

Did I say that?
Current Trends in Policy
Rescission

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Elements of Rescission

- 1) Misrepresentation in an application;
- 2) An intention to deceive or disregard of truthfulness;
- 3) Materiality of the facts misrepresented;
- 4) Does the claim relate to the facts misrepresented.

Misrepresentation

- Objective questions (i.e. have you been hospitalized in the past three years?)
- Subjective questions (i.e. are you in good health?)

Deceit / Disregard of truthfulness

- Varies from state to state, and from insurance product to insurance product
- Incontestability period
- Deceit may be implied from facts

Incontestability Clauses

- “After two years from the date of issue of this policy no misstatements, **except for 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 ... commencing after the expiration of such two-year period.”

Materiality

- Would the insurer have written coverage differently (or not at all) if the application were accurate?
- Need a detailed affidavit, testimony from underwriter.
- Do underwriting guidelines address the issue?

Causation

- Most states look for a causal link between the facts misrepresented and the loss.
- Misrepresentation must affect the risk.

Rescinding Coverage

- You generally do not need to sue.
- Rescind as early as you discover grounds for doing so.
- Tender premiums paid.
- Be clear about the reasons for rescission.

Rescission In

ERISA Cases

MISREPRESENTATIONS BY THE PLAN PARTICIPANT

- What are the likely claims that a plan sponsor/administrator/insurer will assert against a participant?
 - Rescission
 - Common law misrepresentation
 - Common law fraud in the inducement

MISREPRESENTATIONS BY THE PLAN PARTICIPANT

▪ Rescission

- In order to obtain **any** relief under ERISA, the plan sponsor/administrator/insurer must have been acting as a fiduciary at the time of the misrepresentation.
 - A functional test is used to determine whether an entity is a fiduciary under ERISA. Specifically, an entity is a fiduciary “to the extent (i) [it] exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of [plan] assets ..., or (iii) [it] has any discretionary authority or discretionary responsibility in the administration of such plan.” 29 U.S.C. § 1002(21)(A) (ERISA §3(21)(A)).
- If acting as a fiduciary, §502(a)(3) (29 U.S.C. § 1132(a)(3)) provides that the fiduciary may assert a civil action against the participant:
 - (A) to enjoin any act or practice which violates ... the terms of the plan, or
 - (B) to obtain appropriate equitable relief
 - (i) to redress such violations or
 - (ii) to enforce any provisions of ... the terms of the plan.
- NOTE: the only relief a fiduciary may receive under §502(a)(3) is “appropriate equitable relief,” **not compensatory relief**. See *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

MISREPRESENTATIONS BY THE PLAN PARTICIPANT

- Rescission (cont'd)
 - ERISA is silent on the elements of a rescission claim.
 - Courts apply the federal common law of ERISA, which is informed by state law.
 - In applying state law, some courts have held that rescission is appropriate based on:
 - The effect of the misrepresentation on the insurer's decision to issue the policy; and
 - Whether the insured had made a knowing misrepresentation.
 - Also, whether a rescission claim succeeds may depend on applicable incontestability periods under state law. See *Dignity Viatical Settlement Partners v. Cedalion Systems, Inc.*, 4 F. Supp. 2d 466 (W.D.N.C. 1998).
 - NOTE: If rescission is granted, the fiduciary will most likely not be able to recover funds paid to the plan participant because of the misrepresentation, unless the fiduciary can establish that an equitable lien has been created. *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006).
 - Otherwise, the recovery of funds would likely be considered compensatory, monetary relief.

MISREPRESENTATIONS BY THE PLAN PARTICIPANT (cont'd)

■ Misrepresentation

- Will the fiduciary's claim against the participant be subject to ERISA's preemption provision (§514(b))?
- Probably....
 - A common law claim will be preempted if it "relates to" an ERISA-governed plan. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).
 - The "relates to" test is an expansive preemption provision.
- However, the claim may not be preempted if:
 - The claimant is not an individual or entity who is entitled to seek relief under ERISA – e.g. a participant, beneficiary, or **fiduciary**. See ERISA §502.
 - The plan was not established at time of misrepresentation.
 - The alleged misrepresentation had no effect on the administration, structure or fiscal well-being of the plan.
 - See *Stetson v. PFL Ins. Co.*, 16 F. Supp. 2d 28 (D. Me. 1998).

MISREPRESENTATIONS BY THE PLAN PARTICIPANT (cont'd)

- Fraud in the Inducement
 - Preemption –
 - Like a misrepresentation claim, a common law fraud in the inducement claim will likely be preempted because it “relates to” an ERISA-governed plan.
 - However,
 - Courts have held that fraud in the inducement claims may not be preempted because, at the time of the fraud, the prerequisites for forming a contract had not been met. Under such circumstances, the contract had not been formed and a plan is not at issue. See *Woodworker’s Supply Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985 (10th Cir. 1999); *Nash v. Trustees of Boston Univ.*, 946 F.2d 960 (1st Cir. 1991). But see *Hobson v. Robinson*, 75 Fed. Appx. 949 (5th Cir. 2003).

MISREPRESENTATIONS BY THE PLAN PARTICIPANT (cont'd)

- Misrepresentation and Fraud in the Inducement Claims:
 - Preemption is a defense that the participant will likely assert because:
 - The fiduciary's relief will be limited to "appropriate equitable relief" under §502(a)(3).
 - If the claim is not preempted, the fiduciary's claim will be subject to state law, including all available remedies.

Top Ten Insured's Arguments

- “The insured didn’t understand the question”
- “The insured did not speak English.”
- “The doctor never told the insured....”
- “The insured never would have lied.”
- “The insured’s condition was obvious to the agent.”

Top Ten Insured's Arguments (Cont'd)

- “The insured told the agent, but the agent did not record the answer correctly...”
- “The agent told the insure he/she did not have to disclose their condition...”
- “The insured did not read the application before signing it.”
- “The agent promised there would be coverage.”
- “The insured disclosed enough information that the insurer could have investigated.”

Practical Defenses

- Look at the insured's verification on the application.
- Take the writing agent's statement.
- Review carefully medical records.
- Depose treating physicians.
- Investigate insured's employment.

Post-Claim Underwriting

- Some courts have held that an insurer's failure to investigate a medical history at the inception of coverage precludes a rescission action based on a misrepresentation found at the time of a claim.

Thank You

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