
JOURNAL OF INSURANCE REGULATION

Cassandra Cole and Kathleen McCullough
Co-Editors

Vol. 34, No. 3

**Material Misrepresentations in Insurance
Litigation: An Analysis of Insureds' Arguments
and Court Decisions**

Kevin Gatzlaff, Ph.D.
Stephen Avila, Ph.D.
John Fitzgerald, Ph.D.



The NAIC is the authoritative source for insurance industry information. Our expert solutions support the efforts of regulators, insurers and researchers by providing detailed and comprehensive insurance information. The NAIC offers a wide range of publications in the following categories:

Accounting & Reporting

Information about statutory accounting principles and the procedures necessary for filing financial annual statements and conducting risk-based capital calculations.

Consumer Information

Important answers to common questions about auto, home, health and life insurance — as well as buyer's guides on annuities, long-term care insurance and Medicare supplement plans.

Financial Regulation

Useful handbooks, compliance guides and reports on financial analysis, company licensing, state audit requirements and receiverships.

Legal

Comprehensive collection of NAIC model laws, regulations and guidelines; state laws on insurance topics; and other regulatory guidance on antifraud and consumer privacy.

Market Regulation

Regulatory and industry guidance on market-related issues, including antifraud, product filing requirements, producer licensing and market analysis.

NAIC Activities

NAIC member directories, in-depth reporting of state regulatory activities and official historical records of NAIC national meetings and other activities.

Special Studies

Studies, reports, handbooks and regulatory research conducted by NAIC members on a variety of insurance-related topics.

Statistical Reports

Valuable and in-demand insurance industry-wide statistical data for various lines of business, including auto, home, health and life insurance.

Supplementary Products

Guidance manuals, handbooks, surveys and research on a wide variety of issues.

Capital Markets & Investment Analysis

Information regarding portfolio values and procedures for complying with NAIC reporting requirements.

White Papers

Relevant studies, guidance and NAIC policy positions on a variety of insurance topics.

For more information about NAIC publications, view our online catalog at:

 <http://store.naic.org>

© 2015 National Association of Insurance Commissioners. All rights reserved.

Printed in the United States of America

No part of this book may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any storage or retrieval system, without written permission from the NAIC.

NAIC Executive Office
444 North Capitol Street, NW
Suite 700
Washington, DC 20001
202.471.3990

NAIC Central Office
1100 Walnut Street
Suite 1500
Kansas City, MO 64106
816.842.3600

NAIC Capital Markets
& Investment Analysis Office
One New York Plaza, Suite 4210
New York, NY 10004
212.398.9000

Editorial Staff of the *Journal of Insurance Regulation*

Co-Editors

Cassandra Cole and Kathleen McCullough
Florida State University
Tallahassee, FL

Case Law Review Editor

Jennifer McAdam, J.D.
NAIC Legal Counsel

Editorial Review Board

Cassandra Cole, Florida State University, Tallahassee, FL
Lee Covington, Insured Retirement Institute, Arlington, VA
Brenda Cude, University of Georgia, Athens, GA
Robert Detlefsen, National Association of Mutual Insurance Companies,
Indianapolis, IN
Bruce Ferguson, American Council of Life Insurers, Washington, DC
Stephen Fier, University of Mississippi, University, MS
Kevin Fitzgerald, Foley & Lardner, Milwaukee, WI
Robert Hoyt, University of Georgia, Athens, GA
Alessandro Iuppa, Zurich North America, Washington, DC
Robert Klein, Georgia State University, Atlanta, GA
J. Tyler Leverty, University of Iowa, Iowa City, IA
Andre Liebenberg, University of Mississippi, Oxford, MS
David Marlett, Appalachian State University, Boone, NC
Kathleen McCullough, Florida State University, Tallahassee, FL
Charles Nyce, Florida State University, Tallahassee, FL
Mike Pickens, The Goldwater Taplin Group, Little Rock, AR
David Sommer, St. Mary's University, San Antonio, TX
Sharon Tennyson, Cornell University, Ithaca, NY

Purpose

The *Journal of Insurance Regulation* is sponsored by the National Association of Insurance Commissioners. The objectives of the NAIC in sponsoring the *Journal of Insurance Regulation* are:

1. To provide a forum for opinion and discussion on major insurance regulatory issues;
2. To provide wide distribution of rigorous, high-quality research regarding insurance regulatory issues;
3. To make state insurance departments more aware of insurance regulatory research efforts;
4. To increase the rigor, quality and quantity of the research efforts on insurance regulatory issues; and
5. To be an important force for the overall improvement of insurance regulation.

To meet these objectives, the NAIC will provide an open forum for the discussion of a broad spectrum of ideas. However, the ideas expressed in the *Journal* are not endorsed by the NAIC, the *Journal's* editorial staff, or the *Journal's* board.

Material Misrepresentations in Insurance Litigation: An Analysis of Insureds' Arguments and Court Decisions*

Kevin Gatzlaff, Ph.D.**
Stephen Avila, Ph.D.***
John Fitzgerald, Ph.D.****

Abstract

In an insurance contract, a material misrepresentation occurs when the insured makes an untrue statement that: 1) is material to the acceptance of the risk; and 2) would have changed the rate at which insurance would have been provided or would have changed the insurer's decision to issue the contract. The insurer's remedy upon discovery of a material misrepresentation is rescission of the policy. The circumstances under which the insurer may exercise this rescission remedy are governed by differing state standards, which have been tested in litigation in various state and federal courts. In this paper, we explore some of the court decisions involving an insured's material misrepresentations that featured summary judgment motions by the insurer. We analyze the arguments against the rescission remedy made by insureds and find that they tend to prevail only in

* This research is sponsored by the Center for Actuarial Science, Risk Management and Insurance at Ball State University. The authors thank the participants of the 2013 Southern Risk and Insurance Association annual meeting and two anonymous reviewers for their helpful suggestions.

** Assistant Professor of Risk Management and Insurance, Miller College of Business, Ball State University; kmgatzlaff@bsu.edu.

*** Professor of Risk Management and Insurance, Miller College of Business, Ball State University.

**** Professor of Risk Management and Insurance, Miller College of Business, Ball State University.

very specific circumstances. We also find that, overall, insurers appear to be proficient at determining in which cases they are likely to prevail on summary judgment, due to their high degree of success in our sample. We theorize that this result is explained partly by selection bias in the sample and partly due to variance in state laws governing the insurer's remedy of policy rescission. Insureds, insurers, agents and brokers, regulators, and litigators could all potentially benefit from this broad review of litigation involving material misrepresentations and the remedy of insurer rescission.

Introduction

Insurance contracts require that both parties operate under the duty of utmost good faith. For example, from the insurer, the insured expects a fair investigation and expeditious settlement of legitimate claims. A violation of this condition on the part of the insurer can subject it to expensive bad faith litigation and punitive damages awarded by a judge or a jury.

