*, 56 N.Y.S.2d 475 (N.Y. App. Div. 1945), and the Historical Note to Section 149’s citation to Judge Finch’s dissent in *Geer*, which the commentators purport, read together, “makes clear” the legislature’s rejection of an objective test.⁹³ The authorities they cite cannot bear the weight the authors place upon them.

The Appellate Division cases cited by these commentators simply do not support the proposition for which they are cited. In five of the seven footnoted cases, the issue was not whether the materiality test was objective or subjective from the perspective of the insurer, but rather whether the insurer had sustained its burden on a motion for summary judgment to establish materiality *as a matter of law*. In each of those cases, the courts merely ruled that the insurer had not met its burden to establish materiality as matter of law and that the issue remained one for the trier of fact to decide.⁹⁴ In the sixth case, the court actually cited with approval to

⁹¹ Richard Jacobs, QC, Lorelie S. Masters & Paul Stanley, *LIABILITY INSURANCE IN INTERNATIONAL ARBITRATION: THE BERMUDA FORM 239-40* (Hart Publishing 2004).

⁹² *Id.* at 243; see Patterson *supra* note 49.

⁹³ *Id.* at 239-40.

⁹⁴ See *Zilkha v. Mut. Life Ins. Co. of N.Y.*, 732 N.Y.S.2d 51, 52 (N.Y. App. Div. 2001) (“Here, there are issues of fact as to whether . . . any such alleged misrepresentations were material.”); *Carpinone v. Mut. of Omaha Ins. Co.*, 697 N.Y.S.2d 381, 383 (N.Y. App. Div. 1999) (“The materiality of an applicant’s misrepresentation is ordinarily a factual question unless the insurer proffers clear and substantially uncontradicted evidence concerning materiality, in which event the matter is one of law for the court to determine.”); *Campese v. Nat’l Grange Mut. Ins. Co.*, 689 N.Y.S.2d 313, 314 (N.Y. App. Div. 1999) (reinstating complaint where “the [trial] court erred . . . in determining that the misrepresentations were material as a matter of law”); *Cutrone v. Am. Gen. Life Ins. Co.*, 606 N.Y.S.2d 491, 492 (N.Y. App. Div. 1993) (“Summary judgment was

Geer in support of its holding and confirmed the trial court's entry of judgment against the insured on the jury's finding that the insured's misrepresentation was material.⁹⁵ Finally, in the seventh case, the court's decision does not even address whether the misrepresentation was material or not under any standard.⁹⁶

Moreover, this group of commentators highlight that the main point of Section 149 was to treat the materiality of a misrepresentation as a matter of fact for the jury's consideration. As previously discussed, Judge Finch's dissent in *Geer* was based upon his disagreement with materiality being treated as a matter of law.⁹⁷ With respect to the subjective-objective standard holding, Judge Finch was in absolute agreement with the majority that a "reasonable insurer" (or objective) standard applies, and he approvingly cited to cases (also cited by the majority) which applied an objective standard.⁹⁸

Finally, in *Giuliani*, also relied on by these commentators, the only issue on appeal was whether the trial court erred in treating materiality as an issue of fact, and the court did not consider explicitly whether an objective or subjective test should be used.⁹⁹ The appellate court recognized that prior to the enactment of Section 149, "the tendency of the courts was to determine that every misrepresentation, except the most trivial ones, was material and thus voided the policy."¹⁰⁰ Relying on Section 149, the *Giuliani* court held that except in cases where "misrepresentations and the facts misrepresented were so serious that their very seriousness would establish their materiality as a matter of law," the

properly denied, however, because defendant failed to meet its burden of establishing the materiality of the misrepresentations in the reinstatement application 'sufficiently to warrant the court as a matter of law in directing judgment' in its favor.") (citations omitted); *Sonkin Assoc., Inc. v. Columbian Mut. Life Ins. Co.*, 541 N.Y.S.2d 611, 612 (N.Y. App. Div. 1989) (affirming denial of summary judgment where insurer had failed to establish "as a matter of law" that insured's misrepresentation was material).

⁹⁵ *Meagher v. Exec. Life Ins. Co. of N.Y.*, 607 N.Y.S.2d 361, 361-62 (N.Y. App. Div. 1994) (citing *Geer*, 273 N.Y. at 269).

⁹⁶ *Tennenbaum v. Ins. Corp. of Ir., Ltd.*, 579 N.Y.S.2d 351-52 (N.Y. App. Div. 1992).

