Massachusetts

By William L. Boesch

What is the required procedure for seeking rescission? If there is no required procedure, what are the acceptable or customary procedures for rescission?

There is no required procedure, but typically an insurer will file a complaint for declaratory judgment establishing its right to rescind. The Massachusetts declaratory judgment statute requires that the insurer name as parties all persons "who have or claim any interest which would be affected by the declaration …" *Mass. Gen. Laws* ch. 231A, §8.

A declaratory judgment action to confirm the insurer's view that rescission is warranted is advisable in the liability-insurance context because an insurer who rescinds and declines to defend in error (and has no other valid coverage defense) will be: (a) bound by findings and rulings in the underlying case, and (b) liable for damages flowing from its breach of the duty to defend, and (c) potentially liable for multiple damages under Massachusetts's unfair-claims-practices and consumer-protection statutes.

What must an insurer prove to be entitled to rescind a policy?

Is it required that the insured have committed an intentional or fraudulent misrepresentation on the application? Or is it sufficient that there was a material misrepresentation, regardless of intent?

Is there a separate requisite showing of reliance by the insurer, or is reliance presumed if materiality is found?

With regard to life insurance, accident insurance, and other such policies, does your jurisdiction recognize that the policy becomes "incontestable" after a certain period of time? And must an insurer, in turn, prove fraud to rescind the policy?

Can an insurer rescind based on the insured's failure to volunteer material information that was not requested by the application? That is, does the insured have a duty to volunteer material information?

(a) Materiality alone is sufficient. An insurer may rescind based upon a misrepresentation or warranty that is "made with actual intent to deceive" *or* that "increased the risk of loss." *Mass. Gen. Laws* ch. 175, §186. The latter phrase has been interpreted as equivalent to material to the decision whether and on what terms to issue the policy.

(b) Note that an insurer may be able to avoid the need to separately prove materiality if it states in its application and policy that a particular representation is a "condition precedent" to the policy's effectiveness. *See Shaw v. Commercial Ins. Co. of Newark, N.J.*, 359 Mass. 601, 270 N.E.2d 817, 821 (1971); *Krause v. Equitable Life Ins. Co. of Iowa*, 333 Mass. 200, 129 N.E.2d 617, 619 (1955); *Mass. Mut. Life Ins. Co. v. Fraidowitz*, 443 F.3d 128, 132 (1st Cir. 2006); *Keegan v. Mt. Vernon Fire Ins. Co.*, No. 1451, 2002 WL 31731474, at *4 (Mass. App. Div. Dec. 2, 2002).

(c) There is no separate requirement that an insurer show reliance to rescind a policy. But an insurer is permitted—and will often find it easier—to prove materiality through evidence that if this insurer's underwriters had known the true facts, they would not have issued the policy or

would have increased the premium. In other words, the insurer may and often will choose to prove reliance, and proof of reliance is sufficient to prove materiality.

(d) A life insurance policy must provide that it becomes incontestable after it has been in force for two years, assuming the insured is still alive, and with certain permitted exceptions. *Mass. Gen. Laws* ch. 175, §132(2). There is no exception for fraud in the statute, and the Supreme Judicial Court has concluded that this omission was deliberate, and that a policy cannot create a fraud exception. Nor is the two-year period equitably tolled even if the insured willfully conceals the misrepresentation. *Protective Life Ins. Co. v. Sullivan*, 425 Mass. 615, 682 N.E.2d 624, 633 (1997). Finally, even during the initial two-year period, some life insurance policies may only be rescinded upon proof of fraud. *Mass. Gen. Laws* ch. 175, §124.

An accident-and-health insurance policy must provide that after two years from issuance the insurer may rescind or deny coverage only if there were fraudulent misstatements in the application. *Mass. Gen. Laws* ch. 175, §108(3)(a)(2).

(e) No, the insured does not have a duty to volunteer material information. If an insurer does not request a piece of information, the Massachusetts courts would deem that information non-material as a matter of law, and an insured would have no obligation to volunteer it. *Quincy Mut. Fire Ins. Co. v. Quisset Props., Inc.*, 69 Mass. App. Ct. 147, 153-54, 866 N.E.2d 966, 971 (2007).

If your jurisdiction requires a showing that misrepresentations be material, what constitutes materiality? Does there need to be some sort of causal nexus between the misrepresentation and ultimate loss?

In Massachusetts, a misrepresentation is material if a reasonable underwriter, knowing the truth of the matter, would have made a different decision as to whether or on what terms to issue the policy. *See, e.g., Fed. Ins. Co. v. HPSC, Inc.*, 480 F.3d 26, 34 (1st Cir. 2007). There is no need to show a nexus between the misrepresentation and the actual loss claimed by the insured at the time rescission is sought.

What types of proof can or must an insurer rely on to seek rescission?

An applicant's misrepresentation giving rise to a claim for rescission may be either written or oral. *Mass. Gen. Laws* ch. 175, §186.