This paper focuses on a breach of the duty of utmost good faith on the part of the insured. Specifically, we focus on material misrepresentations on the application for insurance or in the claims process. Material misrepresentations on an application consist of untrue statements or omissions that are material to acceptance of the risk that would either change the rate at which coverage is offered or would cause the insurer to avoid a coverage offer entirely (Childers and Kraham, 2012). Material misrepresentations in the claims process may involve the amount of loss or whether a loss actually occurred. The insurer's remedies upon discovery of a material misrepresentation include the possibility of policy rescission. This amounts to a declaration that the policy was *void ab initio*, and thus no claim payment responsibility obtains. Concurrently, any premiums paid to the insurer must be returned to the insured should the insurer invoke policy rescission.

The paper proceeds in the following manner: First, we briefly discuss rescission as a remedy to reduce the impact of insurance fraud. Next, we discuss summary judgment and when it is appropriate, because these cases comprise the bulk of our sample. We briefly discuss the doctrines of waiver and estoppel as they relate to cases involving material misrepresentations, noting a difference between the remedies of declaring a policy voidable instead of *void ab initio*.

Then, we describe our sample data and analyze cases involving summary judgment where policy rescission is sought by the insurer as a remedy. We examine the insured's arguments in these cases, classifying the insured's arguments into seven categories as follows: 1) no intent to deceive; 2) misrepresentation not relevant to actual claim; 3) agent/broker completed application; 4) insurer has duty to investigate; 5) state law supersedes policy language; 6) ambiguity in the application question leading to potential misrepresentation; and 7) rescission affects an innocent third party. Finally, we

explore some cases where the misrepresentation occurred in the claims process. We find that insurers are generally favored in cases in the first four categories, while insureds are more likely to prevail in the latter three categories of cases, as well as in cases where a misrepresentation is discovered during the claims process. In our sample, most of the cases fall into the first four categories, leading us to conclude that insurers tend to prevail more often in our sample.

The paper then concludes by noting our findings and discussing their importance to various stakeholders. We note that overall, insurers appear to be proficient at determining in which cases they are likely to prevail on summary judgment, due to their high degree of success in our sample. We theorize that this result is explained partly by selection bias in the non-random sample and partly due to variance in state laws governing the insurer's rescission rights. Insureds, insurers, agents and brokers, regulators, and litigators could all potentially benefit from this broad review of litigation involving material misrepresentations and the remedy of insurer rescission.

The Remedy of Policy Rescission

The harsh potential penalty of policy rescission is allowed primarily as a tool to reduce the occurrence of insurance fraud. In this context, fraud requires showing an intent to deceive on the part of the insured. Historically, however, fraud or fraudulent intent was not a prerequisite requirement to the invocation of policy rescission. Early common law developed with policy statements by the insured being construed as warranties, meaning that any inaccuracy, regardless of materiality, could be used as a pretext for an insurer to rescind the policy (Keeton, 1970). Concern over the ability for insurers to use the doctrine of warranty to implement post-loss underwriting led to most states holding that insureds' statements on a policy application should be construed as representations. This meant that the insurer now had to show materiality before invoking the rescission remedy.

Further limitations on the insurer's right to rescind a policy may exist in certain lines of insurance. For example, in life insurance, incontestable clauses commonly exist limiting the insurer's right to invoke rescission to two years from the inception of the policy. Some states will continue to allow rescission in life insurance beyond two years, but only if an intent to deceive can be established (Ingram, 2005). In the area of health insurance, concern exists over the ability for insurers to retroactively cancel policies on the basis of seemingly unrelated, or perhaps even unintentional, misrepresentations. The federal Patient Protection and Affordable Care Act (PPACA) limited health insurers' use of policy rescission, inserting new requirements that now require an intent to deceive or fraudulent activity (Childers and Kraham, 2012). Some states place further restrictions on the insurer's use of policy rescission when material misrepresentations arise in the claims process, as opposed to those found in an application.

Ingram (2005) mentions four possible constructions of state laws governing when insurers are justified in invoking policy rescission as a remedy. They are as follows:

- 1) The existence of any material misrepresentation.
- 2) Intent to deceive *or* a material misrepresentation.
- 3) Intent to deceive *or* an increase in the risk of loss.
- 4) Intent to deceive *and* materiality.

The propriety of policy rescission has been challenged by insureds in various state and federal courts. In the paper that follows, we examine a sample of 29 court cases disposed of via summary judgment to better understand the dynamics of material misrepresentation litigation. The law governing an insurer's remedy in the case of rescission varies from state to state as noted above, meaning that cases with similar facts in different states could potentially be differentially adjudicated. We find that in our sample, insurers experience great success when invoking rescission remedies triggered by insureds' material misrepresentations, and as mentioned previously, we theorize that this result is brought about partly by these variances.

Sometimes, material misrepresentations are clear, and the outcome appears to be exactly what one might expect. For example, in *Bowens v. Nationwide Insurance Company*,¹ the homeowners policy application asked if any of the household members had been convicted of a felony in the past 10 years. The insured answered "no" and signed the blank attesting that all information provided in the application was true and correct, but had actually had a felony conviction and had served time in prison within the stated time period. A significant fire loss occurred, and upon investigation of the statements in the application, the insurer denied the claim and invoked its rescission rights due to the material misrepresentation. The misrepresentation was shown to be material, as Nationwide's underwriting guidelines specifically stated that persons with felony convictions in the past 10 years are not acceptable for coverage. The insured contested the insurer's decision, but the insurer prevailed on summary judgment.

A similar case on the commercial side is *Williams v. American Western Home Insurance Company*,² where the insured represented that all cooking surfaces were covered by fire suppression systems and that there were no existing fire code violations. Significant fire damage occurred. A post-claim investigation revealed that the open flame causing the fire was from a cooking surface not covered by a fire suppression system and that there had been a previous citation for a fire code violation that remained uncorrected at the time of the loss. Consequently, the insurer denied the claim, and upon summary judgment, the court ruled that the contract was *void ab initio* because of the presence of a material misrepresentation in the contract application.

1. U.S. District Court, N.D. Mississippi, Eastern Division, No. 1:10CV310-B-S.

2. U.S. District Court, E.D. Michigan, Southern Division, No. 11-10963.

The cases that are examined in this paper all involved insurers seeking to void an issued policy because of an alleged material misrepresentation on the part of the insured. In these cases, summary judgment motions are often filed by one of the parties to the lawsuit. In our sample, the insurer often pursues this avenue.

Summary Judgment Applications

A key distinction in our sample is whether summary judgment is appropriate. Where questions of fact remain, a trial is necessary. Where no facts are in dispute and only questions of law remain, summary judgment may be used. Ordinarily, the materiality of a misrepresentation is a question of fact to be determined by a judge or jury at trial. In our sample, which consists of summary judgment motions, the court has already determined the misrepresentation to be material or not material as a matter of law.

