New Jersey

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Formation of a Life Insurance Contract

Insurable Interest Requirement

For the purpose of life insurance, health insurance or annuities, New Jersey statutes provide that an individual has an insurable interest in his own life, health, and bodily safety. N.J.S.A.17B:24-1.1. An individual also has an insurable interest in the life, health, and bodily safety of another individual with whom he is "closely related by blood or by law and in whom he has a substantial interest engendered by love and affection." *Id.* Similarly, an individual liable for the support of a child or former wife or husband may procure a policy of insurance on that child or former wife or husband. *Id.*

The same statute further provides that an individual has an insurable interest in the life, health, and bodily safety of another if he "has an expectation of pecuniary advantage through the continued life, health and bodily safety of that individual and consequent loss by reason of his death or disability." *Id.*

In New Jersey, a corporation has an insurable interest in the life, physical and mental ability of any of its (or its subsidiaries') directors, officers, employees or any other person whose death or physical or mental disability might cause financial loss to the corporation. A corporation may also have an insurable interest pursuant to a contractual arrangement with any shareholder; pursuant to contracts obligating the corporation to compensation arrangements; and contracts obligating the corporation to act as a guarantor or surety of a principal obligor. *Id.* A nonprofit or charitable entity qualified under 26 U.S.C. §501(c)(3), or a government entity has an insurable interest in the life, physical, or mental ability of its directors, officers, employees, supporters or their designees or others to whom it may look for counsel, guidance, fundraising or assistance in the execution of its legally established purpose, under certain conditions. *Id.*

Under N.J.S.A. 17B:24-2, a minor not less than 15 years of age may contract for annuities or insurance.

Must the Insured Sign the Application?

There is no specific New Jersey statute or regulation requiring a life insurance applicant to sign an application. The applicant is required, however, to sign a statement as to whether the applicant has existing policies or contracts. N.J.A.C. 11:4–2.3.

An alteration or amendment to an application cannot be made by a person other than the applicant without his written consent. N.J.S.A. 17B:24-3(c). With or without a signature, no application for any life or health insurance policy or annuity contract shall be admissible in evidence in any action relative to such policy or contract, unless a copy of the application was attached to or endorsed upon the policy or contract when issued. N.J.S.A. 17B:24-3a.

Conditional Receipt/Temporary Insurance Application and Agreement ("TIAA")

A conditional receipt provides interim life insurance coverage as of the date the coverage was applied for while the application is evaluated during the underwriting process. *See Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 307, 208 A.2d 638, 646 (1965). Applying the doctrine of reasonable expectations, the court stated that "the very acceptance of the premium in advance tends naturally towards the understanding of immediate coverage though it be temporary and terminable…." *Id.* at 302, 208 A.2d at 642.

In a separate case, the New Jersey Supreme Court held that a conditional receipt is subject to equitable rescission based upon material misrepresentations in the application. *Mass. Mut. Life Ins. Co. v. Manzo*,

122 N.J. 104, 113, 584 A.2d 190, 194 (1991) (applying N.J.S.A. 17B:24-3 to conditional receipt).

Does the Insurer's Acceptance and Retention of a Premium Create a Life Insurance Policy?

New Jersey courts hold that receipt of an initial premium with an application may bind an insurer to interim coverage, even without a conditional receipt. *Von Milbacher v. Teachers Ins. & Annuity Ass'n*, 1988 WL 113353, at *5 (D.N.J. 1988), *on reconsideration in part*, 1988 WL 142322 (D.N.J. 1988). The court found the doctrine of reasonable expectations will affect a "binder" when two elements are present: "(a) events comprising a solicitation for insurance which are ambiguous in that they can support an objective and reasonable expectation of interim coverage, and (b) the insurer's failure to terminate the interim contract." *Von Milbacher*, 1988 WL 113353, at *5.

If an insurer, directly or through an agent, issues a conditional receipt upon receiving payment of an initial premium, then the conditional receipt is enforceable pursuant to its terms. *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 307, 208 A.2d 638, 646 (1965).

In connection with reinstatement after lapse, mere submission of an overdue premium, even if accepted by the insurer, is insufficient to reinstate coverage. *See*, *e.g.*, *Glezerman v. Columbian Mut. Life Ins. Co.*, 944 F.2d 146, 154 (3d Cir. 1991); *Hogan v. John Hancock Mut. Life Ins. Co.*, 195 F.2d 834, 837 (3d Cir. 1952). The reinstatement conditions set forth in the policy, presumably in compliance with N.J.S.A 17B:25-9, will be enforced.

Good Health Requirement at Time of Delivery

A good health requirement is enforceable as a condition precedent if clearly and unambiguously stated in either the application or policy. *Kramer v. Metropolitan Life Ins. Co.*, 494 F. Supp. 1026, 1031 (D.N.J. 1980); *Metropolitan Life Ins. Co. v. Somers*, 137 N.J. Eq. 419, 426 (Ch. Div. 1946). For example, a statement that "no insurance shall take effect unless… there has been no change in health and insurability from that described in this application" has been upheld. *Protective Life Ins. Co. v. Van Sant*, 1992 U.S. Dist. Lexis 15404, at *9 (D.N.J. Sept. 21, 1992). The court determined that before the policy containing this language took effect this condition precedent must have been satisfied, *i.e.*, there must have been no change, at the time of delivery, in the applicant's health and insurability from that originally described in his application.

Free Look Period After Policy Delivery

New Jersey statutory law requires that all individual policies of life insurance contain a term providing that an insured may, within ten days after receipt, cancel a policy and receive a prompt refund of any premium paid, plus policy fees and other charges. N.J.S.A. 17B:25-2.1. A policy term that permits a period of greater than ten days has been held consistent with this statute. *Glushowsky v. Boyarsky*, 2011 U.S. Dist. Lexis 90586 (D.N.J. Aug. 15, 2011).

Electronic Signature Requirements

Electronic signatures are permitted in New Jersey if the statutory and administrative requirements are met under the Uniform Electronic Transactions Act (the "UETA"). N.J.S.A. 12A:12-1, *et seq.* The UETA is designed to ensure that transactions in the electronic marketplace are as enforceable as transactions memorialized on paper with manual signatures. The UETA does not change the substantive rules of law that apply to such transactions. Accordingly, the objective of the UETA is limited to providing that an electronic record of a transaction is equivalent to a paper record, and that an electronic signature will be given the same legal effect as a manual signature. The UETA essentially provides that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form. In addition, a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. The UETA, however, does not apply to the cancellation or termination of health insurance or life insurance policies. N.J.S.A. 12A:12-3(c).

The New Jersey Administrative Code clarifies the UETA in sections N.J.A.C. 11:1-47.3 and 47.4. These regulations require that all parties to a transaction must agree to the use of electronic records for the

transaction to be given effect. The regulations further require that insurers and producers develop appropriate procedures for the use of electronic transactions in dealing with applicants. These procedures are considered to be part of the insurer's underwriting rules, to the extent that the underwriting rules are subject to review by the Commissioner of Insurance.

