Washington

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

In Washington, there is no express requirement that an insurer wait for a court to rule that an insurance policy is rescinded. From the absence of such a requirement, it may be inferred that an insurer may unilaterally rescind a policy, provided the facts support rescission, and provided that the insurer returns the premiums to the insured. *See Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 974, 948 P.2d 1264 (1997) ("Tender back of premiums paid is a condition precedent to maintaining an action to rescind an insurance policy on the grounds of fraud or misrepresentation"). Although an insurer is not required to seek a judicial ruling that a policy is rescinded, it may be prudent for insurers that unilaterally rescind a contract in Washington to file a declaratory judgment action on the issue of rescission in an effort to head off any claims of bad faith made by the insured.

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

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

"Rescission under Washington law is governed by RCW 48.18.090. The statute contains two subsections, the first pertaining to 'oral and written misrepresentation[s] … made in the negotiation of an insurance contract,' and the second to statements made in writing by the insured in an application for life or disability insurance. *See* RCW 48.18.090. Where the first or both sections are implicated, Washington law clearly requires that an insured may rescind a policy upon satisfying four factors: (1) the policyholder represented as truthful certain information during the negotiation of the insurance contract; (2) those representations were untruthful, or misrepresentations; (3) the misrepresentations were material; and (4) the misrepresentations were made with the intent to deceive." *Karpenski v. Am. Gen. Life Co. LLC*, 999 F. Supp. 2d 1235, 1243 (W.D. Wash. 2014). But where only the second section is implicated, actual intent to deceive does not necessarily need to be established in order to rescind the insurance agreement. *Id.* Rescission under subsection (2) requires first that a false statement be knowingly made on the part of the insured. *Id.* "Once false statements have been shown, the insurer seeking to rescind must establish that the false statements were made with either (1) actual intent to deceive, or (2) that they materially affected either the acceptance of risk or the hazard assumed by the insurance company." *Id.* at 1243-44; *see, e.g.*, *Olson v. Bankers Life. Ins. Co. of Neb.*, 63 Wn.2d 547, 388 P.2d 136 (1964) (affirming jury instruction based on showing of either intent to deceive or materiality).

Under Washington law, proof that a material false statement was made in an insurance application knowingly raises a presumption that it was made with intent to deceive. *Music v. United Ins. Co. of Am.*, 59 Wn.2d 765, 769, 370 P.2d 603 (1962); *Wilburn v. Pioneer Mut. Life Ins. Co.*, 8 Wn. App. 616, 620, 508 P.2d 632 (1973). If the insured knowingly makes a false statement, the burden shifts to the insured to establish an honest motive or innocent intent. *Kay v. Occidental Life Ins. Co.*, 28 Wn.2d 300, 302, 183 P.2d 181 (1947). "The bare affirmation that there was no intent to deceive is not credible evidence of good faith, and in the absence of credible evidence of good faith, the presumption warrants a finding in favor of the insurer." *Kay*, 28 Wn.2d at 302.

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

In order to void a policy because of the content of the insured's application, an insurer must establish that the insured committed actionable fraud. *St. Paul Mercury Ins. Co. v. Salovich*, 41 Wn. App. 652, 656, 705 P.2d 812 (1985). Thus, an insurer must prove the nine elements of fraud by clear, cogent, and convincing evidence. *Id.* at 655-56. One of these elements is "reliance on the truth of the representation[.]" *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969).

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

RCW 48.20.052 requires that all disability insurance policies contain an incontestability clause, which prevents an insurer, after two years from the date of issue of the policy, from seeking to rescind the policy for misstatements—except fraudulent misstatements—made by the applicant. However, unless an insurer contractually reserves its right to defend against fraudulent misstatements for an unlimited time, it waives the right to invalidate the policy due to insureds' misstatements or concealment. *Jack v. Paul Revere Life Ins. Co.*, 97 Wn. App. 314, 322-23, 982 P.2d 1228 (1999).

RCW 48.23.050 requires that all life and annuity insurance policies contain an incontestability clause, which prevents an insurer, after the policy has been in force for two years while the insured is still alive, from rescinding the policy. No exception is made for fraudulent misstatements.

RCW 48.24.120 requires that all group life and annuity policies contain an incontestability clause, which prevents an insurer, after the policy has been in force for two years, from rescinding the policy. No exception is made for fraudulent misstatements.