From the standpoint of strategy on an insurer's part, it would seem most advantageous to avoid a jury trial. Ables (2007) makes this point emphatically, stating, "As all defense counsel know, when a trier of fact gets an opportunity to review almost any matter relating to insurers and their claims handling, the insurer will generally not prevail." (Ables, 2007). Consequently, requests for summary judgment by insurers in material misrepresentation cases are not surprising. The determination of whether a misrepresentation is a matter of law or a matter of fact may be examined and reversed on appeal. For example, in *Omni Insurance Group v. Poage*,³ two parents had joint custody of their son, who maintained dual residences. The son was listed on the father's auto insurance policy as an insured, but not on the mother's. While the son was driving his mother's car, an accident occurred. The mother had represented that there were no residents of the household that were not disclosed. Importantly, the mother's policy excluded coverage for any resident who is not listed on the declaration page. The insurer denied the claim, citing the misrepresentation. The district court ruled in favor of the insured on summary judgment. The insurer appealed, and the appeals court remanded the case for trial, stating that summary judgment was not appropriate for a case where material facts were in dispute. In this case, there was a genuine question as to whether the son should be considered a resident of the mother; if so, the rescission remedy might be appropriate and allowable. If not, then the policy would be expected to provide coverage, as the son was driving the car with the mother's permission.

The fact that a case was disposed of via summary judgment does not necessarily imply that the insurer has prevailed. Sometimes, when material misrepresentations are alleged, the courts find in favor of the insured on summary judgment. In *Golden Rule Insurance Company v. R.S.*,⁴ the insureds had applied

3. Court of Appeals of Indiana, 2012, No. 92A03-1105-CT-208.

4. Court of Appeals of Missouri, Western District, 2012, No. WD 72578.

for multiple health insurance policies from different insurance companies, paying premiums and making multiple claims for the same expenses as they arose. One insurer contested this behavior on material misrepresentation grounds, noting that dual addresses were given to the different insurance companies. The insureds claimed that they maintained dual residences by often staying at a friend's house in a different state, and thus it did not rise to the level of a misrepresentation. On appeal, the judges agreed with the insureds' argument, and the insurer did not prevail on these grounds.⁵

More commonly in our sample, summary judgments favor insurers. In *Mountain City Ford, LLC v. Owners Insurance Company*,⁶ an employee without a driver's license caused an accident where the injured parties were awarded more than \$1 million. The at-fault employee was not listed in the application as a driver, but the premiums were calculated on the basis of the payroll of drivers, and this particular employee's compensation was listed in the total. Thus, the insured argued that the insurer had accepted premium to cover this driver. The insurer countered that their guidelines would not allow them to cover an unlicensed driver, and that had they known, they would not have issued the policy. At the trial court level, the case was decided in favor of the insurer.⁷

Waiver and Estoppel

There has been some litigation testing whether an insurer's discovery of a material misrepresentation implies a time limit to use a rescission remedy. In other words, in some cases, insureds have argued that because an insurer discovered a material misrepresentation but did not immediately move to rescind the policy, the insurer has implicitly allowed the material misrepresentation to remain without consequence, and has thus waived its right to invoke policy rescission. In this instance, the policy could be said to be voidable, but not *void ab initio*.

For example, in *State Bar Ass'n Mut. Ins. v. Coregis Ins.*,⁸ a firm lawyer had converted client funds for his own use. When renewing his professional liability insurance policy with Coregis, in the application he stated that he was not aware of any "circumstance, act, error, omission, or personal injury which may result in a claim" against him. There were other lawyers in the firm who were sued in connection with this case, and counterclaims against multiple parties. The circuit

5. In this case, another involved insurer contested the multiple payments under the other-insurance provision contained in the policy. That insurer successfully secured a remand of the declaratory judgment to the trial court for further examination of the issue.

6. Court of Appeals of Kentucky, 2011, No. 2009-CA-002233-MR.

7. On appeal, the verdict was upheld, although several additional issues were also addressed. For example, the insured made a motion for a judgment notwithstanding the jury's verdict, based on the unusually close relationship between the insurance agency and the employer, which strengthened the insured's argument that the insurer should have known the true situation. The insured also alleged errors in the trial court's jury instructions.

8. Appellate Court of Illinois, First District, Fourth Division, 2004, No. 1-03-2283.

court stated that the material misrepresentation rendered the policy *void ab initio*, and thus Coregis had no duty to defend its insured. On appeal, the court found that material misrepresentations render insurance contracts voidable, not *void ab initio*. Because Coregis had acted promptly to inform the client that it was reserving rights pending resolution of the matter, the appeals court affirmed the summary judgment verdict of the circuit court in favor of the insurer. The final outcome of this case suggests that in Illinois, a material misrepresentation renders the policy voidable, not *void ab initio*, and the insurer may, perhaps unintentionally, waive rescission rights if it fails to act promptly. *Coregis* reinforces the language in Illinois Code Section 154,⁹ which places a one-year limitation on the insurer's rescission option in certain types of insurance.

Another interesting application of this concept in the same state is *American Service Ins. v. United Auto Ins.*,¹⁰ where a minor child had recently received a driver's permit but was not listed on the auto insurance application as an "operator" of the vehicle. He caused an accident involving only property damage. While investigating, the insurer noted a "coverage issue" but apparently did not explain it to the insured. The insured continued paying premiums without the child listed as a driver, and the insurer continued accepting those premium payments. About seven months later, the child caused another accident. The insurer rescinded the policy as of a date effective prior to the first accident and returned premiums to the insured. On summary judgment, the trial court upheld United's argument and allowed its policy rescission to stand. On appeal, the issue of whether United had waived its rescission rights was raised, given that there were actually two accidents involving the unlisted child, and that time had passed between the two events. The appeals court ruled that the trial court acted properly in allowing a policy rescission on summary judgment in this case, because the one-year time limitation in Section 154 of the Illinois Code was not exceeded.

In some situations, a court may restrict the insurer's right to rescind a policy by invoking the doctrine of estoppel. This legal doctrine is sometimes used to prevent one party from taking certain actions that might produce an unfair result due to the other party's reasonable reliance on the first party's promises. Because promises of coverage are made in insurance contracts, courts take care to examine the degree to which the insured relied on those promises, and may choose to cite the legal doctrine of estoppel to prevent the insurer from using policy rescission as a remedy in the event a material misrepresentation is discovered.

For example, in one case mentioned in Ingram (2006),¹¹ the insured was asked if any prior applications for insurance had been cancelled. In fact, a prior

9. "... With respect to a policy of insurance as defined in subsection (a), (b), or (c) of Section 143.13, except life, accident and health, fidelity and surety, and ocean marine policies, a policy or policy renewal shall not be rescinded after the policy has been in effect for one year or one policy term, whichever is less. This section shall not apply to policies of marine or transportation insurance."