Maintenance of a Life Insurance Policy

Grace Period

New Jersey law requires that all non-group life policies be issued with a 30-day grace period for payment of premium. N.J.S.A. 17B: 25-3. If the last day falls on a Sunday or other holiday, when the insurer does not offer the opportunity to pay the premium, the insured is entitled to pay the premium on the first business day thereafter. *See Guardian Life Ins. Co. of Am. v. Goduti-Moore*, 229 F.3d 212 (3d Cir. 2000).

Lapse for Failure to Timely Pay Premiums

In connection with payment of premiums, and pursuant to N.J.S.A. 17B:25-3, all life insurance policies must contain a provision allowing a grace period of 30 days within which the payment of any premium after the first may be made. If the insured does not pay the premium within the grace period, then the policy lapses. The policy remains in force during the grace period. If a claim arises during the grace period, the amount of any overdue premium may be deducted from the amount payable under the policy.

Once a life insurance policy has lapsed, there is a specific statute which regulates reinstatement. The minimum requirements for reinstatement of a lapsed policy are set forth in N.J.S.A. 17B:25-9, which states:

> There shall be a provision that unless:
>
> a. the policy has been surrendered for its cash surrender value, or
>
> b. the cash surrender value has been exhausted, or
>
> c. the paid-up insurance, if any, has expired, the policy will be reinstated at any time within 3 years (or 2 years in the case of industrial life insurance policies) from the due date of the premium in default upon written application therefore, the production of evidence of insurability satisfactory to the insurer, the payment of all premiums in arrears and the payment or reinstatement of any indebtedness to the insurer upon the policy, all with interest at a specified rate and which may be compounded as specified.

The phrasing of N.J.S.A. 17B:25-9 makes clear that each requirement must be satisfied. Mere payment of overdue premiums is not sufficient to effect reinstatement. *See Glezerman v. Columbia Mut. Life Ins. Co.*, 944 F.2d 146 (3d Cir. 1991) (holding mere payment of premium is insufficient for reinstatement; insured must submit evidence of insurability); *Russo v. Guardian Ins. & Annuity Co., Inc.*, 1997 WL 1037958 (D.N.J. 1997) (holding reinstatement is not effectuated automatically based on submission of application and payment of outstanding premium, but "evidence of insurability satisfactory to the Company" must also be provided).

In *Russo v. Guardian*, the decedent submitted a reinstatement application, but died before the reinstatement application was received and reviewed by the insurer. The court explained that submission of the reinstatement application was not enough: "[R]einstatement is never effectuated until the insurer accepts the application." *Russo*, 1997 WL 1037958, at *3. As to plaintiff's claim, the court further explained:

> The mere fact that decedent was alive and insurable as of the time the application was executed is of no consequence. The decedent must have been insurable at the time of the application, through the time it was submitted to and reviewed by Guardian and on the effective date of reinstatement in order for reinstatement to be effective.

Russo, at *3. Finally, the court held:

> The reinstatement provision does not constitute a 'continuing offer,' but rather provides the insured with the contractual/statutory right to obtain the reinstatement of a lapsed policy provided that the enumerated requirements are meet [sic], *i.e.* evidence of insurability satisfactory to the insurer and payment. *The reinstatement provision, based upon the statute, clearly contemplates that reinstatement*

> *does not become effective until such time as the enumerated requirements have been met. As a result, reinstatement does not become effective until a determination has been made that the applicant is indeed insurable.* Decedent's application for reinstatement was never accepted by Guardian, as Guardian did not receive the application until after the decedent's death. Consequently, reinstatement never occurred.

Russo, at *4 (emphasis added).

Changes in the Beneficiary

Substantial Compliance Rule

In general, a designated beneficiary has a vested right to life insurance benefits when an insured dies. *Czoch v. Freeman*, 317 N.J. Super. 273, 284, 721 A.2d 1019, 1024 (App. Div. 1999). However, this may be modified when there is substantial compliance with the insurer's prescribed methods to change a named beneficiary.

The Appellate Division of New Jersey first adopted the substantial compliance doctrine to a change in beneficiary claim in *Haynes v. Metropolitan Life Insurance Co.*, 166 N.J. Super. 308, 399 A.2d 1010 (App. Div. 1979). The court held "an insured will be released from a strict observance of the terms of the policy if the court can be convinced that the insured made every reasonable effort to effect a change of beneficiary." *Id.* at 313, 399 A.2d at 1012 (citation omitted). In *Haynes*, the insured submitted a change of beneficiary form to the insurer's home office, but it was not accepted by the insurer prior to his death. The court held the insured substantially complied with the requirements of the policy to change his beneficiary and awarded benefits in accordance with the change of beneficiary form.

Substantial compliance can only be demonstrated by convincing the court the insured "has done everything within his power to effect a change, and made every reasonable effort to comply with the conditions of a change of beneficiary." *Prudential Ins. Co. of Am. v. Douglas*, 110 F. Supp. 292, 294 (D.N.J. 1953) (observing doctrine is narrowly applied); *Jarvin v. A.B.*, 2006 WL 2830966, at *5 (D.N.J. 2006) (all expressions of intent to change beneficiary will not suffice); *see also Czoch v. Freeman*, 317 N.J. Super. 273, 286, 721 A.2d 1019, 1025 (App. Div. 1999); *DeCeglia v. Estate of Colletti*, 265 N.J. Super. 128, 134–35, 625 A.2d 590, 593 (App. Div. 1993); *Metropolitan Life Ins. Co. v. Kubichek*, 83 F. App'x 425, 429 (3d Cir. 2003) (even if competing claimant could demonstrate letter was sent by insured to insurer seeking to change named beneficiary, it did not constitute substantial compliance because insured/decedent did not complete and submit required forms).

In *DeCeglia v. Estate of Colletti*, 265 N.J. Super. 128, 136–37, 625 A.2d 590, 594 (App. Div. 1999), the court held the insured's statements to the insurance agent and his attorney that he contemplated changing his beneficiary did not constitute substantial compliance. In *Prudential Insurance Co. v. Prashker*, 201 N.J. Super. 553, 557, 493 A.2d 616, 618 (App. Div.), *cert. denied*, 101 N.J. 334, 501 A.2d 983 (1985), the court held the insured's son was entitled to life insurance benefits based upon what the court considered to be a strong need to encourage proof of compliance with the divorce judgment.

Revocation of Death Benefits by Divorce or Annulment

N.J.S.A. 3B:3-14 was enacted in 2005 and governs the revocation of probate and non-probate assets based upon divorce or annulment. The statute provides, in pertinent part:

> a. Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce or annulment, a divorce or annulment:
>
> (1) revokes any revocable:
>
> (a) dispositions or appointment of property made by a divorced individual to his former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse….