While materiality is often characterized as an objective question—that is, whether a reasonable underwriter presented with the true facts would have declined to issue the policy, or would have done so on different terms—Massachusetts courts often permit an insurer to satisfy the materiality requirement with purely "subjective" evidence—that is, by testimony of the particular insurer's underwriters that if they had known the truth, it would have made a difference to them. *See, e.g., HPSC*, 480 F.3d at 34. Of course, for this to be true, the underwriters would have to be able to testify that they reviewed and relied upon the applicant's original representation.

To be sure, an insurer may seek to bolster its proof of materiality with "objective" evidence—for example, evidence that it had established underwriting policies or practices that would have mandated a different underwriting decision if the true facts were known; or expert testimony as to industry-wide underwriting practices and standards.

Alternatively, an insurer may proceed on a purely objective theory of materiality—by arguing that the fact misrepresented was so obviously material to any insurer's underwriting decision that it should be deemed material regardless of the particular underwriter's state of mind—that is, without any showing of reliance.

See, e.g., A.W. Chesterton Co. v. Mass. Insurers Insolvency Fund, 445 Mass. 502, 838 N.E.2d 1237, 1248-49 (2005) (upholding trial court's determination that insurer's own conduct showed that some misrepresentations on application were material and some were not); *Barnstable Cty. Ins. Co. v. Gale*, 425 Mass. 126, 680 N.E.2d 42, 44 (1997) (applicant for automobile insurance failed to disclose second vehicle; omission was material because insurer would have charged a higher premium, notwithstanding insured's argument that second vehicle did not objectively increase risk of loss); *Hanover Ins. Co. v. Leeds*, 42 Mass. App. Ct. 54, 674 N.E.2d 1091, 1094-95 (1997)

(same where application misstated principal place of garaging insured vehicle); *TIG Ins. Co. v. Blacker*, 54 Mass. App. Ct. 683, 767 N.E.2d 598, 601-02 (2002) (no proof from underwriting needed where applicant for professional liability insurance misrepresented knowledge about potential claims, a matter obviously material in this context); *F.D.I.C. v. Underwriters of Lloyd's*, 3 F. Supp. 2d 120, 139 (D. Mass. 1998) (proof of reliance not required for showing of materiality).

Does an actionable misrepresentation in a policy application render the policy voidable or void *ab initio*?

Under Massachusetts law, an applicant's material misrepresentation gives an insurer the right to rescind (make void) the policy; the misrepresentation does not by itself render the policy void *ab initio*. *John Hancock Mut. Life Ins. Co. v. Banjeri*, 62 Mass. App. Ct. 906, 815 N.E.2d 1091, 1094-95 (2004), *rev'd on other grounds*, 447 Mass. 875 (2006). Other than the statute cited in Item 1 above as to automobile insurance, there is no statute or regulation limiting the scope of a rescission, where permitted.

Upon a showing of the requisite elements of rescission, is rescission effective as to innocent insureds and third-parties?

As noted above, the Massachusetts declaratory judgment statute requires that an insurer that brings an action to establish a right to rescind name all interested persons as parties. This typically includes all claimants and other insureds. Hence, whether and to what extent the rescission is binding on such other persons will typically be established in the action.

Where an application calls for an individual applicant to provide information about himself and other potential insureds (*e.g.*, a managing partner on behalf of a law firm, or a spouse on behalf of another spouse), a material misrepresentation by the applicant will permit the insurer to rescind the policy outright, with binding effect on all insureds, regardless of their individual culpability in making the misrepresentation. However, where a policy contains a severability provision and an applicant's misrepresentation pertains only to himself and is not otherwise imputable to other insureds, the rescission may not apply to such innocent insureds. *See Shapiro v. Am. Home Assurance Co.*, 584 F. Supp. 1245, 1251-52 (D. Mass. 1984), later proceeding, 616 F. Supp. 900, 903-05 (D. Mass. 1984). In other circumstances, a rescission may be partial and only applicable to a particular policy benefit. *See, e.g.*, *John Hancock Mut. Life Ins. Co. v. Banerji*, 62 Mass. App. Ct. 906, 815 N.E.2d 1091, 1094-95 (2004), *rev'd on other grounds*, 447 Mass. 875 (2006).

A rescission, where permissible, is generally binding on a third-party claimant. However, a judgment creditor may reach and apply the compulsory limits of an automobile insurance policy even where the policy is otherwise subject to rescission. *Mass. Gen. Laws* ch. 175 §113A(5); *Espinal v. Liberty Mut. Ins. Co.*, 47 Mass. App. Ct. 593, 714 N.E.2d 844, 847 (1999).

Are there any statutory or regulatory time limits on seeking rescission of a policy? If so, does the statutory or regulatory language override or supersede express policy language allowing for rescission beyond the time limitation?

There are no statutory or regulatory time limits for seeking rescission, where permitted.

What is the requirement for an insurer to be considered to have waived its right to rescind the policy, and what other equitable defenses are available to insureds?

