

Pennsylvania

By Michael Hamilton and Thomas J. Seery

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

In order to seek rescission of an insurance policy, an insurer may, upon notice of facts supporting the rescission, either (1) return the premiums to the insured and rescind the policy, or (2) keep the premiums and file an action with a court to seek a judicial declaration that rescission is proper. Pennsylvania recognizes rescission at law and rescission in equity. “Rescission requires ‘either that the rescinding party return what he received before a rescission could be effected (rescission at law), or else that a court affirmatively decree rescission (rescission in equity).’” *Aspen Specialty Ins. Co. v. Hosp. Supportive Sys., LLC*, No. 16-1133, 2016 U.S. Dist. Lexis 75110, at *9 (E.D. Pa. June 9, 2016) (citing *Deutsche Bank Nat. Trust Co. v. Gardner*, 125 A.3d 1221, 1227 (Pa. Super. Ct. 2015)).

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?

Under Pennsylvania law, an insurance policy can be rescinded and is void *ab initio* for misrepresentation when the insurer establishes three elements: (1) that the representation was false; (2) that the insured knew that the representation was false when made or made it in bad faith; and (3) that the representation was material to the risk of being insured. *S.B. v. United of Omaha Life Ins. Co.*, 2013 U.S. Dist. Lexis 83642, 10–11 (E.D. Pa. June 13, 2013). *See also Burkert v. The Equitable Assurance Society of Amer-*

ica, 287 F.3d 293, 296–97 (3d Cir. 2002); *Shafer v. John Hancock Mut. Life Ins. Co.*, 189 A.2d 234, 236 (Pa. 1963).

In order to satisfy the second element of the test, the insured must have known that the representation was false when it was made, or the representation must have been made in bad faith. The Supreme Court of Pennsylvania defines bad faith as an action undertaken with the purpose of fraud, dishonesty, or corruption. *See Thunberg v. Stause*, 682 A.2d 295, 299 (Pa. 1996); *Frick v. McClelland*, 122 A.2d 43 (Pa. 1956). When determining whether a misrepresentation on an insurance application is fraudulent, “[i]t is sufficient to show that [the representations] were false in fact, and that the insured knew they were false when he made them ... since an answer known by an insured to be false, when made is presumptively fraudulent.” *A.G. Allebach, Inc. v. Hurley*, 540 A.2d 289, 295 (Pa. Super. Ct. 1988) (quoting *Baldwin v. Prudential Ins. Co.*, 258 A.2d 660, 662 (Pa. Super. Ct. 1969)).

Pennsylvania law permits an inference of bad faith as a matter of law in situations where an insured did not personally fill out an application of insurance, the application responses contained false information, and the insured verified the accuracy of the statements in the application with his signature. *See American Franklin Ins. Co. v. Galati*, 776 F. Supp. 1054, 1060–61 (E.D. Pa. 1991). *See also Peer v. Minnesota Mut. Fire & Cas. Co.*, 1995 U.S. Dist. Lexis 4045 at *17 (E.D. Pa. Mar. 27, 1995) (holding an insurance applicant may not avoid the responsibilities imposed by the application simply because the insured signed a blank form’s affirmation that he has read and attests to the accuracy of the application’s contents, but then had another fill in the responses).

In order to rescind a policy, an insurer must prove that the insured knowingly made the material misrepresentation by clear and convincing evidence. *Tudor Ins. Co. v. Twp. of Stowe*, 697 A.2d 1010, 1016

(Pa. Super. Ct. 1997). See also *N.Y. Life Ins. Co. v. Brandwene*, 172 A. 669, 670 (Pa. 1934).

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

There is no authority in Pennsylvania that provides for an additional element of an insurer's reliance on a material misrepresentation on an insurance application in order to rescind a policy.

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?

In Pennsylvania, motor vehicle insurance policies become "incontestable" after 60 days; however, insurers are permitted to rescind a policy after the expiration of this period "when the fraud could not reasonably have been discovered within the 60-day period" and is "limited to those instances where the undiscovered fraud was of such a nature that it is clear that an insurer would never have accepted the risk inherent in issuing the policy." *Erie Ins. Exch. v. Lake*, 671 A.2d 681, 686 (Pa. 1996).