N.J.S.A. 3B:3-14.

By its terms, the statute applies to both the former spouse and the former spouse's relatives. However, if a beneficiary designation is revoked solely by the terms of the statute, the designation is revived by either the remarriage of the former spouses or by the revocation, suspension or notification of the divorce or annulment. N.J.S.A. 3B:3-14. The statute has been held to apply retroactively to control the disposition of life insurance benefits in circumstances where the divorce occurred prior to the enactment of the statute. *Hadfield v. Prudential Ins. Co.*, 408 N.J. Super. 48, 53, 973 A.2d 387, 390 (App. Div. 2009).

N.J.S.A. 3B:3-14 has been held to be preempted by ERISA, 29 U.S.C. §1001, *et seq. See*, *e.g.*, *Juno v. Verizon Commc'ns, Inc.*, 2011 WL 1321683 (D.N.J. 2011); *In re Estate of Kensinger*, 2010 WL 4445752 (D.N.J. 2010). Section 3B:3-14 has also been held to be preempted by the Servicemembers' Group Life Insurance Act, 38 U.S.C.A. 1970(a). *See Calmon-Hess v. Harmer*, 904 F. Supp. 2d 388 (D.N.J. 2012).

Intent is a crucial factor when determining who should receive life insurance benefits that are the subject of a dispute. *See Vasconi v. Guardian Life Ins. Co. of Am.*, 124 N.J. 338, 590 A.2d 1161 (1991). *Vasconi* was decided prior to the enactment of N.J.S.A. 3B:3-14 and considered the issue of whether an ex-spouse is entitled to life insurance benefits when a property settlement agreement does not explicitly address the divorcing parties' life insurance or whether divorce presumptively revokes the former spouse's beneficiary designation. The court held "[t]here is no reason why an insurance/beneficiary designation should be sacrosanct at least between the competing beneficiaries and should yield to the intention of the parties." *Vasconi*, 124 N.J. at 347, 590 A.2d at 1166. Accordingly, the New Jersey Supreme Court remanded the matter to the trial court to "focus on the mutual intent of the parties in an effort to determine whether that property settlement agreement was intended to encompass life insurance." *Id.* at 349, 590 A.2d at 1167.

Since *Vasconi* was decided, New Jersey Courts have had many opportunities to consider what constitutes "mutual intent." In *Fox v. Lincoln Financial Group*, 439 N.J. Super. 380, 109 A.3d 221 (App. Div. 2015), decedent's wife urged the court to adopt a "bright-line" rule that marriage creates a "'presumptive right' to a spouse's life insurance benefits, thereby revoking any contrary premarital beneficiary designation made by the deceased spouse." *Fox*, 439 N.J. Super. at 383, 109 A.3d at 223. In *Fox*, decedent's sister was his named beneficiary. Decedent's wife urged the court to adopt a rule that "just as divorce presumptively disqualifies a former spouse from receiving anything, marriage ought to result in a presumption that she receives everything." *Fox*, 439 N.J. Super. at 384, 109 A.3d at 224–25. The court disagreed, reasoning that such a drastic change in the law could only be made by the legislature. *See Fox*, 439 N.J. Super. at 389, 109 A.3d at 226.

Courts within New Jersey have held against the named beneficiary where it would be inequitable for him or her to receive life insurance benefits. *See Estate of Quinn v. Quinn*, 2015 WL 1809007 (N.J. App. Div. 2015). In *Quinn*, the original named beneficiary was decedent's second wife. The named beneficiary was later changed to decedent's first wife as security until decedent satisfied several post-judgment matrimonial orders and the terms of a settlement agreement. Decedent died at a time when there was an agreement that the first wife would remain beneficiary pending the insured's payment of a minimal settlement. The court held that it would be inequitable for the first wife to receive the entire policy benefit, reasoning that it was approximately 20 times the amount of decedent's obligation. Consequently, the court held the decedent's obligation to his first wife should be paid, and the remainder of the life insurance benefits paid to decedent's second wife—the original named beneficiary.

Courts that have considered extending the New Jersey Supreme Court's decision in *Vasconi* have held *Vasconi* is limited to the matrimonial context, and does not permit the change of a named beneficiary based solely on the change in the relationship between the insured and the named beneficiary. *See IVF Inv. Co. v. Estate of Natofsky*, 2012 WL 1813429 (App. Div. 2012) (holding corporate beneficiary should receive life insurance benefits despite decedent no longer being shareholder of company); *Mitzner v. Lights 18, Inc.*, 282 N.J. Super. 355, 660

A.2d 512 (App. Div. 1994) (holding court will not change beneficiary where parties did not account for change in beneficiary during negotiations); *N.Y. Life Ins. Co. v. Estate of Hunt*, 150 N.J. Super. 271, 274, 375 A.2d 672, 673 (1977) (declining to alter beneficiary where named beneficiary was "the intended wife of insured" and beneficiary broke off their engagement and married another); *American Gen. Life Ins. Co. v. Jae*, 2010 WL 3001198 (D.N.J. 2010) (declining to find substantial compliance where named life insurance beneficiaries had been holographically altered and insurance broker represented decedent was seeking to change named beneficiary).

Payment of Life Claims

Interpleader

New Jersey Court Rule 4:31 governs interpleader actions filed in New Jersey state court and provides:

> Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not grounds for rejection… that the plaintiff denies liability in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim….

N.J. Court Rule 4:31.

"Interpleader is an equitable device that enables a party holding a fund to compel persons asserting conflicting claims to that fund to adjudicate their rights to the fund in a single action." *New Jersey Sports Prods., Inc. v. Don King Prods., Inc.*, 15 F. Supp. 2d 534, 539 (D.N.J. 1998). When a party fears it will be forced to defend multiple claims to a limited fund or property under its control, interpleader provides a procedure to settle the controversy and satisfy obligations within the context of a single proceeding. *Prudential Ins. Co. of Am. v. Hous*, 553 F.3d 258, 265 (3d Cir. 2009). As stated in *Travelers Insurance Co. v. Johnson*, 579 F. Supp. 1457, 1460 (D.N.J. 1984), when a stakeholder legitimately fears a single fund may be the subject of multiple claims, interpleader is proper. Interpleader does not depend on the merits of the adverse claims, and the stakeholder is not required to make a determination as to which claimant has the better claim.

> The benefits of [interpleader] to both the stakeholder and the claimants are substantial. It relieves the stakeholder from determining at his peril the merits of competing claims and shields him from the prospect of multiple liability; it gives the claimant who ultimately prevails ready access to the disputed fund.

NY Life Distribs., Inc. v. Adherence Group, Inc., 72 F.3d 371, 374–75 (3d Cir. 1995) (citation omitted).