RCW 48.25.070 requires that all industrial life insurance policies contain an incontestability clause, which prevents an insurer from rescinding the policy, after the policy has been in force for two years during the lifetime of the insured. No exception is made for fraudulent misstatements.

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

There is no authority in Washington for the proposition that an insurer may rescind a policy based on the insured's failure to volunteer information that was not requested in the application. *Cf. Uslife Credit Life Ins. Co. v. McAfee*, 29 Wn. App. 574, 577, 630 P.2d 450 (1981) ("Absent an insurer's request for health information or a statement of good health, a prospective insured is under no duty to volunteer it").

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

A representation made in conjunction with an insurance policy application or negotiation is material if the representation influenced the insurance company's decision to issue the coverage. *Queen City Farms, Inc. v. Central National Ins. Co. of Omaha*, 126 Wn.2d 50, 100, 882 P.2d 703 (1994). Information is material if the information measures the risk, which is "the touchstone of an insurance contract." *Verex Assurance, Inc. v. John Hanson Savings and Loan, Inc.*, 816 F.2d 1296, 1302 (9th Cir. 1987); *see also Karpenski v. Am. Gen. Life Co. LLC*, 999 F. Supp. 2d 1235, 1244 (W.D. Wash. 2014) ("Washington … provides that a misrepresentation is material if it changes the nature of the risk such that the insurance carrier either would not have issued the policy or would have charged a higher premium had the truth been known."). However, "when an insurer asks no information in regard to a certain matter, it is a fair assumption that it regards the matter as immaterial." *USLife Credit Life Ins. Co. v. McAfee*, 29 Wn. App. 574, 577, 630 P.2d 450 (1981). The materiality of a misrepresentation is usually a question of fact. *Olson v. Bankers Life Ins. Co.*, 63 Wn.2d 547, 552, 388 P.2d 136 (1964).

In Washington, an insurer is not required to show a causal relationship between an insured's misconduct and payments made by the insurer. *Johnson*

v. Allstate Ins. Co., 126 Wn. App. 510, 516, 108 P.3d 1273 (2005); *Allstate Ins. Co. v. Huston*, 123 Wn. App. 530, 540, 94 P.3d 358 (2004).

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

In Washington, it is unlikely that the subjective testimony of an underwriter that a misrepresentation was material to his or her decision to issue a policy would be sufficient to establish the materiality element of a rescission action. *See Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 101-04, 882 P.2d 703 (1994) (excluding underwriter's purportedly expert testimony on the question of materiality where he lacked knowledge of the underwriting practices of the syndicate that insured plaintiff and could not state a generally accepted practice for all of the insurer's syndicates).

In order to void a policy because of the content of the insured's application, an insurer must establish that the insured committed actionable fraud. *St. Paul Mercury Ins. Co. v. Salovich*, 41 Wn. App. 652, 656, 705 P.2d 812 (1985). Thus, an insurer must prove the nine elements of fraud by clear, cogent, and convincing evidence. *Id.* at 655-56. One of these elements is "reliance on the truth of the representation[.]" *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969). It is reasonable to infer from this that, in order to seek rescission, the insurer must prove it reviewed and considered, for purposes of deciding whether to issue the policy, any document or evidence introduced by it for purposes of proving an alleged misrepresentation was material. However, there is no direct authority on this point in Washington.

An insured's oral misrepresentations that are made with the intent to deceive are sufficient to justify rescission. RCW 48.18.090(1). *But see* RCW 48.18.090(2) ("In any application for life or disability insurance made in writing by the insured …").

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

Washington recognizes that a rescinded policy voids it *ab initio*. *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 528, 998 P.2d 856 (2000). *See also Russell v. Stephens*, 191 Wash. 314, 71 P.2d 30, 31 (1937) ("when a contract is legally rescinded, the parties are restored to their status quo generally").

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

By the terms of RCW 48.18.090(1), only misrepresentations made "by the insured or in his or her behalf" may provide a basis for rescission. Similarly, section (2) is limited to written statements "made by the insured." From this statutory language, it is reasonable to infer that a co-insured who did not make any material misrepresentation and did not know of any material misrepresentation would not be subject to rescission. However, there is no authority on this point in Washington.

There is no authority in Washington for the proposition that an innocent spouse of an insured who fraudulently procured an insurance policy is immune from rescission as long as he/she had no knowledge of the misrepresentation.

