

**MISREPRESENTATION LAW AND**  
**INSURANCE COVERAGE**  
**IN**  
**SOUTH CAROLINA**

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**1. The Claim**

An insurer may use the alleged misrepresentations and/or omissions of an insured in the life, health and disability insurance application process in two ways: (i) affirmatively, by seeking rescission of the policy in a declaratory judgment action, or (ii) as a defense to a claim for benefits under the policy.

**(A) *Prima Facie* Case**

Under South Carolina law, a material misrepresentation in an application for insurance is material if the insured knows or has reason to believe that the statement will likely affect the insurer's decision regarding the making of the insurance contract or its terms. State Auto Property & Cas. Ins. Co. v. Gibbs, 314 S.C. 345, 351 n.4, 444 S.E.2d 504, 507 n.4 (1994) (liability insurance); Carroll v. Jackson Nat. Life Ins. Co., 307 S.C. 267, 414 S.E.2d 777 (1992) (life insurance); Ratliff v. Coastal Plain Life Ins. Co., 270 S.C. 373, 242 S.E.2d 424 (1978) (health/accident insurance). See also S.C. Code Ann. § 38-75-730 (West Group 2002 rev.). In order to void a policy on the basis of material misrepresentation, the insurer must show not only that the insured's statements were untrue, but also that the insured was aware of the falsity of the

statements, and that the statements were material to the risk, relied on by the insurer, and made by the insured with the intent to deceive and defraud the insurer. United Ins. Co. of Am. v. Stanley, 277 S.C. 463, 465, 289 S.E.2d 407, 408 (1982).

Evidence that the insured made one or more fraudulent misrepresentations must be established “by clear and convincing evidence.” Primerica Life Ins. Co. v. Ingram, 365 S.C. 264, 269, 616 S.E.2d 737, 739 (Ct.App. 2005); Strickland v. Prudential Ins. Co. of Am., 278 S.C. 82, 86-87, 292 S.E.2d 301, 304 (1982). Where there is conflicting evidence as to whether the insured knowingly made the false statements to the insurer, such evidence creates a question of fact for the jury to resolve. See Primerica Life Ins. Co. v. Ingram, 365 S.C. 264, 269, 616 S.E.2d 737, 739 (Ct.App. 2005); Gasque v. Voyager Life Ins. Co. of S.C., 288 S.C. 629, 633, 344 S.E.2d 182, 184 (Ct.App. 1986); Atlantic Life Ins. Co. v. Beckham, 240 S.C. 450, 126 S.E.2d 342 (1962) (“Supreme Court described itself as ‘quite liberal’ in allowing juries to pass upon questions of alleged fraud in applications for insurance . . .”).

### **(B) Statutes Governing Misrepresentations**

South Carolina defines the terms “false statement” and “misrepresentation” as “a statement or representation made by a person that is false, material, made with the person’s knowledge of the falsity of the statement, and made with the intent of obtaining or causing another to obtain or attempting to obtain or causing another to obtain an undeserved economic advantage or benefit or made with the intent to deny or cause another to deny any benefit or payment in connection with an insurance transaction and such shall constitute fraud.” See S.C. Code Ann. § 38-55-530(D) (Thomson/Reuters West 2007 Supp.).

Notably, a copy of the insurance application must be attached to and made a part of any individual life insurance policy, annuity contract, accident policy, health policy, and/or accident and health policy. See S.C. Code Ann. §§ 38-63-210, 38-69-110, 38-71-30 (West Group 2002 rev.). Otherwise, unless the application was verbally completed, the insurer cannot assert a misrepresentation defense, seeking rescission for any misrepresentation in or omission from the written application. See *Id.*

By statute, all individual and group life insurance policies must include, *inter alia*, provisions regarding the two-year period for contestability of the policy in the event of material misrepresentations and the modification of benefits where the insured's age is misstated. See S.C. Code Ann. § 38-63-220(d), (e) (West Group 2002 rev.) (individual coverage); S.C. Code Ann. § 38-65-210(2), (3) (West Group 2002 rev.) (group coverage). But see S.C. Code Ann. § 37-4-207 (West Group 2002 rev.) (credit life insurance benefits cannot be voided for misstatement as to medical and/or health history); S.C. Code Ann. § 38-38-340(F) (West Group 2002 rev.) (requirements for certificate of benefits issued through fraternal benefit society relating to voiding certificate for material misrepresentations).