Does an insurer need to have actual knowledge that the insured has made a misrepresentation, or will constructive knowledge be sufficient?

Will an insurer be estopped from rescinding the policy if it waits too long to do so after acquiring actual or constructive knowledge of the misrepresentation?

When is an insurer required to investigate application answers? If an insurer is so required, does the duty extend only to "easily ascertainable" fraud, or does it go further?

If the insured intentionally made the misrepresentation or otherwise acted in bad faith, can there be any waiver by the insurer at all?

(a) Where an insurer learns of facts warranting rescission and fails to pursue its rights within a reasonable time, this may be deemed an intentional relinquishment of a known right (constructive waiver), or, where the insured relies on the insurer's inaction, may provide grounds for estoppel. *See Gen. Star Indem. Co. v. Duffy*, 191 F.3d 55, 58-59 (1st Cir. 1999); *Merrimack Mut. Fire Ins. Co. v. Nonaka*, 414 Mass. 187, 606 N.E.2d 904, 906-07 (1993). Waiver can only occur, however, where the insurer has "full knowledge" of the circumstances warranting rescission. *F.D.I.C.*, 3 F. Supp. 2d at 143-44, citing *Niagara Fire Ins. Co. v. Lowell Trucking Corp.*, 316 Mass. 652, 657, 56 N.E.2d 28 (1944).

(b) *See* (a).

(c) Massachusetts law does not impose upon an insurer any affirmative obligation to investigate and verify the accuracy of an applicant's representations. *Gen. Star Indem. Co. v. Duffy*, 191 F.3d 55, 58-59 (1st Cir. 1999).

(d) The same rules apply regardless of the applicant's state of mind.

Under what circumstances must an insurer refund the premiums to the insured when rescinding a policy, and when must the refund be dispensed? Does the insurer have to refund the premiums even in situations where the insured procured the policy through willful fraud?

Full rescission of a policy requires the insurer to refund the premium, regardless of the culpability of the applicant that gave rise to the rescission. Where an insurer provides a refund at the time of initial notice of the rescission, and the policyholder accepts the refund without a reservation of rights, this may be deemed a binding acquiescence to the rescission. *See Cont'l Ins. Co. v. Bahnan*, 216 F.3d 150, 153 (1st Cir. 2000). Alternatively, an insurer can make clear in a declaratory judgment action its readiness and willingness to issue a refund, but wait until it actually obtains a declaratory judgment as to its right to rescind before proceeding to issue the refund. *See John Hancock Mut. Life Ins. Co. v. Banerji*, 815 N.E.2d at 1095.

Are there any other notable cases or issues regarding an insurer's right and ability to rescind?

A dispute over alleged misrepresentation on an application will often turn on a reading of the application question at issue and interpretation of what it required of the applicant. A true ambiguity in the wording of a question—that is, one that makes the question susceptible to reasonable disagreement as to its meaning—will be construed against the insurer. *Hingham Mut. Fire Ins. Co. v. Mercurio*, 71 Mass. App. Ct. 21, 878 N.E.2d 946, 949 (2008); *Hakim v. Mass. Insurers' Insolvency Fund*, 424 Mass. 275, 675 N.E.2d 1161, 1165 (1997); *Tr. of Tufts Univ. v. Commercial Union Ins. Co.*, 415 Mass. 844, 616 N.E.2d 68, 72 (1993).

In the 2017 case *Schultz v. Tilley*, 91 Mass. App. Ct. 539, the Massachusetts Appeals Court found ambiguity in a question on an application for homeowner's insurance that asked about the "bite history" of any household dogs, and thus overruled a trial court's judgment allowing rescission where the policyholder had denied any "bite history" despite two recent incidents where his dog had attacked and bitten other dogs. The court upheld as reasonable the policyholder's contention that he thought the question was limited to human victims.

The insurer must show that the applicant (*i.e.*, the insured) was responsible for the misrepresentation. This can be complicated where an agent was involved in preparing the disputed application. If the agent erred in completing the form (for example, by never asking the applicant the question at issue, or misunderstanding the question asked or the applicant's answer), the insurer must show that the agent's error should be imputed to the policyholder. *See Guerrier v. Commerce Ins. Co.*, 66 Mass. App. Ct. 351, 847 N.E.2d 1113, 1118 (2006) (no rescission permitted where agent was responsible for misstatement in application signed in blank by insured); *RLI Ins. Co. v. Santos*, 746 F. Supp. 2d 255, 267-68 (D. Mass.

2010) (permitting rescission where agent failed to have insured sign application); *Merchants Ins. Grp. v. Mr. Cesspool, LLC*, No. 08–cv–12040–DPW, 2010 WL 2836859, at *4-7 (D. Mass. July 19, 2010) (granting summary judgment of rescission; in case where agent involved, insured can prevent rescission only by showing that he gave agent correct oral answers to questions and that they were wrongly recorded; also discusses the effect of the insured's failure to read an application—if the error would have been evident, failure to read is no excuse.).

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