RCW 48.18.090(1) makes clear that misrepresentations made by an insured "or in his or her behalf" may provide a basis for rescission. This indicates that the misrepresentation of an insured's agent is imputed to the insured. Note, though, that in Washington, an "insurance agent" is considered an agent of the insurer, not of an applicant; hence, an "insurance agent's" misrepresentations are chargeable to the insurer, rather than the applicant. *Olson v. Bankers Life Ins. Co. of Neb.*, 63 Wn.2d 547, 388 P.2d 136 (1964).

There is no authority in Washington for the proposition that a tort claimant ignorant of fraud or the material misrepresentation is immune from rescission.

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

RCW 48.20.052 requires that all disability insurance policies contain an incontestability clause, which prevents an insurer, after two years from the date of issue of the policy, from seeking to rescind the

policy for misstatements—except fraudulent misstatements—made by the applicant. However, unless an insurer contractually reserves its right to defend against fraudulent misstatements for an unlimited time, it waives the right to invalidate the policy due to insureds' misstatements or concealment. *Jack v. Paul Revere Life Ins. Co.*, 97 Wn. App. 314, 322-23, 982 P.2d 1228 (1999).

RCW 48.23.050 requires that all life insurance policies contain an incontestability clause, which prevents an insurer, after the policy has been in force for two years while the insured is still alive, from contesting the policy. No exception is made for fraudulent misstatement.

RCW 48.24.120 requires that all group life and annuities policies contain an incontestability clause, which prevents an insurer, after the policy has been in force for two years, from rescinding the policy. No exception is made for fraudulent misstatement.

RCW 48.25.070 requires that all industrial life insurance policies contain an incontestability clause, which prevents an insurer, after the policy has been in force for two years while the insured is still alive, from rescinding the policy. No exception is made for fraudulent misstatement.

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

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

There is no authority in Washington that addresses this issue.

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

There is no authority in Washington that addresses this issue.

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

An insurer is obligated to try to ascertain the insured's interest in the property before issuing a policy. *Gossett v. Farmers Ins. Co.*, 82 Wn. App. 375, 387, 917 P.2d 1124 (1996), *rev'd in part*, 133 Wn.2d 954, 948 P.2d 1264 (1997). An insurer may waive its right to challenge an alleged misrepresentation if it does not make a reasonable investigation regarding the extent of an insured's interest. *Gossett v. Farmers Ins. Co.*, 82 Wn. App. 375, 387, 917 P.2d 1124 (1996), *rev'd in part*, 133 Wn.2d 954, 948 P.2d 1264 (1997).

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

Acceptance of premiums by an insurer after having notice of fraud for which policy could be rescinded waives the insurer's right to challenge the policy. *Millis v. Continental Life Ins. Co.*, 162 Wash. 555, 298 P. 739 (1931).

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

Tender back of premiums paid is a condition precedent to maintaining an action to rescind an insurance policy on the ground of fraud or misrepresentation. *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 974, 948 P.2d 1264 (1997) (citing dissenting opinion in *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 111-12, 882 P.2d 703 (1995)).

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

No insurance application is admissible evidence in any action regarding the policy, unless a true copy was attached or otherwise made part of the policy when issued and delivered. RCW 48.18.080(1).

However, there are methods for overcoming the attachment issue. In *Cutter & Buck, Inc. v. Genesis Ins. Co.*, 306 F. Supp. 2d 988 (W.D. Wash. 2004), the court held that RCW 48.18.090(1) allows the insurer to rescind based on oral or written material misrepresentations, and that nothing in the statute limits misrepresentations to those that are physically attached to the policy. The insured's misrepresentations may also be admissible by other means, such as the insured's admissions in other statements or in a declaration. *Tornetta v. Allstate Ins. Co.*, 94 Wn. App. 803, 973 P.2d 8 (1999).

Where the insured engages in post-loss misrepresentation, an insurer may seek to rescind a policy without having to prove the elements of fraud. *See St. Paul Mercury Ins. Co. v. Salovich*, 41 Wn. App. 652, 655-57, 705 P.2d 812 (1985). The insurer is only required to prove that its insured made an intentional misrepresentation. *Id.* What is more, the standard of proof for cases involving the intentional submission of either a false claim or a false proof of loss is by a "preponderance of the evidence," rather than the more demanding "clear, cogent, and convincing evidence" standard. *Id.*

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