10. Appellate Court of Illinois, First District, First Division, 2011, No. 1-09-3070.

11. *Graphic Arts Mutual Insurance Company v. Pritchett*, 469 S.E.2d 199 (Ga. Ct. App. 1995).

application with the insurer's corporate parent had been cancelled, along with others. The insured falsely answered "no." The court ruled that the insurer was estopped from invoking the rescission remedy in this case, holding that the insurer's prior dealings with the insured should have alerted it to the prior cancellation.

Data

We searched the database of U.S. court cases accessible via *www.leagle.com* and *www.next.westlaw.com* for the phrases "material misrepresentation" and "insurance." The Westlaw Next search result returns hundreds of cases. Of those, Leagle.com returns 44 cases decided since 2000 across all lines of insurance in both federal and state courts. In 15 of those cases, significant additional issues were present so that the case was not decided solely on the basis of the presence of a material misrepresentation. The remaining 29 cases comprise our sample. In those cases, insurers prevailed on summary judgment in 19 of them, while insureds prevailed in 10.¹² We assign the cases to categories based on the primary arguments made by the insureds. We construct the following seven categories of argument: 1) there was no intent to deceive; 2) there was no causal connection between the misrepresentation and the loss; 3) the agent/broker filled out the application; 4) the insurer had a duty to investigate representations made on the contract; 5) state law supersedes policy language; 6) ambiguity exists in the questions on the application; and 7) an innocent third party is affected by a policy rescission. We proceed by detailing and analyzing the cases as they appear by the categories identified above.

Intent to Deceive

A common argument of insureds facing rescission for material misrepresentation is that the misrepresentation in question was innocent. In other words, the insured was not deliberately trying to mislead the insurer into offering coverage it otherwise would not have offered. Unfortunately for insureds, this argument is not powerful in most states.

For example, in *Nationwide v. Nelson*,¹³ the insured had been convicted of a felony but answered the question on the application that he had not. The defendants insisted that it was not a deliberate attempt to mislead the insurer, but the court ruled that intentional misrepresentation is not required to void the policy

12. We note that an insured prevailing on summary judgment sometimes means a case is remanded for, or proceeds to, trial, which does not guarantee that the insured will prevail on the merits in the end.

13. U.S. District Court, Eastern District of Kentucky, 2012, No. 11-32-ART.

ab initio. The court stated, “When it comes to insurance applications, Kentucky law makes no distinction between honest mistakes and intentional lies.”

Some states, in fact, do require an intent to deceive for an insurer to invoke a rescission remedy. For example, in *Kiss Construction NY, Inc. v. Rutgers Casualty Insurance Company*,¹⁴ a company listed the nature of its business as 100% interior painting. Later, when the company acted as a general contractor in the construction of a three-family building, some injuries occurred. Rutgers sought to void the policy *ab initio*, because the actual work of the business incorporated excavation and paving in addition to painting. The court cited an earlier case, *Dwyer v. First Unum*, showing that intent to deceive can be determined as a matter of law if the insured knows that certain facts are material to its risk and chooses to omit them in the application. Because the firm had been involved in similar construction work for some time before this particular insurance application without disclosing it, the appeals court ruled that the policy was *void ab initio*, and that the insurance company could avoid defending or paying on the claim, but was also ordered to return premiums to the insured.

Missouri statutes governing non-life insurance indicate that policies may not be canceled except for: 1) non-payment of premiums; 2) fraud or material misrepresentation; and 3) certain conditions that may increase the hazard present.¹⁵ Missouri case law has established a requirement to establish an intent to deceive to allow an insurer to invoke a rescission remedy. In *Childers v. State Farm Fire and Cas.*,¹⁶ a fire destroyed the insureds’ residence and items within. Upon investigation, the insurer discovered that many of the items listed on the initial inventory of losses had not been damaged and denied the claim. The district court ruled that the insurer was justified in invoking its rescission remedy, and the appeals court affirmed, further ruling that misrepresentations by one insured can adversely affect the recovery rights of a joint insured, if the intent of those misrepresentations is to deceive the insurer.

Misstatement of items damaged in the claims process, while material, may not always present *prima facie* evidence of intent to deceive under Missouri law. For example, in *Young v. Allstate*,¹⁷ a misrepresentation was alleged in the claims process relating to the initial inventory of items included on a proof of loss form in connection with a fire loss. The insureds later admitted that the initial inventory included items that were not damaged by the fire. At that point, the insurer denied the entire claim on the basis of material misrepresentation. The district court granted summary judgment for the insurer, ruling that the insureds’ failure to revise the inventory of damaged items until just before being examined under oath would make it impossible for a reasonable juror to conclude that the insureds had not intended to deceive the insurer. On appeal, the insureds argued that there was

14. Appellate Division of the Supreme Court of New York, First Department, 2009, 877 N.Y.S.2d 253.

15. Missouri Statutes 375.002.

16. Missouri Court of Appeals, 1990, 799 S.W.2d 138.

17. U.S. Court of Appeals, Eighth Circuit, 2011, No. 11-1562.

no intent to deceive in the inventory of losses provided. The appeals court reversed the district court's decision, concluding that summary judgment was inappropriate because there were genuine issues of fact requiring a jury determination with regard to the alleged misrepresentations and whether their existence implied the necessary intent to deceive.

No Causal Connection Between Misrepresentation and Actual Loss

In these types of cases, insureds often make the argument that there is no relationship between the actual loss and the misrepresentation on the application and that, therefore, the claim should be paid. Ingram (2005) notes that, in most jurisdictions, a causal connection between the misrepresentation and the loss is not necessary for the insurer to invoke the rescission remedy. We find similar results in our sample. The actionable issue is not whether the misrepresentation was related to the loss. Rather, it is whether the misrepresentation is related to the risk assumed by the insurer.

An interesting application of this idea occurs in *Garcia v. American*.¹⁸ Mr. Garcia was insured under a group life insurance policy and subsequently died in a traffic accident. Upon further investigation, the company discovered that he had provided a false Social Security number (SSN) and that he was not a U.S. citizen. The company refused payment, citing the material misrepresentation. Mrs. Garcia, the beneficiary, sued the life insurance company. The district court ruled in favor of the insurance company, and on appeal, the verdict was affirmed. The appellate court cited the false identity as material because it would not allow the insurance company a proper opportunity for underwriting,¹⁹ nor would it allow proper cross-checking with the U.S. Department of the Treasury's Office of Foreign Assets Control's Specially Designated Nationals List, which could identify drug traffickers, money launderers and terrorists. The appellate court concluded that false SSNs expose the insurance company to potentially serious penalties since it cannot properly comply with certain legal requirements. Thus, the court reasoned that rescission was appropriate.