Pursuant to S. C. Code Ann. § 38-71-40 (West Group 2002 rev.), the “falsity of any statement in the application for any policy [of accident and health insurance] does not bar the right to recovery thereunder unless the false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer.” See Lanham v. Blue Cross and Blue Shield of South Carolina, Inc., 338 S.C. 343, 348, 526 S.E.2d 253, 255 (Ct.App, 2000), *affirmed as modified*, 349 S.C. 356, 563 S.E.2d 331 (2002). Furthermore, all accident, health, or

accident and health insurance policies delivered or issued for delivery in South Carolina must include a provision limiting the time during which they may be contested on the basis of material misrepresentations. See S.C. Code Ann. § 38-71-340(2) (West Group 2002 rev.) (providing for a two-year contestable period). In addition, insurers have the option of including a “Misstatement of Age” provision in accident, health, or accident and health insurance policies, stating that “[i]f the insured’s age has been misstated, the benefits will be those the premium paid would have purchased at the correct age.” S.C. Code Ann. § 38-71-370(2) (West Group 2002 rev.).

**(C) An Insured’s Material Misrepresentations as a Matter of Law**

A prospective insured's representations in an insurance application should be true and complete because “[t]he insurer has the right to know the whole truth.” See Government Employees Ins. Co. v. Chavis, 254 S.C. 507, 513, 176 S.E.2d 131, 133-134 (1970); Parker v. Pacific Mutual Life Insurance Company of California, 179 S.C. 117, 183 S.E. 697 (1935). As the South Carolina Supreme Court recognized, “A misstatement of material facts by the applicant takes away the [insurer's] opportunity to estimate the risk under its contract.” Government Employees Ins. Co. v. Chavis, 254 S.C. 507, 513, 176 S.E.2d 131, 133-134. Moreover, where the insurer specifically inquires about a fact, or frames a question so as to elicit a desired fact, the applicant must make a full disclosure, and the insurer has the right to rely upon the applicant’s answers. See Government Employees Ins. Co. v. Chavis, 254 S.C. at 513, 176 S.E.2d at 134. In other words, an applicant must “make full answers without evasion, suppression, misrepresentation[,] or concealment of material facts so that such statements will represent his knowledge of the hazards of the loss.” Government

Employees Ins. Co. v. Chavis, 254 S.C. at 513, 176 S.E.2d at 134. Consequently, when an applicant “states[s] the circumstances which can affect the risk, he must do so fully and faithfully.” Government Employees Ins. Co. v. Chavis, 254 S.C. at 513, 176 S.E.2d at 134; Southern Farm Bureau Cas. Ins. Co. v. Ausborn, 249 S.C. 627, 155 S.E.2d 902 (1967). An insured’s misrepresentations regarding serious conditions, such as heart disease, cancer, kidney disease, liver disease, and the like, are effectively misrepresentations as a matter of law. See generally Lanham v. Blue Cross Blue Shield of South Carolina, Inc., 349 S.C. 356, 563 S.E.2d 331 (2002); Strickland v. Prudential Ins. Co. of Am., 278 S.C. at 85-86, 292 S.E.2d at 303-304; Cain v. United Health Ins. Co., 232 S.C. 397, 102 S.E.2d 360 (1958).