An interpleader action typically involves two steps. First, the court determines whether the facts presented demonstrate that interpleader relief is appropriate and whether the stakeholder may be relived from liability upon depositing the disputed funds with the court. Second, the court adjudicates the competing claims to the interpleaded funds, and directs distribution of those funds accordingly. In *New Jersey Sports Productions*, 15 F. Supp. 2d at 539, the court described the "classic interpleader scenario" involving a neutral stakeholder, "such as an insurance company," faced with competing claims between potential beneficiaries over the rights to the proceeds of a life insurance policy. Upon payment of the disputed funds into the court or in compliance with a court order, the neutral stakeholder/insurer is entitled to be discharged of any future liability for the death benefit due as a result of the decedent's death.

It is well-settled that attorneys' fees and costs are generally awarded in an interpleader action to a party who is: "(1) a disinterested stakeholder, (2) who had conceded liability, (3) has deposited the disputed funds with the court, and (4) has sought a discharge from liability." *Metropolitan Life Ins. Co. v. Kubichek*, 83 F. App'x 425, 431 (3d Cir. 2003); *see also Stonebridge Life Ins. Co. v. Kissinger*, 89 F. Supp. 3d 622, 626 (D.N.J. 2015). Courts may award attorneys' fees and costs from the funds deposited with the court because the interpleading stakeholder usually is an innocent target in a dispute it did not create. *See Mass. Mut. Life Ins. Co. v. Cent. Penn Nat'l Bank*, 372 F. Supp. 1027, 1044 (E.D. Pa. 1974), *aff'd*, 510 F.2d 970 (3d Cir. 1975).

The Third Circuit in *Kubichek* not only upheld an award of attorneys' fees in favor of the insurer, it

also held the insurer was entitled to attorneys' fees and costs in connection with an appeal taken by one of the competing claimants. *See* 83 F. App'x at 431. In *United States Life Insurance Co. v. Romash*, 2010 WL 2400163, at *1 (D.N.J. 2010), the court, citing *Kubichek*, awarded attorneys' fees and costs to the stakeholder who filed the interpleader action. *See also Guardian Life Ins. Co. of Am. v. Jaye*, 2010 WL 5392731 (D.N.J. 2010) (noting fees were appropriate because insurer's continued requests for voluntary relief were rejected; yet no one opposed providing insurer with interpleader relief after it filed a motion).

New Jersey law is consistent with federal precedent. In *Sunset Beach Amusement Corp. v. Belk*, 33 N.J. 162, 168–69, 162 A.2d 834, 837 (1960), the New Jersey Supreme Court stated that when a litigant does more than advance its own interests and, in fact, benefits other parties, "it is fair that all contribute to the cost by a charge against the subject matter." Addressing this principle in the context of an interpleader action, it then continued:

> A stakeholder who interpleads the fund is allowed the expenses of the interpleader itself because as a fiduciary he is entitled to be reimbursed for the costs of handling the Res…. [T]he services involved represent the efforts of a stakeholder to protect or relieve itself of the fund rather than as an adversary seeking to establish that the fund is its own.

Id. at 169.

In *Washington Construction Co. v. United States*, 75 N.J. Super. 536, 538, 183 A.2d 496, 498 (Ch. Div. 1962), the court stated "[t]here seems no question but that such an allowance should be granted to an innocent stakeholder in an interpleader suit," even in the face of a federal tax lien asserted by the United States. *See also Bennett v. Allstate Ins. Co.*, 317 N.J. Super. 324, 328 n.4, 722 A.2d 115, 116 n.4 (App. Div. 1998) (permitting insurer to interplead net proceeds of policy after deducting its "attorney's fees and costs associated with the interpleader"). However, fees may be denied when the stakeholder acts in a manner that creates a disputed claim. *See Prudential Ins. Co. of Am. v. Richmond*, 2007 WL 1959252, at *5 (D.N.J. 2007) (holding fees not appropriate when interpleading plaintiff was partially responsible for creating confusion regarding named beneficiary).

Slayer Statute and Related Common Law Rule

N.J.S.A. 3B:7-1.1 provides that "[a]n individual who is responsible for the intentional killing of the decedent forfeits all benefits… and revokes any revocable disposition or appointment of property made by decedent to the killer… including their rights to life insurance." Pursuant to N.J.S.A. 3B:7-1.3.2, the effect of the beneficiary intentionally killing the insured is that both the killer and the relatives of a killer disclaim all rights, and are treated as if the killer or relatives of the killer predeceased the decedent.

Courts in New Jersey have relied on equitable principles to achieve the legislative purpose behind N.J.S.A.3B:7-1.1 and its predecessor, N.J.S.A. 3B:7-3. In *Bennett v. Allstate Insurance Co.*, 317 N.J. Super. 324, 329–31 (1998), a man who murdered his wife was the primary beneficiary, and his mother was contingent beneficiary on the wife's policy. The court relied on equitable principles to divest the contingent beneficiary of her interest in the policy benefits and award the benefits to her grandchildren, reasoning that grandmother would have the discretion to transfer the benefits back to her son. N.J.S.A. 3B:7-3 is obviously designed to insure that an intentional killer will not be permitted to benefit, directly or indirectly, from his wrongful act. The common law has long followed the same principle. Absent the statute's presumption that the murderer predeceased the decedent, he would have been deemed to hold the insurance proceeds in constructive trust for the benefit of the heirs and next of kin of the decedent. *See*, *e.g.*, *DeSena v. Prudential Ins. Co.*, 117 N.J. Super. 235, 242, 284 A.2d 363, 367 (App. Div. 1971); *Kalfus' Estate v. Kalfus*, 81 N.J. Super. 435, 440, 195 A.2d 903, 906 (Ch. Div. 1963); *Jackson v. Prudential Ins. Co.*, 106 N.J. Super. 61, 75, 254 A.2d 141, 148 (Law Div. 1969). This follows the maxim of the common law that no man can profit by his own wrongdoing. *DeSena*, 117 N.J. Super. at 242, 284 A.2d at 367; *see also* Restatement of Restitution §189 (beneficiary who murders insured holds his interest under constructive trust for insured's estate).

Interest on Life Insurance Proceeds

N.J.S.A. 17B:25-11, governing life insurance other than group insurance, provides that insurers must pay benefits under a policy within 60 days after receipt of due proof of death, and at the insurer's option, proof of the interest of the claimant. For individual life policies, the insurer may also require surrender of the policy. This period may be extended for contested claims. The statute further states that overdue payments shall bear an annual interest rate equal to the average rate of return of the State of New Jersey Cash Management Fund, established pursuant to N.J.S.A. 52:18A-90.4, for the preceding fiscal year, rounded to the nearest one-half percent (*e.g.*, 5.78 percent would be rounded to 6.0 percent; 5.41 percent would be rounded to 5.5 percent).