In *Dormer v. Northwestern Mutual Life Insurance Co.*,²⁰ the applicant for disability insurance failed to completely disclose other health conditions that the insurer contended would have resulted in a refusal to issue a disability policy. She also stated that she had not ever received disability payments in the past, failing to

18. U.S. Court of Appeals, Fifth Circuit, 2011, No. 10-40388.

19. The policy was a \$20,000 life and accidental death policy (with a potential \$40,000 payout at stake). In its denial, the insurance company stated that it relies on an individual's identity to assess potential health risks, the financial and moral fitness of an applicant, and the likelihood of a filing a false claim.

20. U.S. Court of Appeals, Second Circuit, 2011, No. 10-0227-cv.

disclose that she had received prior disability insurance payments some 20 years in the past. Under New York law, in disability coverage, which falls under the life and accident section of the insurance code, rescission may only be utilized beyond a two-year incontestable period in the case of material misrepresentation intended to defraud the insurer.²¹ The district court concluded in a bench trial that the failure to disclose these material facts constituted a material misrepresentation and permitted the insurance company to rescind coverage. On appeal, this decision was affirmed in favor of the insurer.

In *Lawhon v. Mountain Life Insurance Company*,²² the plaintiff had purchased credit disability insurance concurrent with a vehicle and subsequently became disabled. He filed for benefits, which were denied on the basis of misrepresentations in the application. Specifically, the plaintiff had received treatment for chronic obstructive pulmonary disease (COPD) and two hip replacement surgeries. None of this was disclosed in the application, and the ultimate injury was to his back. Under Tennessee law,²³ material misrepresentations may void the policy only when they either are made with the intent to deceive or increase the risk of loss. The trial court originally found that the back injury could not have been affected by the undisclosed conditions. The appeals court, citing testimony that Mountain Life had never issued a policy to someone with COPD, reversed in favor of the insurer, stating that the ultimate decision involved not whether the misrepresentation was related to the loss, but whether it was related to the overall risk of loss. Additionally, the plaintiff was required to pay costs of the appeal, despite prevailing at the trial court level.

In *Pettinaro Enterprises LLC v. Continental Casualty Company*,²⁴ the plaintiff owned a building that was vacant at the time of loss. It had previously been leased to a tenant, but the lease had expired, and the tenant had vacated before the loss occurred. The building was destroyed by fire. In the Proof of Loss form, the plaintiff made a claim for lost rents. Because the building was not occupied at the time, the insurer denied the entire claim on the basis of the material misrepresentation in the Proof of Loss. The claim would not have been paid had the insurer known that the building was vacant for 60 continuous days prior to the loss. The district court found in favor of the insurer, and the U.S. Third District Court of Appeals affirmed, citing the 1884 Supreme Court precedent that infers an intent to defraud from the making of a false statement that one knows to be false.²⁵

21. The relevant section reads, "After 2 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 2 year period." N.Y. Ins. Law 3216(d)(1)(B)(i).

22. Court of Appeals of Tennessee, at Knoxville, 2011, No. E2011-00045-COA-R3-CV.

23. Tenn. Code Ann. 56-7-103

24. U.S. Court of Appeals, Third Circuit, 2011, Nos. 11-1070, 11-1195.

25. U.S. Supreme Court, 1884, *Clafin v. Commonwealth Ins. Co.*, 110 US 81.

In *Harper v. Fidelity*,²⁶ the insured had misrepresented several facts in the life insurance application and subsequently passed away within the two-year incontestability period. Among other issues, the plaintiff argued that the misrepresentations were not related to the ultimate cause of death. Because Wyoming law²⁷ allows policy rescission where the misrepresentation would have either changed the insurer's underwriting decision or the rate at which coverage would have been provided, and because the insurer provided evidence that underwriting guidelines would have prevented coverage being offered to the plaintiff had true facts been presented, the policy rescission was upheld by the district court and affirmed on appeal.

Agent/Broker Completes Application

Sometimes, insureds argue that the agent or the broker completed the application for them and, therefore, the insured should not be held responsible for any misrepresentations therein. Ingram (2005) notes that knowledge held by the agent is generally imputed to the insurer. Given this, it is understandable that insureds might argue that the agent omitted relevant facts while completing the application. While it is certainly true that the agent or broker has an incentive to paint the insured in the best possible light, in our sample, it appears that this argument is not helpful to insureds.

In the aforementioned *Nationwide v. Nelson*, the defendants argued that the agent who sold them the policy knew that the applicant had a felony conviction, and by letting him fill out an application, he negligently or intentionally let them present false information on the application. Kentucky courts have recognized that insurance agents can assume a duty to advise the insured, but it requires additional consideration beyond a premium or an explicit request for advice. The court found that the agent owed no duty to the insured, and thus dismissed the agent from the action.

Cases exist involving brokers, not just agents, completing applications for their insureds. For example, in *Suit Gallery Five Star Men's Wear, Inc. v. Granite State Insurance Company*,²⁸ the retailer suffered a burglary. The insurer refused to pay because two previous burglaries were not disclosed at the time of application, and the insured was asked to provide instances of prior losses. The insured argued that the broker provided only one quote, and thus should be held to be an agent of the company rather than a broker. The court cited case law that stated if an insurance broker provided information on an application, the contents are still the responsibility of the insured to verify. Further, Section 331 of California's Insurance Code states that concealment, whether intentional or not, entitles the

26. Wyoming Supreme Court, 2010, No. S-09-0119.

27. Wyo. Stat. Ann. 26-15-109

28. Court of Appeals of California, Fourth District, Division Three, 2011, No. G042622.

injured party to rescind insurance. Five Star further argued that incontestability clauses used in life and disability insurance should apply by analogy, but the court refused to do so and affirmed for the insurer.

In *Meadlock v. American Family Life Assurance Company of Columbus*,²⁹ the insured failed to disclose heart issues on the application and subsequently died of ventricular fibrillation. The insurer refused to pay, citing material misrepresentations. The plaintiff argued that the misrepresentations of health status in the life insurance application resulted from the agent not reading all the questions or from the agent deliberately making false representations by ignoring the proper answers and substituting his own. The plaintiff further alleged that the agent forged the insured's signature on the policy.³⁰ The court reasoned that the insured had the opportunity to review the policy and did not correct the misrepresentations, so even if the allegations were true, rescission of the policy was proper. It affirmed in favor of the insurer.

In the case of *Royal Maccabees Life Ins. Co. v. Malachinski*,³¹ the defendant represented that no other disability insurance was in force. In fact, he had a substantial group policy. Royal Maccabees made several disability payments before discovering the misrepresentation, and sued to void the contract and recover those payments. One of the defendant's arguments was that the broker knew he had a group policy and that that knowledge should be imputed to the company. The court followed Illinois case law³² in finding that because the broker was not an exclusive agent of Royal Maccabees, his knowledge cannot be imputed to the company. Further, the court found that the misrepresentation of other insurance was material, because the two policies together represented more than 100% of the defendant's working income. The court reasoned that it was likely that the insurance company would have refused to insure in this amount in this case, given affidavits about company policy in this regard. Summary judgment for the insurer to rescind the disability coverage was granted.