In Pennsylvania, health and accident insurance policies are "incontestable" after three years. 40 Pa. Stat. Ann. §753 (LexisNexis, Lexis Advance through 2016 Regular Session Acts 1-174; P.S. documents are current through 2016 Regular Session Acts 1-85 and 87-114). However, insurers may contest the policy after the expiration of this period for reasons of fraudulent misstatements in the insurance application. See *Sadel v. Berkshire Life Ins. Co. of Am.*, 473 F. App'x 152, 155 (3d Cir. 2012).

In Pennsylvania, life or endowment insurance become incontestable after two years. 40 Pa. Stat. Ann. §510 (LexisNexis, Lexis Advance through 2016 Regular Session Acts 1-174; P.S. documents are current through 2016 Regular Session Acts 1-85 and 87-114). After the expiration of this period, the clause bars insurers from contesting the validity of the policy, but not from challenging policy coverage. See *Groll v. Safeco Life Ins. Co.*, 566 A.2d 269, 270 (Pa.

Super. Ct. 1989) (citing *Perilstein v. Prudential Ins. Co. of America*, 29 A.2d 487 (Pa. 1943)).

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?

The Pennsylvania Supreme Court has yet to rule on whether an insurer may rescind an insurance policy based on an insured's failure to volunteer material information that was not requested by the application. The District Court of the Eastern District of Pennsylvania, when analyzing a case under Pennsylvania law, has stated in dicta that "an applicant is under no duty to volunteer information where no question plainly and directly requires it to be furnished." *Bogatin v. Fed. Ins. Co.*, 2000 U.S. Dist. Lexis 8632, at *68 (E.D. Pa. June 21, 2000) (citing *Vella v. Equitable Life Assurance Society of the United States, et al.*, 887 F.2d 388, 392 (2d Cir. 1989)). However, in making this assertion, the district court cited a Second Circuit case analyzing New York substantive law, and did not address specifically whether the legal premise was applicable under Pennsylvania law.

Pennsylvania courts have stated that an insured has a duty to not make any material misrepresentations on an insurance application, which includes the failure to disclose material information. Pennsylvania courts have held that rescission is available when an insurer can demonstrate with clear and convincing evidence that the insured knowingly failed to disclose information that was material to the risk against which the insured sought to be protected. *Rohm & Haas Co. v. Continental Cas. Co.*, 732 A.2d 1236, 1251 (Pa. Super. Ct. 1999). See also *A.G. Allebach, Inc. v. Hurley*, 540 A.2d 289 (Pa. Super. Ct. 1988).

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?

Pennsylvania courts have defined materiality, with regards to misrepresentations on insurance policies,

as a false statement that would naturally influence the insurer's issuance of the policy, assessment of the risk, or pricing of the premium. *A.G. Allebach, Inc. v. Hurley*, 540 A.2d 289 (Pa. Super. Ct. 1988). See also *Baldwin v. Prudential Ins. Co.*, 258 A.2d 660, 662 (Pa. Super. Ct. 1969) (stating facts are "material if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium").

Inquiries into prior medical treatment and hospitalizations are material as a matter of law for life insurance and disability insurance policies. *Friel v. UNUM Life Ins. Co. of Am.*, 1998 U.S. Dist. Lexis 18578, at *9 (E.D. Pa. Nov. 16, 1998) (citing *Knepp v. Nationwide Ins. Co.*, 471 A.2d 1257, 1263 (Pa. Super. Ct. 1984)).

Additionally, "a misrepresentation may be material even though it does not affect determination of the premium." *Whitford Land Transfer Co. v. Seneca Ins. Co.*, 2008 U.S. Dist. Lexis 89097, at *29–30 (E.D. Pa. Oct. 31, 2008) (quoting *Provident Life & Accident Ins. Co. v. Charles*, 1993 U.S. Dist. Lexis 5030 at *17–18 (E.D. Pa. Apr. 14, 1993)); *N.Y. Life Ins. Co. v. Johnson*, 923 F.2d 279, 282 (3d Cir. 1991) (stating "[a]nything which increases the risk cannot be immaterial."). A statement is material if it is relevant to the risk assumed, even if it is unrelated to the loss actually incurred. *Woods v. Nat'l Life & Acci. Ins. Co.*, 380 F.2d 843, 848 n.12 (3d Cir. 1967). See also *Shafer v. John Hancock Mut. Life Ins. Co.*, 189 A.2d 234, 237 (Pa. 1963).