Interest payable for group life insurance is governed by N.J.S.A. 17B:27-75, and has identical requirements. NJ Bulletin 2001–19, issued by the Department of Banking and Insurance, permits an insurer to choose whether to use the Fund's State or Other–than–State rates. However, insurers may not change the rate once chosen. The rates of return are published on the State Treasury website at **www.state.nj.us/treasury**.

Contested Life Insurance Claims

Contestability Period

New Jersey, by statute, requires incontestability provisions in life insurance policies. N.J.S.A. 17B:25-4 provides that:

> There shall be a provision that the policy (exclusive of provisions of the policy or any contract supplemental thereto relating to disability benefits or to additional benefits in event of death by accident or accidental means or in event of dismemberment or loss of sight) shall be incontestable, except for nonpayment of premiums, after it has been in force during the lifetime of the insured for a period of 2 years from its date of issue.

Incontestability clauses are required for the benefit of the insured. *Paul Revere Life Ins. Co. v. Haas*, 137 N.J. 190, 197, 644 A.2d 1098, 1102 (N.J. 1994). Since incontestability clauses are statutorily mandated, ordinary rules of statutory construction apply and the policy is not construed against the insurer. *Id.* at 199, 644 A.2d at 1103.

Can a Claim Still Be Contested After Expiration of the Contestability Period?

The statute requires that actions for rescission based on equitable fraud be commenced prior to expiration of the incontestability period. *See Formosa v. Equitable Life Assur. Soc'y*, 166 N.J. Super. 8, 13–14, 398 A.2d 1301, 1303–04 (App. Div. 1979). Once the contestability period has passed and the insured is still living, an insurer may not seek rescission of the policy, but may still deny a claim on the basis that the insured concealed material information in the application for the policy. *See Paul Revere*, 137 N.J. at 202–03, 644 A.2d at 1104–05.

The requirement that the policy be in force for two years "during the lifetime of the insured" means an insurer can seek to rescind a policy if the insured dies before the expiration of the incontestability period, even if the insurer files suit more than two years after issuance of the policy. *Alliance Life Ins. Co. v. Bleich*, 2012 WL 714686, at *7 (D.N.J. 2012); *Formosa*, 166 N.J. Super. 8, 13–14, 398 A.2d 1301, 1303–04.

Suicide

The Third Circuit, applying New Jersey law, enforced a suicide limitation stating, "[i]f, within two years from the date of issue, the Insured dies as a result of suicide, while sane or insane, the liability of the company will be limited to an amount equal to the premium paid without interest." *Johnson v. Metropolitan Life Ins. Co.*, 404 F.2d 1202 (3d Cir. 1968). In *Johnson*, the Third Circuit affirmed the district court's decision, holding: "[I]nsanity or other mental derangement does not negate suicidal intent if the decedent is shown to have performed the self-destructive act with an understanding of its physical nature and consequences. Proof that the act was compelled by an irresistible impulse would merely establish that 'self-destruction was the very result intended, albeit by a deranged mind.'" *Johnson*, 404 F.2d at 1204.

STOLI/BOLI/COLI and Stranger Owned Annuity Contracts

While neither the New Jersey Supreme Court nor the Third Circuit have issued substantive rulings on STOLI policies, decisions on motions to dismiss reveal that New Jersey leans towards finding that a STOLI policy is void ab initio if it lacks an insurable interest at the time of inception. This defense may apply even after the contestability period has expired.

New Jersey law requires an insurable interest to exist at the time a life insurance policy is issued. *See* N.J.S.A 17B:24-1.1(a). An individual has an insurable interest in his own life or the life of a close blood relation, and also where there exists "an expectation of pecuniary advantage through the continued life" of the insured at the time of policy procurement. *Id.* Additionally, an individual who obtains life insurance on his own life is permitted to transfer ownership of the procured policy to a person or entity that lacks an insurable interest. *See Travelers Ins. Co. v. Morris*, 115 N.J. Eq. 142 (N.J. 1934) (recognizing the legality of assigning insurance policies to parties without an insurable interest).

The insurable interest requirement was developed to prevent prohibited "wagering contracts," that is, "a contract of insurance upon a life in which the [policyowner] has no interest is a pure wager that gives the [policyowner] a sinister counter interest in having the life come to an end." *Grigsby v. Russell*, 222 U.S. 149, 154–55 (1911). Without a "reasonable ground… to expect some benefit or advantage from the continuance of the life of the assured," such wagers are, "independently of any statute on the subject, condemned as being against public policy." *Warnock v. Davis*, 104 U.S. 775, 779 (1881).

"Insureds begin to run afoul of the insurable interest requirement… when they intend at the time of the policy's issuance, to profit by transferring the policy to a stranger with no insurable interest at the expiration of the contestability period." *Lincoln Nat. Life Ins. Co. v. Calhoun*, 596 F. Supp. 2d 882, 889 (D.N.J. 2009). In *Calhoun*, the plaintiff insurance company sought a finding that a life insurance policy held by the defendants was void ab initio because "at the time [defendant insured] applied for a life insurance policy, [defendant insured] intended to sell his policy to 'stranger investors' in the secondary life insurance market." *Id.* at 884–86. In response, the defendants filed a motion to dismiss, asserting that it was "legally permissible for an individual applying for life insurance to have a pre-existing agreement with a stranger lacking an insurable interest in the life of the person applying for insurance." *Id.* at 887. After noting that neither the Third Circuit nor the New Jersey Supreme Court had addressed the issue before the court, the court denied the defendant's motion to dismiss, explaining:

> This court finds that because issues of intent are crucial to this determination, dismissal at this juncture would be premature… Here, [plaintiff] is entitled to proceed and attempt to discover whether, and with whom, Calhoun had arranged to sell the [p]olicy at the time the [a]pplication was submitted to [plaintiff].

Id. at 890.

In *Lincoln National Life Insurance Co. v. Schwarz*, 2010 WL 3283550, at *8 (D.N.J. 2010), the court denied the insured's motion to dismiss the insurer's claims for rescission based upon lack of insurable interest, common law fraud, and violation of the New Jersey Insurance Fraud Prevention Act ("IFPA"), N.J.S.A. 17:33A-1. The court found that the "New Jersey Supreme Court would likely follow decisions from other state and federal courts that have held that a lack of insurable interest by an insured at the inception of a life insurance policy causes the policy to be void *ab initio*." *Id.* at *8. In support of this contention, the court noted New Jersey's strong distaste for contracts that are contrary to public policy. *See Vasquez v. Glassboro Serv. Ass'n Inc.*, 83 N.J. 86, 98, 415 A.2d 1156, 1162 (1980) ("[N]o contract can be sustained if it is inconsistent with the public interest or detrimental to the common good."); *Hebela v. Healthcare Ins. Co.*, 370 N.J. Super. 260, 266, 851 A.2d 75, 80 (2004) ("[O]ur courts will decline to enforce an insurance policy, like any other contract, if its enforcement would be contrary to public policy."); *Saxon Constr. & Mgmt. Corp. v. Masterclean of N.C., Inc.*, 273 N.J. Super. 231, 236, 641 A.2d 1056, 1059 (1994) ("[I]t is equally well recognized that our courts may refuse to enforce contracts that are

unconscionable or violate public policy."). The court noted that its survey of precedent from other state and federal courts demonstrated that the majority view is that life insurance contracts that lack an insurable interest at inception are akin to wagering contracts and are void ab initio.