In *Precision Auto Accessories, Inc. v. Utica First Insurance Company*,³³ a fire loss destroyed the plaintiff's building. Similar to the facts in *Suit Gallery Five Star* above, the insurer rescinded the policy after discovering that previous losses had not been disclosed at the time of application. The plaintiff argued that it did not willfully misrepresent the loss history and that the incorrect application resulted from the negligence of the broker. The court specifically rejected both arguments, citing New York case law in stating that a "material misrepresentation, even if innocent or unintentional, is sufficient to warrant a rescission of the policy"³⁴ and

29. Court of Appeals of North Carolina, 2012, No. COA11-1009.

30. Handwriting experts were employed by both parties, and they failed to agree. The court ultimately ruled this aspect immaterial to the case.

31. U.S. District Court, N.D. Illinois, Eastern Division, 2001, No. 96 C 6135.

32. *Economy Fire & Cas. Co. v. Bassett*, 170 Ill. App. 3d 765.

33. Appellate Division of the Supreme Court of the State of New York.

34. *McLaughlin v. Nationwide Mutual Fire Ins. Co.*, 2004, 8 A.D.3d 739.

that “the signer of a contract is conclusively bound by it regardless of whether he or she actually read it,”³⁵ and affirmed in favor of the insurer.

In *Bleeker St. Health and Beauty Aids, Inc. v. Granite State Ins. Co.*,³⁶ the insured was asked if the building contained, among other things, any deep-fat fryers. The insured answered “no,” but there was a deep-fat fryer in the restaurant that shared a building. The building suffered a fire loss caused by improper disposal of cigarette butts (i.e., the fryer was not involved). The insured contended that the materiality of the misrepresentation was a matter of fact for a jury to determine, not a matter of law, given that the applicant relied on the broker to complete the application. The court ruled that the insured was bound by the statements on the application, even if not reviewed. Under New York law, the court noted that to justify policy rescission, the insurer must demonstrate via reference to policy manuals that it would have not issued the policy had it known the true facts. The insurer was able to demonstrate that it would not have issued a policy had it known of the presence of the deep-fat fryer, and the court found in favor of the insurer on summary judgment.

Insurer Has Duty to Investigate

Similar to arguing that the agent or broker filled out the application, some insureds have further argued that insurers have a duty to verify the truthfulness of application statements or accept them as true, sometimes within a certain time frame. To an extent, this is analogous to a life insurance policy’s incontestability clause. Ingram (2005) mentions that in most cases, the insurer has no duty to investigate representations on an insurance application, but notes that when an insurer has cause to question an assertion, some courts have ruled that an insurer should be estopped from policy rescission. Some states have created case law that seems to provide some merit for this particular argument.

In *Titan Insurance Company v. Auto-Owners Insurance Company*³⁷ and *Titan v. Hyten*,³⁸ an interesting application of this idea is present in Michigan law. With the decision of *State Farm Mut. Auto Ins. Co. v. Kurylowicz*³⁹ in 1976, Michigan law forbade rescissions in the case of “easily ascertainable” fraud. In other words, in Michigan, insurers had a duty to investigate representations on applications in certain cases. The purpose was to protect the injured third party, to guarantee a source of recovery. For example, in *Titan v. Auto-Owners*, an insurance applicant signed an application without listing additional insureds. She did indicate she was married in the application. Her husband was involved in a serious at-fault auto accident. The insurer asked to be excused from providing more than the statutory

35. *Curanovic v. New York Cent. Mut. Fire Ins. Co.*, 2003, 307 A.D.2d 435.

36. New York Supreme Court, New York County, 2006, NY Slip Op 50817 (U).

37. Court of Appeals of Michigan, 2012, No. 302191.

38. Michigan Supreme Court, 2012, No. 142774.

39. Michigan Court of Appeals, 1976, No. 568: 242 N.W.2d 530.

limits of coverage because of the misrepresentation.⁴⁰ The trial court awarded summary judgment to the insured, reasoning that the misrepresentation was “easily ascertainable” because the insured had indicated she was married. On appeal, the court affirmed the district court’s decision, not only because of the “easily ascertainable” standard, but also because of the involvement of an innocent third party.

In *Titan v. Hyten*, the insured had a suspended drivers’ license. She expected it to be reinstated on a certain date and postdated an insurance application to that date. Unfortunately, her license was not reinstated until later. After reinstatement, she was involved in an auto accident. Her insurer denied the claim on the basis of the material misrepresentation about the license suspension. At trial, the court decided to uphold the *Kurylowicz* precedent, reasoning that this fraud was “easily ascertainable,” and because a third party was injured, prevented the insurer from invoking the rescission remedy. On appeal, the Michigan Supreme Court decided to overrule the *Kurylowicz* precedent to remove the duty to investigate on an insurer’s part where “easily ascertainable” fraud is involved. The case was remanded back for trial because the materiality of the misrepresentation was determined to be a matter of fact requiring a jury’s determination rather than a matter of law.

A main argument in *Jackson v. Hartford*⁴¹ was that the insurer made no more than a perfunctory effort to request information. After the insured died within the two-year contestability period, the insurer investigated and discovered that the insured had previously been treated for a gunshot wound to the head and had a prior felony conviction. The insurer claimed that had it known these facts, it would not have issued the policy.⁴² The plaintiff claimed that she had written nothing on the application but a signature and that the agent had completed the policy on his own. Because none of the questions were asked of any of the other adult insureds, the plaintiff argued that the insurer did not properly investigate and should be estopped from denying the claim on the basis of material misrepresentation. The court stated that under Maryland case law, an applicant for insurance is held to the representations on the application even if a third party fills out the application, and mentions that this is still the case even if the third party inserts misrepresentations or false information.

The decedent was asked on the application if he had been examined by a physician for any condition and whether he had been convicted of a felony within the last five years. Both answers were misrepresented. The court suggested that the prior gunshot wound was not material, noting it did not result from criminal activity but from a random accident, and judged it a question of fact to be determined by a jury. The other misrepresentation, involving a prior felony

40. Under Michigan law, only amounts in excess of the statutory minimums may be avoided in the case of (some) material misrepresentations.

41. U.S. District Court, D. Maryland, 2002, No. CIV. CCB-01-2496.

42. The plaintiff contested this conclusion as well, although the plaintiff’s expert witness was found to have no knowledge of the company’s underwriting guidelines.

conviction, was found to be material. The court found in favor of the insurer, noting that the insurer does not have to prove it would not have issued the policy, but only that a material misrepresentation exists in order to invoke the rescission remedy. The court further noted cases in other states such as Arizona where the presence of a material misrepresentation on the application would not automatically grant the insurer the right of rescission.⁴³

State Law Supersedes Policy Language

Misrepresentations in life insurance policies are governed slightly differently in some states. In most policies, an incontestability clause limits the rescission right of the insurer, generally imposing a two-year period for an insurer to contest the issuance of a life insurance policy. Beyond that period, a policy is incontestable, except for certain reservations a company may make. Some policies do not impose a limit to discover material misrepresentations. However, a state may impose more stringent guidelines than what a policy contains.