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

In order to determine what is necessary to demonstrate that a misrepresentation is material, Pennsylvania courts have held that "[e]very fact untruly asserted or wrongfully suppressed must be regarded as material if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium." *Baldwin v. Prudential Ins. Co.*, 258 A.2d 660, 662 (Pa. Super. Ct. 1969) (quoting 7 Couch on Insurance 2d, §35:79, p. 94 (1961)).

Pennsylvania courts have relied on the testimony of an underwriter to determine that an insurer

would not have issued a life insurance policy to its insured had it known of the insured's material misrepresentations on the insurance application, and thus deemed the policy void *ab initio*. *Cummings v. Am. Gen. Life Ins. Co.*, 2008 U.S. Dist. Lexis 37157, at *16–19 (E.D. Pa. May 6, 2008) (holding that an insured's failure to disclose recent cocaine use on a life insurance application was a material misrepresentation that permitted rescission, a decision based in part on an underwriter's affidavit testimony that applicable underwriting guidelines would not have permitted the insurer to issue the policy had the withheld information been disclosed on the application).

Pennsylvania law permits reliance on documentary evidence in order to seek rescission. *Shafer v. John Hancock Mut. Life Ins. Co.*, 189 A.2d 234, 236–37 (Pa. 1963) (quoting *Freedman v. Mutual Life Ins. Co.*, 21 A.2d 81 (Pa. 1941)) ("Where it affirmatively appears from sufficient documentary evidence, that the policy was issued in reliance on false and fraudulent statements, made by or on behalf of the insured, as where false answers are shown to have been given by the insured under such circumstances that he must have been aware of their falsity, the court may direct a verdict or enter judgment for the insurer."). If uncontradicted documentary evidence establishes that an insured received medical treatment so recently that "a person of ordinary intelligence could not have forgotten these incidents" when completing an insurance application, a court may infer as a matter of law that the insured knew the statements were false when seeking rescission. *Grimes v. Prudential Ins. Co.*, 585 A.2d 29, 31 (Pa. Super. Ct. 1991).

Pennsylvania law allows for an inference of bad faith, sufficient to satisfy the second element of the test to determine whether an insurance policy may be rescinded for misrepresentation, when the plaintiff reviews and signs an application that contains misrepresentations. See *American Franklin Ins. Co. v. Galati*, 776 F. Supp. 1054, 1060–61 (E.D. Pa. 1991). In *American Franklin*, the Court found that whether the plaintiff personally filled out the application was immaterial, because the fraudulent statements are imputed to the plaintiff through his signed affirmation that he read and attested to the truth of the application's contents. *Id.* at 1061. The Court went on to state that if the plaintiff did not review the misrep-

representations in the application prior to signing the application, and instead relied on someone else to provide appropriate answers, then the act of signing the application constituted bad faith sufficient for rescission. *Id.*

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

An insurance policy is void *ab initio* for misrepresentation when the insurer establishes three elements: (1) that the representation was false; (2) that the insured knew that the representation was false when made or made it in bad faith; and (3) that the representation was material to the risk of being insured. *S.B. v. United of Omaha Life Ins. Co.*, 2013 U.S. Dist. Lexis 83642, *10–11 (E.D. Pa. June 13, 2013). *See also Burkert v. The Equitable Assurance Society of America*, 287 F.3d 293, 296–97 (3d Cir. 2002).

See also the response to question 7 regarding incontestability statutes.

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

Insurers are prevented from rescinding benefits to an innocent third party involved in a motor vehicle accident, when a motor vehicle operator acquires automobile insurance through fraud or material misrepresentation on an insurance application, the operator injures an innocent third party, and the insurer rescinds the operator's policy based on the fraud or misrepresentation. *See Erie Ins. Exch. v. Lake*, 671 A.2d 681 (Pa. 1996). *See also Infinity Select Ins. Co. v. Fleming*, 2016 Pa. Super. Unpub. Lexis 3755 (Pa. Super. Ct. 2016).