⁹⁷ *See supra* Part III.

⁹⁸ *Id.*

⁹⁹ *Giuliani v. Metro. Life Ins. Co.*, 56 N.Y.S.2d 475, 477 (N.Y. App. Div. 1945).

¹⁰⁰ *Id.* at 479.

question of materiality should be a question of fact for the jury.¹⁰¹ Notably, however, while *Giuliani* did not expressly address the standard that should be used to determine materiality, it implied that an objective standard should be used, stating that “it cannot be said as a matter of law that a prudent insurer like the defendant would have or would not have rejected the application.”¹⁰²

The authorities cited by this group of commentators for the proposition that the courts have established a subjective standard in New York by openly disregarding *Geer* and embracing a subjective reading of Section 149, in fact stand for the proposition that courts have departed from *Geer* in only a single respect: that materiality should be treated as an issue of fact. To argue that these authorities indicate Section 149 completely superseded *Geer* in every respect and thus marked the end of the objective “prudent insurer” standard is to extract more from these authorities than is warranted.

Other commentators similarly have opined—although with less specific analysis—that under New York law, a subjective test must be applied in determining whether an insurer would have considered a misrepresentation to be material.¹⁰³ However, the key case they most often cite, *Mut. Benefit Life Ins. Co. v. Lindenman*, similarly does not support the conclusion reached by these commentators. Rather, *Lindenman* addressed only the issue of what evidence is needed to determine materiality as a matter of law:

Whether there has been a misrepresentation, and whether it is material are usually questions for the jury. However,

¹⁰¹ *Id.*

¹⁰² *Id.* (emphasis added).

¹⁰³ See Joseph K. Powers, *Pulling the Plug on Fidelity, Crime and All Risk Coverage: The Availability of Rescission as a Remedy or Defense*, 32 TORT & INS. L.J. 905, 915 n. 63 (Summer 1997) (“Materiality may be proven through evidence of the insurer’s practice concerning similar risks or the insurer’s manuals (where they exist), or testimony of qualified employees of the insurer, or where common sense dictates that the misrepresentation was significant to the underwriting process.”) (citing *Mut. Benefit Life Ins. Co. v. Lindenman*, 911 F. Supp. 619, 624-25 (E.D.N.Y. 1995)); see also Susan Koehler Sullivan & David A. Ring, *Recurring Issues in Rescission Cases*, 42 TORT & INS. L.J. 51, 56 n. 27 (Fall 2006) (citing *Lindenman* for the proposition that “[m]ost states measure materiality from the subjective viewpoint of the insurer.”). See also Edwin W. Patterson, *Misrepresentation by Insured Under the New York Insurance Law*, 44 COLUM. L. REV. 24 (1944).

where the evidence is “clear and substantially uncontradicted,” the court may determine it. . . . For the court to determine materiality as a matter of law, unequivocal evidence is required of the insurer’s practice concerning similar risks, or the insurer’s manuals, or “testimony of qualified employees of the insurer that the insurer would not have issued the particular contract it did if the facts had not been disclosed.”¹⁰⁴

The *Lindenman* court determined that there was sufficient evidence (including internal memoranda and uncontested underwriting guidelines of the insurer) to find materiality as a matter of law, and to grant summary judgment in favor of the insurer.¹⁰⁵ The *Lindemman* court never considered, discussed, analyzed, or in any way addressed the standard that would apply if the question of materiality was not decided as a matter of law, but rather became an issue of fact to be determined by the jury at trial. And, notably, as discussed above in Part IV, Section 149(3) only addresses what evidence “shall” be admissible at trial, and never excludes other evidence which “may” be admissible, such as practices of other underwriters, expert testimony, and general industry practice.¹⁰⁶

VII. THE BETTER READING: *GEER* REMAINS GOOD LAW AND AN OBJECTIVE STANDARD APPLIES

The case law regarding the objective/subjective standard is far from consistent. Although the majority of New York Appellate Division decisions since *Geer* appear to apply a subjective standard for materiality, others explicitly have stated that materiality should be determined objectively.¹⁰⁷ For example, in *Horton*, the court quoted *Geer* at length in

¹⁰⁴ *Mut. Benefit Life Ins. Co.*, 911 F. Supp. at 624-25.

¹⁰⁵ *Id.* at 626.