Such is the case in *Halberstam v. The United States Life Insurance Company in the City of New York*.⁴⁴ A trust had applied for life insurance on a principal. The insured died after the incontestability period had expired. Upon investigation, the insurer claimed that it had been provided with blood samples that did not match those taken from the actual insured, and it denied the claim. Its incontestability clause said that the policy would not be contested after two years “except for non-payment of premiums and material misrepresentations.” The plaintiff contested the insurer’s decision, but further argued that New York law did not allow for policy rescission beyond two years, even in the case of material misrepresentation. The court noted one exception to New York’s stringent statute: that if an imposter applied for insurance, then the contract is not with the insured. Thus, the insurer could still challenge on the basis of material misrepresentation where someone other than the insured took the medical exam and gave blood, because the named insured, being a stranger to the contract, does not obtain the benefits of the incontestability clause. In this case, because a trust purchased the policy, the court ruled the contract was between the trust and the insurer, and that the trust was not a stranger to the contract even if an imposter had provided the blood test. The court ruled in favor of the insured, citing New York’s statute⁴⁵ and several cases that allow no other exceptions to the two-year mandated incontestable clause. In this case, the more stringent wording of the state statute prevailed over the policy language.

43. *Russell v. Royal Maccabees Life Ins. Co.*, 1999, 193 Ariz. 464, 974 P.2d 443.

44. New York Supreme Court, Kings County, 2012, NY Slip Op 22126.

45. New York State Ins. Law 3203 (a)(3).

Ambiguity in Policy

It is well established in insurance law that ambiguities are to be construed against the insurer, because insurance contracts are contracts of adhesion (Miller, 1988). It should, therefore, not be surprising to discover that some insureds seek to mitigate the impact of a material misrepresentation by arguing that application questions are ambiguous. As we shall see, this argument is sometimes successful.

For example, in *Hingham v. Mercurio*,⁴⁶ an umbrella policy asked the family to list all motor vehicle operators on the application. A son who owned a separately insured auto was not listed on the application. Had he been listed, the cost of the policy would have increased by \$25 (18%). A serious car accident ensued, with the son driving a friend's car at the time. The insurer rescinded the policy, citing the misrepresentation.

The plaintiffs argued that they were unsure whether or not to list the son, as he had his own underlying auto policy, and claimed they relied on the agent's advice in not listing him as an "operator." The application had asked for a list of "household members and all operators of vehicles as required by company." The previous section of the policy asked for information about household vehicles. The court ruled that there was ambiguity in whether the contract was asking for operators of household vehicles or operators of any vehicle whatsoever. Further, the "as required by company" language of the contract provides little clarification, but added relevance to the testimony that the family consulted the agent on how to answer. Consequently, the court found for the insured and ordered the insurer to pay the claim. The decision was affirmed on appeal in favor of the insured.

In *Ocean's 11 Bar and Grill v. Indemnity Insurance Corporation, RRG*,⁴⁷ ambiguity in the policy played a major role in the court's decision. An undescribed incident occurred, prompting the insurer to conduct an investigation, which revealed some uncertainty involving alcohol server training. On the application, the business was asked, "Does the applicant allow persons other than employees trained in their Formal Alcohol Awareness training program to serve alcohol to patrons?" The insured answered in the negative. The insurer argued that there was no formal training provided, because the restaurant did not participate in an industry-certified training program, and that this constituted a misrepresentation allowing rescission of the policy. The insured argued that by providing its own extensive training program, it had satisfied the requirement and had properly answered the question. The court ruled that "Formal Alcohol Awareness training" was ambiguous, because it was not clear that it referred to industry-certified training, and it denied the insurer's summary judgment motion to allow rescission of the policy.

46. Appeals Court of Massachusetts, Worcester, 2008, No. 06-P-1994.

47. U.S. District Court, S.D. Florida, 2012, No. 11-6157-CIV-ALTONAGA/Simonton.

Rescission's Impact on Innocent Third Parties

Ingram (2005) notes that courts sometimes consider the effect on an innocent third party when deciding if policy rescission is an appropriate remedy. One instance we discover in our sample is *Blundy v. Secura*,⁴⁸ where a father insured a vehicle that was owned by his son. The son was involved in an accident, and would have been entitled to personal injury protection (PIP) no-fault benefits. The insurer claimed that had it known the son owned the vehicle, it would have impacted the rate at which coverage was provided, in the form of a lower multi-vehicle discount extended to the father on his premium.⁴⁹ Michigan law requires an intent to deceive for an insurer to invoke the rescission remedy.⁵⁰ Further, because the son was injured and not a party to the contract, the insurer was prevented from voiding the policy.⁵¹ The district court's granting of the insured's summary judgment motion was upheld by the appeals court.

Claim Misstatements

Sometimes, the material misrepresentation challenged in court occurs in the claims process, rather than on the application. The aforementioned *Young v. Allstate* is an example, as is *Pettinaro v. Continental Casualty Company* on the commercial side. The remedy for the insurer is still policy rescission, which can sometimes affect not only the disputed damages, but indeed, the entire claim (including the undisputed portion).

For example, in *Hackbarth v. State Farm*,⁵² a fire loss damaged the insured's home. The policy provided some \$680,000 in dwelling coverage, and a potential \$550,000 for personal property and living expenses. The insurer ultimately paid an amount over \$600,000. The plaintiff sued for a higher payout. Through investigation, the insurer discovered that several losses had been misstated in the original claim and sought to void the policy, which would require a return of the original claim payout. Under the terms of the policy,⁵³ this result is possible only when the misrepresentation is made "willfully and with intent to defraud." The

48. Court of Appeals of Michigan, 2008, No. 275462.

49. There were other grounds the insurer cited as reasons to avoid the policy, but this argument is most on point with regard to potential material misrepresentation.

50. *Bergen v. Baker*, 2004, 264 Mich. App. 376, 382; 691 N.W.2d 770.

51. *Hammoud v. Metro Prop. and Cas.*, 1997, 222 Mich. App. 485, 488; 563 N.W.2d 716.

52. U.S. District Court, District of Minnesota, 2013, Civil No. 11-690 (DSD/FLN).

53. We note that the insurer's own policy terms require the misrepresentation to be willful and with intent to deceive, rather than the insurer being limited to that language by statute.

court found for the insurer, and not only denied the plaintiff's motion, but required the return of the original claim amount.