Pennsylvania courts have not specifically addressed the issue of the effect of rescission on innocent co-insureds. However, Pennsylvania law does provide that when determining whether an innocent co-insured is precluded from recovering under a policy in which the actions of one insured causes a denial of coverage, courts look to “whether the policy treats each insured as jointly or severally covered; the distinction being policies offering joint coverage impose a duty on any policyholder to be

responsible for the acts of another policyholder, whereas several coverage covers each insured irrespective of the actions of their co-insureds.” *See Kundahl v. Erie Ins. Grp.*, 703 A.2d 542, 544 (Pa. Super. Ct. 1997). *See also McAllister v. Millville Mut. Ins. Co.*, 640 A.2d 1283 (Pa. Super. Ct. 1994). If the insureds' interests in the policy is joint, then the innocent co-insured is denied coverage if the actions of any other insured would preclude coverage, but if the interests are several, the actions of another insured cannot cause coverage to be denied to an innocent co-insured. *Kundahl v. Erie Ins. Grp.*, 703 A.2d 542, 544 (Pa. Super. Ct. 1997).

Pennsylvania courts have held that misrepresentations made by an insured's agent are imputed to an insured who is ignorant of the agent's misrepresentations. *See Luber v. Underwriters at Lloyd's*, 1992 U.S. Dist. Lexis 18376, at *14–15 (E.D. Pa. Nov. 13, 1992) (holding that if an insured does not review an insurance application but instead signs a blank application and relies on his insurance broker to provide answers, any misrepresentation on the application constitutes bad faith sufficient to rescind the policy under Pennsylvania law); *Am. Home Assur. Co. v. Church of Bible Understanding*, 2006 U.S. Dist. Lexis 63859, at *18 (E.D. Pa. Sep. 6, 2006) (“[U]nder Pennsylvania law, an insured is not relieved from responsibility for misstatements in an insurance application that are made by an insurance broker, rather than the insured.”). *See also Bird v. Penn Central Co.*, 341 F. Supp. 291, 295 (E.D. Pa. 1972) (“Where the agent of the insured, in effecting an insurance, makes a false and unauthorized representation, the policy is void.”) (quoting *Mundorff v. Wickersham*, 63 Pa. 87, 89 (Pa. 1870)).

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?

Pennsylvania statutes provide the following time limits after which certain types of insurance policies become incontestable. However, insurers may still be granted rescission if certain requirements are met.

Motor Vehicle Insurance

Pennsylvania's *Act 68* provides restrictions regarding the manner by which motor vehicle insurance policies can be terminated, including that an insurer is permitted only a 60-day period to terminate a policy after it is issued. *See* 40 Pa. Stat. Ann. §991.2001 *et seq.* (LexisNexis, Lexis Advance through 2016 Regular Session Acts 1-174; P.S. documents are current through 2016 Regular Session Acts 1-85 and 87-114). However, an insurer may rescind an insurance policy, despite the expiration of the 60-day period, "when the fraud could not reasonably have been discovered within the 60-day period" and is "limited to those instances where the undiscovered fraud was of such a nature that it is clear that an insurer would never have accepted the risk inherent in issuing the policy." *Erie Ins. Exch. v. Lake*, 671 A.2d 681, 686 (Pa. 1996) (referencing *Act 68's* predecessor, *Act 78*, 40 Pa. Stat. Ann. §1008 *et seq.* [Repealed] (LexisNexis, Lexis Advance through 2016 Regular Session Acts 1-174; P.S. documents are current through 2016 Regular Session Acts 1-85 and 87-114)).