The *Schwarz* court also held that insurers may contest the validity of the policy after two years based upon a lack of insurable interest. *Schwarz* cited the New Jersey Supreme Court in *Ledley v. William Penn Insurance Co.*, 138 N.J. 627, 635 (1995), which stated, in dicta, "even after the expiration of the contestability period an insurer may deny a claim if the insured committed fraud in the policy application." It thus reasoned that the two-year incontestability clause did not bar a claim of legal fraud where plaintiff alleged defendant trustees submitted applications containing false and incomplete information, that the defendants had knowledge that the information was not accurate, and that defendants made misrepresentations with the knowledge that plaintiff would rely on the incorrect information.

Finally, *Schwarz* held that the insurer may proceed with its claim under the New Jersey Insurance Fraud Prevention Act based on alleged material misrepresentations made in applications. The court reasoned that unlike common law fraud, proof of fraud under the IFPA does not require proof of reliance on the false statement, resultant damages, or proof of intent to deceive. *See State v. Nasir*, 355 N.J. Super. 96, 106, 809 A.2d 796, 802, *cert. denied*, 175 N.J. 549, 816 A.2d 1051 (2003). In a case under the IFPA an insurance company may also recover its reasonable investigation expenses, costs of suit, and attorney's fees. N.J.S.A. 17:33A-7. Under the IFPA, if the court determines the defendant has engaged in a pattern of violations, damages shall be trebled. *Id.*

While there is no Third Circuit or New Jersey Supreme Court decision that has determined whether a policy can be voided due to lack of an insurable interest based on the unilateral intent of the insured to sell the policy to a stranger, or whether rescission requires there to have been mutual intent on the part of both the insured and the stranger to assign the policy, *Calhoun* and *Schwarz* suggest unilateral intent to transfer the policy to a third party with no insurable interest is enough to find a policy is void ab initio and to support a cause of action for fraud and violation of the IFPA. *See Calhoun*, 596 F. Supp. 2d at 890; *Schwarz*, 2010 WL 3283550, at *14.

Material Misrepresentations in the Application

Applicable State Statute

N.J.S.A. 17B:24-3d provides:

> The falsity of any statement in the application for any policy or contract covered by this section may not bar the right to recover thereunder unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insured.

N.J.S.A. 17B:24-3(a) provides that no life insurance application can be admitted into evidence unless a copy of the application is attached to or endorsed to the policy at the time it was issued. *See Allianz Life Ins. Co. of Am. v. Estate of Austin Bleich*, 2012 WL 714686, at *8–11 (D.N.J. 2012). *See also* N.J.S.A. 17B:25-5 (providing life insurance policy and attached application shall constitute entire contract and all statements in application, in the absence of fraud, shall be deemed to be representations and not warranties). N.J.S.A. 17B:27-34 establishes the same requirement for group life insurance policies.

Reinstatement of life insurance policies that lapse for non-payment of premium are governed by N.J.S.A. 17B:26-7. An insurer may reinstate the policy upon acceptance of the delinquent premiums, or may require an application for reinstatement when issuing a conditional receipt for the delinquent premiums. Failure to issue a conditional receipt promptly upon receiving the required premiums results in automatic reinstatement of the policy. *Provident Life & Cas. Ins. Co. v. Fein*, 310 N.J. Super. 110, 122–23, 708 A.2d 419, 426 (App. Div. 1998), *cert. denied*, 155 N.J. 590, 715 A.2d 993 (1998).

By virtue of N.J.S.A. 17B:26-34, the incontestability clause in a reinstated policy begins on the date of reinstatement. *See Fein*, 310 N.J. Super. at 126–27, 708 A.2d at 428–29.

Prima Facie Case of Misrepresentation

An insurer seeking to rescind an insurance policy under a legal fraud theory must prove that the insured's application for the policy contained knowing and material misrepresentations made with the intention that the other party rely on them, resulting in reliance by that party to its detriment. *Bonnco Petrol, Inc. v. Epstein*, 115 N.J. 599, 609, 560 A.2d 655, 660 (1989). A misrepresentation by the insured, "whether contained in the policy itself or in the application for insurance, will support a forfeiture of the insured's rights under the policy if it is untruthful, material to the particular risk assumed by the insurer, and reasonably relied upon by the insurer issuing the policy." *FDIC v. Moskowitz*, 946 F. Supp. 322, 329 (D.N.J. 1996) (citing *Williams v. Am. Home Assur. Co.*, 121 N.J. Super. 351, 361, 297 A.2d 193, 198 (App. Div. 1972)). The objective is to encourage insurance applicants to be honest. *See Certain Underwriters at Lloyd's, London v. Cleopatra, LLC*, 2013 WL 6081460, at *9 (App. Div. 2013).

Impact of "to the Best of My Knowledge and Belief" Language in Application

New Jersey law draws a distinction between misrepresentations made in response to questions on the application that are objective as opposed to subjective. "Objective questions call for information within the applicant's knowledge, such as whether the applicant has been examined or treated by a physician." *Ledley v. William Penn Life Ins. Co.*, 138 N.J. 627, 635, 651 A.2d 92, 95 (1995). Even an innocent misrepresentation with respect to an objective question can warrant rescission and constitute equitable fraud. "When an objective question is 'unambiguous and calls for a statement of fact, misrepresentation or concealment is inexcusable.'" *Mi Ja Jae v. Metropolitan Life Ins. Co.*, 2013 WL 535256, at *4 (App. Div. 2013) (citing *Ledley*, 138 N.J. at 637, 651 A.2d at 95), *cert. denied*, 214 N.J. 175, 68 A.3d 891 (2013).

Courts are more lenient when reviewing an applicant's misrepresentations in response to subjective questions. *Ledley*, 138 N.J. at 636. "The rationale behind the distinction between objective and subjective questions is that the answer to a subjective question will not constitute equitable fraud 'if the question is directed toward probing the knowledge of the applicant and determining the state of his mind and… the answer is a correct statement of the applicant's knowledge and belief.'" *Ledley*, 138 N.J. at 636 (internal citations omitted). In addition, an insurer may seek damages under the New Jersey Insurance Fraud Prevention Act, N.J.S.A. 17:33A-1, *et seq. See Certain Underwriters at Lloyd's*, 2013 WL 6081460, at *13.