¹⁰⁶ It also is interesting to note that at least one of these group of commentators may not even appreciate the difference between the two standards, stating both that Missouri applies a “subjective” standard, Sullivan, *supra* note 103, at 56 n. 27 (citing *Coots v. United Employers Fed’n*, 865 F. Supp. 596, 603 (E.D. Mo. 1994)), while just sentences later stating that Missouri applies an “objective” standard. *Id.* at 57 n.29 (citing *Crewse v. Shelter Mut. Ins. Co.*, 706 S.W.2d 35, 39 (Mo. Ct. App. 1985)).

¹⁰⁷ See *Horton v. Prudential Ins. Co. of Am.*, 363 N.Y.S.2d 130, 132 (N.Y. App. Div. 1975); see also, Giuliani, 56 N.Y.S.2d. at 479 (finding that “it cannot be

support of its decision to reverse the trial court's denial of the defendant insurer's motion to dismiss on the ground of a material misrepresentation. The court used an objective standard, stating that a misrepresentation is material when a "reasonable insurer would be induced by the misrepresentation to take action which he might not have taken if the truth had been disclosed."¹⁰⁸

In addition, other jurisdictions and the federal judiciary have held that, under New York law, materiality is determined by an objective test. In *Hoechst Celanese Corp. v. National Union Fire Insurance Co.*, 1990 WL 96400 at *1 (Del. Super. July 6, 1990), the Superior Court of Delaware (citing *Geer* as relevant precedent) recognized that under New York law, "fraudulent concealment can serve as a bar to recovery under an insurance contract if the contract contains a representation made by the insured that is false and material and that was relied upon by insurer in issuing the policy."¹⁰⁹ The court provided a thorough analysis on misrepresentations under New York law, providing in part: "Materiality is judged by an objective standard; that is, would industry practice consider the allegedly concealed information as material to an insurer's decision to renew the policy."¹¹⁰ Similarly, the Southern District of New York twice has held that the test for materiality under New York law is an objective one, and depends on whether industry practice would consider the undisclosed information material as to the insurer's decision to participate in the insurance contract.¹¹¹

Despite the potential confusion created by the enactment of Section 149 and the inconsistent holdings of lower New York courts, there has been one constant for applying an objective test: the New York Court of Appeals. When a statute is enacted, it becomes the responsibility of the

said as a matter of law that *a prudent insurer like the defendant* would have or would not have rejected the application.") (emphasis added).

¹⁰⁸ *Horton*, 363 N.Y.S.2d at 132 (quoting *Geer v. Union Mut. Life Ins. Co.*, 273 N.Y. 261, 272 (N.Y. 1937)).

¹⁰⁹ *Hoechst Celanese Corp. v. Nat'l Union Ins. Co. of Pittsburgh*, No. 89C-SE-35, 1994 WL 721653, at *2 (Del. Super. Ct. Mar. 31, 1994).

¹¹⁰ *Id.* at *3.

¹¹¹ See *John Jovino Co. v. Fireman's Fund Ins. Co.*, No. 90 Civ. 7486, 1992 WL 176956, at *7 (S.D.N.Y. July 14, 1992) ("The standard by which materiality is judged is an objective one."); *Am. Home Assurance Co. v. Fremont Indem. Co.*, 745 F. Supp. 974, 977 (S.D.N.Y. 1990) ("It remains to be seen whether under the standard by which materiality is judged, an objective one, industry practice would consider the [insured's] loss projections as material to a reinsurer's decision to participate . . .").

courts to interpret the law. If the legislature believes the courts have misinterpreted the law, the legislature can step in and make a correction. The legislature never has expressly abrogated *Geer*'s objective standard of materiality. Moreover, other jurisdictions as well as New York federal courts and certain lower states courts in New York have concluded, correctly, that New York law applies an objective standard of materiality.

Fundamentally, New York statutory law means what the New York Court of Appeals says it means, and the New York Court of Appeals says that a misrepresentation "is material where it appears that a reasonable insurer would be induced by the misrepresentation to take action which he might not have taken if the truth had been disclosed."¹¹² The Court of Appeals continues to treat *Geer* as good law, and Section 149 did not expressly abrogate, nor is it inconsistent with, this holding. It is time for all courts and tribunals applying New York law to end the unnecessary confusion, give precedential effect to the ruling of the New York Court of Appeals, and consistently apply the objective standard set down by New York's highest court.

¹¹² *Geer v. Union Mut. Life Ins. Co.*, 273 N.Y. 261, 272 (1937).