Life and Endowment Insurance

Pennsylvania law provides a two-year time limit after which life or endowment insurance is incontestable. This provision does not contain any explicit exception for fraudulent misstatements. Pennsylvania courts have held that an incontestability clause bars the insurer from challenging the validity of a policy, but does not bar a challenge to policy coverage. *Groll v. Safeco Life Ins. Co.*, 566 A.2d 269, 270 (Pa. Super. Ct. 1989) (citing *Perilstein v. Prudential Ins. Co. of America*, 29 A.2d 487 (Pa. 1943)). When incontestability is triggered under a life insurance policy, defenses based on the conditions of insurance are barred, but defenses based on coverage limitations are allowed. *Groll*, 566 A.2d at 271. In *Groll*, the Pennsylvania Superior Court held that the question of whether an employee was eligible for enrollment in his employer's group life insurance policy was a condition of insurance, and was therefore an issue of policy coverage that barred the insurer from using an incontestability defense to deny life insurance coverage. *Groll*, 566 A.2d at 271. The relevant statute follows:

40 Pa. Stat. Ann. §510. Uniform Policy Provisions. No policy of life or endowment insurance, except policies of industrial insurance

where the premiums are payable monthly or oftener, shall hereafter be delivered in this Commonwealth unless it contains, in substance, the following provisions or provisions which, in the opinion of the Insurance Commissioner, are more favorable to the policyholder:

* * *

- (c) A provision that the policy shall be incontestable after it has been in force, during the lifetime of the insured, two years from its date of issue, except for nonpayment of premiums; and that, at the option of the company, provisions relative to disability benefits, and provisions which grant additional insurance specifically against death by accident or accidental means, may also be excepted.

40 Pa. Stat. Ann. §510 (LexisNexis, Lexis Advance through 2016 Regular Session Acts 1-174; P.S. documents are current through 2016 Regular Session Acts 1-85 and 87-114).

Health and Accident Insurance

Pennsylvania law provides a three-year time limit after which health and accident insurance are incontestable based on "misstatements" made in the application. However, the statute provides an exception that permits insurers to contest the policy on the basis of "fraudulent misstatements" after the contestability period expires and does not suggest any special, higher burden for establishing fraud beyond the incontestability period. *See Sadel v. Berkshire Life Ins. Co. of Am.*, 473 F. App'x 152, 155 (3d Cir. 2012).

The relevant statute follows:

40 Pa. Stat. Ann. §753. Policy Provisions. (A). Required Provisions. Except as provided in paragraph (C) of this section, each such policy delivered or issued for delivery to any person in this Commonwealth shall contain the provisions specified in this subsection in the words in which the same appear in this section: provided, however, that the insurer may, at its option, substitute for one or more of such provisions corresponding provisions of different wording approved by the commissioner which are in each instance not less favorable in any respect to the insured or the beneficiary. Such provisions shall be preceded individually by the caption appearing in this

subsection or, at the option of the insurer, by such appropriate individual or group captions or sub-captions as the commissioner may approve.

* * *

- (2) A provision as follows: Time Limit on Certain Defenses: (a) After three years from the date of issue of this policy no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such three year period.

(The foregoing policy provision shall not be so construed as to affect any legal requirement for avoidance of a policy or denial of a claim during such initial three year period, nor to limit the application of section six hundred eighteen (B), (1), (2), (3), (4) and (5) in the event of misstatement with respect to age or occupation or other insurance.)

(In a policy where the premiums are payable weekly, the words “if such application is made a part of the policy” may be inserted in the foregoing policy provision between the word “policy” and the word “shall” immediately following.)

(A policy which the insured has the right to continue in force subject to its terms by the timely payment of premium (1) until at least age fifty or, (2) in the case of a policy issued after age forty-four, for at least five years from its date of issue, may contain in lieu of the foregoing the following provision (from which the clause in parentheses may be omitted at the insurer’s option) under the caption “Incontestable”. After this policy has been in force for a period of three years during the lifetime of the insured (excluding any period during which the insured is disabled), it shall become incontestable as to the statements contained in the application.)

40 Pa. Stat. Ann. §753 (LexisNexis, Lexis Advance through 2016 Regular Session Acts 1-174; P.S. documents are current through 2016 Regular Session Acts 1-85 and 87-114).

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?