Materiality

A misrepresentation by an insured in an application for insurance must be material to warrant the remedy of rescission in New Jersey. N.J.S.A. 17B:24-3(d) provides:

> The falsity of any statement in the application for any policy or contract covered by this section may not bar the right to recovery thereunder unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer.

Id. In *Massachusetts Mutual Life Insurance Co. v. Manzo*, 122 N.J. 104, 113–15, 584 A.2d 190, 194–95 (1991), the New Jersey Supreme Court elaborated on the statutory mandate for materiality, stating that a misrepresentation is material to an insurer's risk if it "naturally and reasonably" influences the judgment of the underwriter in (1) making the insurance contract at all, (2) estimating the degree or character of the risk, or (3) fixing the rate of premium to insure the risk. The court rejected contentions that an insurer would be required to prove that the insured intentionally lied with intent to defraud, or that the misrepresentation either rendered the insured uninsurable or was causally related to the insured's death. *Id.*

In determining whether an insured's false statement in an application for insurance is material so as to bar recovery under the policy, the focus is on the underwriter's view of the risk at the inception of the policy, not after a claim has been asserted. *Weinstein v. Mut. Benefit Life in Rehab.*, 313 N.J. Super. 609, 614–15, 713 A.2d 569, 572 (App. Div. 1998) (insured's misrepresentations about his income and medical history in application for disability policy were material to risk assumed at inception of policy). *See*

also Longobardi v. Chubb Ins. Co., 121 N.J. 530, 541, 582 A.2d 1257, 1262 (1990) ("materiality" of false statement "should be judged as of the time when the misrepresentation is made" because in hindsight, the significance of an untruth "may turn out to be greater or lesser than expected"). "Every fact which is untruly stated or wrongly suppressed must be regarded as material, if the knowledge or ignorance of it would naturally and reasonably influence the judgment of the underwriter making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premium." *Formosa v. Equitable Life Assur. Soc'y.*, 166 N.J. Super. 8, 21, 398 A.2d 1301, 1307 (App. Div. 1979).

Causal Connection

There need not be a relationship between the misrepresentation and the insured's loss for the insurer to successfully raise equitable fraud as a cause of action. *See Formosa*, 166 N.J. Super. at 22, 398 A.2d at 1308 (citing *Metropolitan Life Ins. Co. v. Alvarez*, 133 N.J. Eq. 65, 66–67 (Ch. 1943)). In *Formosa*, the insured did not disclose his history of diabetes in his application for a life insurance policy, and the court rescinded the policy on grounds of equitable fraud due to that non-disclosure even though the insured's death was not related to diabetes. The court stated: "[W]e emphatically reject the (trial) court's suggestion that there must be a causal relationship between an applicant's false statements and the cause of his death before an insurer may rescind a life policy on the ground of equitable fraud. This is not the law in a majority of jurisdictions in this country,… and we hold that it is not the law of this State." *Formosa*, 166 N.J. Super. at 22 (internal citations omitted); *see also Mass. Mut. Life Ins. Co. v. Manzo*, 122 N.J. 104, 584 A.2d 190 (1990) (upholding rescission of policy after decedent died from gunshot wound where he failed to disclose history of diabetes on application).

Impact of Agent's Knowledge and False Responses

An insurance agent is required to exercise good faith and reasonable skill in advising an insured. *Weinisch v. Sawyer*, 123 N.J. 333, 340, 587 A.2d 615, 618 (1991); *Ledley*, 138 N.J. at 640, 651 A.2d at 98. Agents and brokers acting on behalf of an insured owe the insured a duty of due care. *Rider v. Lynch*, 45 N.J. 465, 476, 201 A.2d 561, 566 (1964). When an agent completes an application on behalf of an insured and accurately records the information received from the insured, there is no breach of duty. *Ledley*, 138 N.J. at 640, 651 A.2d at 98.

In *Hartford Life & Accident Co. v. Nittolo*, 955 F. Supp. 331, 335–36 (D.N.J. 1997), the court applied New Jersey law and held that even if the insured had been truthful with the agent and the agent had made an error resulting in an apparent misrepresentation, the insured was bound by the statements that appeared in the application. The court's reasoning was based upon the application explicitly stating that (1) the applicant had read the statements and answers, (2) they were true and correct, (3) the application would become part of any policy that was issued, and (4) the insurer would rely on that information in deciding whether to issue a policy.

An insured is understandably considered to have the best knowledge of his or her medical history and will be bound by the content of the application for an insurance policy. Accordingly, any misrepresentation contained in the application, even if due only to an error in recording by the agent, is binding upon the insured. In *Hartford Life*, the court relied on New Jersey law in holding that an agent acts on behalf of the insured, not the insurer. *Id.* at 335; *see also Wang v. Allstate Ins. Co.*, 125 N.J. 2, 13–14, 592 A.2d 527, 533 (1991).

Defenses

Statutes of Limitation/Contractual Limitations Period

The general rule in New Jersey is that the six-year statute of limitations applicable to contract matters set forth in N.J.S.A. 2A:14-1 governs actions on insurance policies. *Gahnney v. State Farm Ins. Co.*, 56 F. Supp. 2d 491, 495 (D.N.J. 1999). However, the limitations period may be shortened by the terms of the insurance contract. *Id.*; *Azze v. Hanover Ins. Co.*, 336 N.J. Super. 630, 636, 765 A.2d 1093, 1097 (App. Div. 2001).

The limitations period is tolled during the period between the time the insured gives notice and the time the insurer gives notice denying coverage. *Azze*, 336 N.J. Super. at 637, 765 A.2d at 1097.

In *Baer v. Prudential Life Insurance Co.*, 2008 WL 4998481 (App. Div. 2008), the plaintiff sought to recover life insurance proceeds more than thirty years after the death of the insured. The policy required notice of claim to be submitted within ninety days of the insured's death. The policy further provided that failure to furnish the required proof within the required time would not invalidate the claim if: (1) it was not reasonably possible to give proof within that time, and (2) proof was furnished "as soon as reasonably possible." The insurer relied on N.J.S.A. 17B:27-46, which required a lawsuit seeking to recover on a policy be brought within three years from the expiration of the time limit for submitting proof of loss. The court agreed that despite some basis for applying the policy provision extending the deadline for submitting proof of loss, the suit was barred by the limitations provision. *Id.* at *3–4.

Duty to Read Policy

New Jersey follows the rule that an insured is under a duty to read the policy and object if the policy terms are different from expected. Failure to read the policy does not provide legal grounds for nullifying its conditions or defending against the insurer's action to declare the policy void and return the premiums paid. *Pisker v. Metropolitan Life Ins.*, 115 N.J.L. 582, 586–87, 181 A. 31, 33–34 (N.J. 1935). "An insured is under a duty to examine his policies, and if the terms disclosed by such an examination are inconsistent with his desires, he is required to notify the company of the inconsistency and of his refusal to accept the policy in the proffered condition." *Martinez v. John Hancock Mut. Life Ins. Co.*, 145 N.J. Super. 301, 311, 367 A.2d 904, 910 (App. Div. 1976).