Material misrepresentations in the claims process may be more difficult to establish as a matter of law, and may instead require a jury determination, as in the aforementioned *Young v. Allstate*. Similarly, in *Felman Production, Inc. v. Industrial Risk Insurers*,⁵⁴ the insurer filed for summary judgment asking the court to declare that claims misrepresentations for business interruptions in the Proof of Loss form entitled it to void the policy *ab initio*. There were six separate communications where the insurer claimed that the insured concealed or misrepresented facts. In all of these cases, the court decided that the existence of a misrepresentation was not clear enough to be considered so as a matter of law; rather, the court explicitly said that these issues were questions of fact for a jury to determine. Consequently, the insurer's motion for summary judgment was denied.

Conclusion

Material misrepresentations on an insurance application or in the claims process expose insureds to the potentially harsh consequence of policy rescission. Policy rescission amounts to a declaration that the policy is *void ab initio* and that no claim payment responsibility exists. States place differing limits on the ability of an insurer to utilize the rescission remedy, and those limits have been tested in state and federal courts. The preceding analysis explores different arguments employed by insureds to avoid rescission in summary judgment motions. We find that when insureds argue that they had no intent to deceive, that there is no causal connection between the misrepresentation and the loss, that the agent or broker filled out the application, or that the insurer had a duty to investigate the representations made on the application, insureds generally have difficulty prevailing in summary judgment cases. Conversely, we find that in our sample, if insureds can establish that state law supersedes policy language, that ambiguity exists in the questions asked on the application, or that an innocent third party would be affected by rescission, they are more likely to prevail. We further find that insureds survive summary judgment more often when misrepresentations occur in the claims process, because these are often matters of fact for a jury to decide.

In our sample, we note that many of the decisions involve summary judgment. This means, *de facto*, that any questions about the materiality of a misrepresentation have been settled; it is clear to the judge(s) that the misrepresentation is or is not material. If it were not clear, a jury determination would be required, and the record might not exist in our sample. Consequently, our sample has a clear selection bias, which might tend to overestimate the insurer's likelihood of prevailing.

54. U.S. District Court, S.D. West Virginia, Huntington Division, 2011, No. 3:09-0481.

Further, we note that many of the arguments used by insureds facing potential rescission for material misrepresentation might be successful in some states, but not others. For example, it might seem reasonable to rationalize that if the misrepresentation is not material to the loss, it should not be a reason to use policy rescission. Indeed, some have argued that insurers should avoid rescission in these cases to prevent possible bad faith claims (Ables, 2007). In some states, the law requires that policy rescission requires misrepresentations to be material to the loss; in most others, it is not. The combination of selection bias in our sample and insureds' beliefs that are not supported by state laws likely explains the advantage experienced by insurers in our sample.

Insurers, insureds, and litigators should take note of the differing limitations states place on the rescission remedy. Differences in these state laws can dramatically influence settlement and litigation strategy. Regulators should take note as well and perhaps encourage legislators to consider modifications to existing laws to promote consistency across states with regard to the insurer's rescission remedy. Agents and brokers should also take care to ensure applications contain accurate information, both to increase insureds' confidence that claims will be timely paid and to protect themselves from the cost of litigation of the type described above.

Future Research

We have seen differences in courts' interpretations of insureds' arguments involving material misrepresentations based on differences in state laws, in whether the misrepresentation occurred in the claims process or on the application, and in different lines of insurance. Future research will further refine the differences in court rulings in cases involving material misrepresentation and policy rescission by examining them by line of insurance (i.e., health and disability, property/casualty and life insurance). Insurers, insureds, agents and brokers, regulators, and litigators will all benefit from additional research in this area.

References

- Ables, A., 2007. "Misrepresentation and Rescission of Insurance Contracts," *Federation of Regulatory Counsel, Inc.*, 18(3): 1–6.
- Childers, S.D., and J.L. Kraham, 2012. "The Future of Insurance Rescission," *Federation of Regulatory Counsel, Inc.*, 23(3): 1–7.
- Ingram, J.D., 2005. "Misrepresentations in Applications for Insurance," *University of Miami Business Law Review*, 14(1): 103–118.
- Keeton, R.E., 1970. "Insurance Law Rights at Variance with Policy Provisions: Part Two," *Harvard Law Review*, 83(6): 1281–1322.
- Miller, D.S., 1988. "Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine," *Columbia Law Review*, 88(8): 1849–1872.

Journal of Insurance Regulation

Guidelines for Authors

Submissions should relate to the regulation of insurance. They may include empirical work, theory, and institutional or policy analysis. We seek papers that advance research or analytical techniques, particularly papers that make new research more understandable to regulators.

Submissions must be original work and not being considered for publication elsewhere; papers from presentations should note the meeting. Discussion, opinions, and controversial matters are welcome, provided the paper clearly documents the sources of information and distinguishes opinions or judgment from empirical or factual information. The paper should recognize contrary views, rebuttals, and opposing positions.

References to published literature should be inserted into the text using the “author, date” format. Examples are: (1) “Manders et al. (1994) have shown. . .” and (2) “Interstate compacts have been researched extensively (Manders et al., 1994).” Cited literature should be shown in a “References” section, containing an alphabetical list of authors as shown below.

Cummins, J. David and Richard A. Derrig, eds., 1989. *Financial Models of Insurance Solvency*, Norwell, Mass.: Kluwer Academic Publishers.

Manders, John M., Therese M. Vaughan and Robert H. Myers, Jr., 1994. “Insurance Regulation in the Public Interest: Where Do We Go from Here?” *Journal of Insurance Regulation*, 12: 285.

National Association of Insurance Commissioners, 1992. *An Update of the NAIC Solvency Agenda*, Jan. 7, Kansas City, Mo.: NAIC.

“Spreading Disaster Risk,” 1994. *Business Insurance*, Feb. 28, p. 1.

Footnotes should be used to supply useful background or technical information that might distract or disinterest the general readership of insurance professionals. Footnotes should not simply cite published literature — use instead the “author, date” format above.

Tables and charts should be used only if needed to *directly support* the thesis of the paper. They should have descriptive titles and helpful explanatory notes included at the foot of the exhibit.

Papers, including exhibits and appendices, should be limited to 45 double-spaced pages. Manuscripts are sent to reviewers anonymously; author(s) and affiliation(s) should appear only on a separate title page. The first page should include an abstract of no more than 200 words. Manuscripts should be sent by email in a Microsoft Word file to:

Cassandra Cole and Kathleen McCullough
jireditor@gmail.com

The first named author will receive acknowledgement of receipt and the editor's decision on whether the document will be accepted for further review. If declined for review, the manuscript will be destroyed. For reviewed manuscripts, the process will generally be completed and the first named author notified in eight to 10 weeks of receipt.

Published papers will become the copyrighted property of the *Journal of Insurance Regulation*. It is the author's responsibility to secure permission to reprint copyrighted material contained in the manuscript and make the proper acknowledgement.

NAIC publications are subject to copyright protection. If you would like to reprint an NAIC publication, please submit a request for permission via the NAIC Web site at www.naic.org. (Click on the "Copyright & Reprint Info" link at the bottom of the home page.) The NAIC will review your request.