In order for an insured to establish that the insurer committed a waiver under Pennsylvania law when an insured intentionally made a misrepresentation on an insurance policy and the insurer failed to rescind, “there must be sufficient knowledge disclosed to the insurer that there is some falsity in the statement by the insured or something of some significance which would put a reasonably prudent person on notice to make further inquiry.” *Matinchek v. John Alden Life Ins. Co.*, 93 F.3d 96, 102 (3d Cir. 1996) (citing *First Pennsylvania Banking and Trust Co. v. United States Life Ins. Co.*, 421 F.2d 959, 963 (3d Cir. 1969)). To establish that an insurer committed a waiver, “the evidence must show the acts of the insurance company constituted a voluntary, intentional relinquishment of a known right and the insurer had full knowledge of all pertinent facts.” *Royal Indem. Co. v. Deli by Foodarama, Inc.*, 2005 U.S. Dist. Lexis 3301, at *10 (E.D. Pa. Mar. 2, 2005) (citing *Wasilko v. Home Mut. Cas. Co.*, 232 A.2d 60, 63 (Pa. Super Ct. 1967)).

Under Pennsylvania law, “the burden of proof is on the party asserting the waiver.” *Royal Indem. Co. v. Deli by Foodarama, Inc.*, 2005 U.S. Dist. Lexis 3301, at *13 (E.D. Pa. Mar. 2, 2005) (citing *Shane v. WCAU-TV, CBS Television Stations, Div. of CBS, Inc.*, 719 F. Supp. 353, 357 (E.D. Pa. 1989)).

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?

An insurer can be estopped from rescinding a policy. If an insurer had knowledge of a material misrepresentation but reviewed and renewed a policy, the insurer waives its right to rescind the policy. *Bhd. Mut. Ins. Co. v. Salem Baptist Church*, 985 F. Supp.

2d 624, 635 (E.D. Pa. 2013). The District Court of the Eastern District of Michigan, applying Pennsylvania law, stated that a “party who continues to work under a Pennsylvania contract after the other party has breached thereby waives the right to rescind.” *McAlpine v. AAMCO Automatic Transmissions, Inc.*, 461 F. Supp. 1232, 1250–51 (E.D. Mich. 1978). Insurers are not, however, barred from rescinding policies for the sole reason that the policy has already expired. *Aspen Specialty Ins. Co. v. Hosp. Supportive Sys., LLC*, 2016 U.S. Dist. Lexis 75110, at *10 (E.D. Pa. June 9, 2016).

Pennsylvania law regarding the timeframe to rescind contracts is also relevant to this analysis. In Pennsylvania, the non-breaching party must act promptly to rescind a contract from the viewpoint of a reasonably prudent person. *Stafford Investments, LLC v. Vito*, 375 F. App’x 221, 223–24 (3d Cir. 2010) (citing *Siskin v. Cohen*, 70 A.2d 293, 294–95 (Pa. 1950)). Further, in a case involving a real estate transaction, the Pennsylvania Supreme Court held that rescission is not available if the party seeking a rescission fails to act promptly on its potential claim for rescission. Prompt action is a prerequisite to the remedy of rescission. *Schwartz v. Rockey*, 932 A.2d 885, 894 (Pa. 2007) (citing *Fichera v. Gording*, 227 A.2d 642, 643–44 (Pa. 1967)). The Pennsylvania Supreme Court explained that:

When a party discovers facts which warrant rescission of his contract, it is his duty to act promptly, and, in case he elects to rescind, to notify the other party without delay, or within a reasonable time. If possible, the rescission should be made while the parties can still be restored to their original positions. Failure to rescind within a reasonable time is evidence, and may be conclusive evidence, of an election to affirm the contract.

Fichera, 227 A.2d at 643–44 (quoting 8 Pennsylvania Law Encyclopedia §258 at 280–281).

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?

Upon learning of a possible misrepresentation on an insurance application, an insurer is required to “make further inquiry.” *Matinchek v. John Alden Life*

Ins. Co., 93 F.3d 96, 102 (3d Cir. 1996). The duty to investigate further, or request further clarification of an application answer, exists only “if the [insurer] was in possession of information warning it of the falsity of the answers in the application would the duty devolve upon it to make independent inquiry or be held bound by the knowledge such inquiry would have disclosed.” *Hered LLC v. Seneca Ins. Co.*, 420 F. App’x 143, 148 (3d Cir. 2011) (citing *Franklin Life Ins. Co. v. Bieniek*, 312 F.2d 365, 375 (3d Cir. 1972)).