There are exceptions to this rule. An insured may rely upon the representations of an insurer or its general agent. *Martinez*, 145 N.J. Super. at 313 (citing *Harr v. Allstate Ins. Co.*, 54 N.J. 287, 314 (1969) ("*Harr* held, in substance, that where an agent tells an insured that he is covered, the insured is entitled to rely on that representation and is not required to read the policy to detect an inaccuracy or a falsehood in the representation."). But note that in *Aden v. Fortsh*, 169 N.J. 64, 86, 776 A.2d 792, 805 (2001), the New Jersey Supreme Court held the insured's failure to read an insurance policy is not an affirmative defense to the insured's negligence claim against an insurance broker. An insured is also permitted to assume that a renewal policy affords coverage no less restrictive than that given in the policy being renewed. *Bauman v. Royal Indem. Co.*, 36 N.J. 12, 25, 174 A.2d 585, 592 (1961).

Waiver/Estoppel

Waiver

New Jersey defines waiver as the "voluntary and intentional relinquishment of a known right, operative unilaterally and without regard to reliance by others." *Merchants Indem. Corp. v. Eggleston*, 68 N.J. Super. 235, 253, 172 A.2d 206, 215 (App. Div. 1961), *aff'd*, 37 N.J. 114, 179 A.2d 505 (1962).

An insurer may waive its right to rescind or seek other equitable relief by failure to act when it has knowledge of fraud. In the case of fraud, the law grants the injured party a choice:

> He may rescind (the contract) or affirm. If he rescinds, he must return what he received…. On the other hand, he may choose to affirm the contract, whereupon he retains the consideration he received and has as well a claim for money damages for deceit…. But the defrauded party must thus elect which course he wishes to follow. He cannot pursue both. If he elects to continue with the contract, the election is final and the contract is affirmed, not because he wants it to be, but because the law makes it so…. The same principle applies when the carrier learns of a material breach of the contract. It may refuse to perform, but if it does proceed, its election is final and the contract is affirmed.

Merchants Indem. Corp. v. Eggleston, 37 N.J. 114, 128–29, 179 A.2d 505, 512 (1962) (internal citations omitted).

In certain circumstances, an insurer may waive its right to rescind or may be otherwise estopped

from asserting that right. For example, in *John Hancock Mutual Life Insurance Co. v. Cronin*, 137 N.J. Eq. 586, 587–88, 46 A.2d 71, 73 (N.J. Ch. 1946), *rev'd*, 139 N.J. Eq. 392, 51 A.2d 2 (N.J. 1947), the Chancery Court held an insurer could not rescind a policy where the insurer relied upon its own investigation, which demonstrated that certain responses in the application were false. The Chancery Court stated that once it learned of the misrepresentations, the insurer was required to act promptly if it wished to rescind the policy, and it did not do so. *Cronin*, 137 N.J. Eq. at 592, 46 A.2d at 75.

The Court of Errors and Appeals agreed that if the insurer did not rely on the material misrepresentations made in the application, that is, if it knew the representations were false, it would not be entitled to rescission. *Cronin*, 139 N.J. Eq. at 396–97, 51 A.2d at 4–5. However, the court held the insurer's investigation did not result in the insurer learning of all of the falsehoods contained in the application, and that making the investigation did not nullify its right to rely on the information contained in the application. *Id.* at 398, 51 A.2d at 5. Moreover, the court held that although the insurer would be required to act promptly once it learned of fraud or misrepresentation, the facts indicated that the insurer was not aware of the true facts regarding the insured's medical history until after the insured had died. *Id.* at 398–99, 51 A.2d at 5–6. *See also Goldstein v. Metropolitan Cas. Ins. Co. of N.Y.*, 10 N.J. Super. 291, 77 A.2d 51, 52 (Law Div. 1951) (stating insurer's issuance of policy or acceptance of premiums with knowledge of facts demonstrating breach of warranty or condition by the insured constitutes a waiver).

The insurer has no independent duty to inquire, and may rely upon the representations in the application, unless it is on notice that they may be false. In *Gallagher v. New England Mutual Life Insurance Co. of Boston*, 33 N.J. Super. 128, 109 A.2d 457 (App. Div. 1954), *aff'd*, 19 N.J. 14, 114 A.2d 857 (1955), the proposed insured submitted an application that substantially misrepresented numerous material facts regarding his health and prior medical treatment. Separately, the insurer also had received a report indicating the applicant had undergone an electrocardiogram which disclosed "a left axis deviation of the heart." Testimony given to the trial court indicated this result indicated a 70 percent chance of heart pathology, but also a 30 percent chance that no disease was indicated.

While acknowledging the misrepresentations in the application, the beneficiaries asserted that the insurer had sufficient information to trigger a duty to inquire as to whether the facts stated in the application were true. The court considered the totality of the information available to the insurer and determined that the insurer had no duty to make further inquiry. *See* 33 N.J. Super. at 137, 109 A.2d at 462. Nevertheless, the Supreme Court of New Jersey cautioned that when an independent investigation by the insurer "discloses sufficient facts to seriously impair" the information provided by the applicant, the insurer may be assessed the duty to investigate the facts asserted in the application. *See Gallagher*, 19 N.J. at 22, 114 A.2d at 862.

Estoppel

The New Jersey Supreme Court has stated that "equitable estoppel is available, under appropriate circumstances, to bring within insurance coverage risks or perils which are not provided for in the policy or which are expressly excluded." *Harr v. Allstate Ins. Co.*, 54 N.J. 287, 308, 255 A.2d 208, 219 (1969). This is a fact specific inquiry, in which the insured must prove two elements: (1) a misrepresentation as to the fact or extent of coverage, innocent or otherwise, by the insurer or its agent, and (2) reasonable reliance by the insured thereon to his ultimate detriment. *Martinez v. John Hancock Mut. Life Ins. Co.*, 145 N.J. Super. 301, 313–14, 367 A.2d 904. Application of equitable estoppel may expand coverage beyond that set forth in the insurance policy, conflicting with the equitable maxim that the court should not write a better contract than the insured bargained for; but, the New Jersey Supreme Court reasoned that exceptions are necessary in certain circumstances:

> These decisions [finding equitable estoppel] all proceed on the thesis that where an insurer or its agent misrepresents, even though innocently, the coverage of an insurance contract, or the exclusions therefrom, to an insured

> before or at the inception of the contract, and the insured reasonably relies thereupon to his ultimate detriment, the insurer is estopped to deny coverage after a loss on a risk or from a peril actually not covered by the terms of the policy. The proposition is one of elementary and simple justice. By justifiably relying on the insurer's superior knowledge, the insured has been prevented from procuring the desired coverage elsewhere.

Harr, 54 N.J. at 306, 255 A.2d at 219.

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