When an insurance company decides to investigate a claim, an independent investigation does not deprive “the insurer of the right to rely upon misrepresentations made by the applicant” unless the investigation reveals “facts sufficient to expose the falsity of the representations of the applicant to put the insurer upon further inquiry.” *Royal Indem. Co. v. Deli by Foodarama, Inc.*, 2005 U.S. Dist. Lexis 3301, at *11 (E.D. Pa. Mar. 2, 2005) (citing *Crawford v. Manhattan Life. Ins. Co.*, 221 A.2d 877, 886 (Pa. Super. Ct. 1966)). See also *Franklin Life Ins. Co. v. Bieniek*, 312 F.2d 365 (3d Cir. 1962).

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

If the insured intentionally made a misrepresentation or otherwise acted in bad faith, the insurer can waive its ability to rescind, as stated in the above examples. Intentional or bad faith misrepresentations are both considered sufficient to rescind a policy should the misrepresentations also be false and material. See *S.B. v. United of Omaha Life Ins. Co.*, 2013 U.S. Dist. Lexis 83642, 10–11 (E.D. Pa. June 13, 2013).

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?

Pennsylvania permits the unilateral rescission of insurance contracts as a remedy for misrepresentations.

tations made by the insured in an insurance application, without a judicial determination, so long as premiums are returned to the insured. *Friel v. UNUM Life Ins. Co. of Am.*, 1998 U.S. Dist. Lexis 18578 (E.D. Pa. Nov. 16, 1998) (involving policy providing disability insurance); *Associated Elec. & Gas Ins. Servs. v. Rigas*, 382 F. Supp. 2d 685 (E.D. Pa. 2004) (involving policy providing liability insurance); *Knepp v. Nationwide Ins. Co.*, 471 A.2d 1257, 1260 (Pa. Super. Ct. 1984) (involving policy providing health insurance); *King*, 2016 U.S. Dist. Lexis at *10 (involving policy providing health insurance). This unilateral rescission, or “rescission at law,” requires “that the rescinding party return what he received before a rescission could be effected ...” *Aspen Specialty Ins. Co. v. Hosp. Supportive Sys., LLC*, 2016 U.S. Dist. Lexis 75110, at *9 (E.D. Pa. June 9, 2016) (citing *Deutsche Bank Nat. Trust Co. v. Gardner*, 125 A.3d 1221, 1227 (Pa. Super. Ct. 2015)). Pennsylvania law provides that “unilateral rescission of a contract remains an optional remedy for an insurance carrier.” *King v. Golden Rule Ins. Co.*, No. 16-3614, 2016 U.S. Dist. Lexis 175157, at *10 (E.D. Pa. Dec. 19, 2016).

In contrast, Pennsylvania recognizes a second type of rescission, “rescission in equity,” which requires a court to “affirmatively decree rescission” with a judicial determination. *Aspen Specialty Ins. Co. v. Hosp. Supportive Sys., LLC*, 2016 U.S. Dist. Lexis 75110, at *9 (E.D. Pa. June 9, 2016) (citing *Deutsche Bank Nat. Trust Co. v. Gardner*, 125 A.3d 1221, 1227 (Pa. Super. Ct. 2015)). There is no case law in Pennsylvania to support the notion that equitable rescission mandates the return of insurance premiums before the insurer can bring a claim seeking rescission. *Aspen Specialty Ins. Co. v. Hosp. Supportive Sys., LLC*, No. 16-1133, 2016 U.S. Dist. Lexis 75110, at *10 (E.D. Pa. June 9, 2016) (citing *Deutsche Bank Nat. Trust Co. v. Gardner*, 125 A.3d 1221, 1227 (Pa. Super. Ct. 2015)).

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

The United States Court of Appeals for the Third Circuit recently issued a decision in *H.J. Heinz Co. v. Starr Surplus Lines Ins. Co.*, No. 16-1447, 2017 U.S. App. Lexis 510 (3d Cir. Jan. 11, 2017). This decision, which focused on issues including choice of law, rescission, and waiver of rescission, has been closely followed through the appellate ranks in Pennsylvania. The court determined that New York rescission law applied to the policy, so substantive issues surrounding its holding on rescission law are addressed in the New York section of this compendium.

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