#### **(D) Insurer’s Increased Risk of Loss**

An insurer may avoid an insurance policy based on a misrepresentation when and if the issuance of a policy was based on material misrepresentations that led the insurer to assume a risk materially different from the risk it thought it was assuming. See Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 563 S.E.2d 331 (2002) (to rescind coverage, the insurer must show both a false statement made with the intent to deceive and the materiality of the statement to either the acceptance of the risk or the hazard assumed); Southern Farm Bureau Cas. Ins. Co. v. Ausborn, 249 S.C. 627, 155 S.E.2d 902 (1967) (insured’s failure to disclose prior insurance cancellations and misrepresentation regarding driving record were material to the risk and sufficient to void policy); Arnold v. Life Ins. Co. of Georgia, 226 S.C. 60, 83 S.E.2d 553 (1954) (intentional misrepresentation as to diagnosis of mental illness and prior hospitalization voided life insurance policy because they increased insurer’s risk of loss).

### (E) Insured's Fraudulent Misrepresentations

Misrepresentations in insurance applications are only actionable if they are fraudulent misrepresentations. See Primerica Life Ins. Co. v. Ingram, 365 S.C. 264, 269, 616 S.E.2d 737, 739 (Ct.App. 2005); Lanham v. Blue Cross & Blue Shield, 349 S.C. at 364, 563 S.E.2d at 334-335 (to void a policy on material misrepresentations the insurer must show a false statement was made with the intent to deceive in addition to materiality of the misstatement); Gasque v. Voyager Life Ins. Co. of S.C., 288 S.C. 629, 344 S.E.2d 182 (Ct.App. 1986) (insured must intend to deceive the insurance company); Small v. Coastal States Life Ins. Co., 241 S.C. 344, 348, 128 S.E.2d 175, 177 (1962) (insured's responses to questions in a health insurance application are representations and are not warranties). See also Nationwide Life Ins. Co. v. Attaway, 254 F.2d 30, 32, 34 (4th Cir.1958) (fraud as a matter of law where insured received extensive treatment for symptoms typical of heart disease that he did not disclose); Washington v. Garden State Life Ins. Co., No. 3:06-2824-MBS, 2007 WL 2363827, at \*1-2, 4 (D.S.C. Aug. 16, 2007) (insured renewed application for insurance six months after HIV diagnosis but stated he had not tested positive for HIV or consulted a doctor in last five years); Reese v. Woodmen of the World Life Ins. Soc., 221 S.C. 193, 203, 69 S.E.2d 919, 923 (1952) (intent to defraud inferred as a matter of law because of applicant's recent and extended medical care for serious heart disease); Robinson v. Pilgrim Health & Life Ins. Co., 216 S.C. 141, 145, 57 S.E.2d 60, 62 (1949) (fraud as a matter of law where insured stated he was generally in sound health and concealed a recent operation for tuberculosis); Murray v. Metro. Life Ins. Co., 193 S.C. 368, 370-71, 8 S.E.2d 314, 315 (1940) (insured stated he had not been treated by a physician and

had no health problems when he had been hospitalized for advance tuberculosis); McLester v. Metro. Life Ins. Co., 175 S.C. 425, 428–29, 179 S.E. 490, 491–92 (1935) (fraud as a matter of law where insured was informed she had an incurable cancer, sought an insurance agent's office away from her town, and failed to disclose her cancer). In addition, a material misrepresentation in an insurance application only voids the policy when the insurer demonstrates the insured's statements were: (a) untrue, (b) known by the insured to be false, (c) material to the risk, (d) relied on by the insurer, and (e) made by the insured to deceive and defraud the insurer. See Shenandoah Life Ins. Co. v. Smallwood, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Ct.App. 2013) (2013 WL 238866, filed 23 January 2013); Primerica Life Ins. Co. v. Ingram, 365 S.C. at 269, 616 S.E.2d at 739; United Ins. Co. of Am. v. Stanley, 277 S.C. 463, 465, 289 S.E.2d 407, 408 (1982). Thus, an insured's intent and good faith in making the allegedly false statements is always an issue in material misrepresentation cases. Primerica Life Ins. Co. v. Ingram, 365 S.C. 264, 269, 616 S.E.2d 737, 739 (Ct.App. 2005); Southern Farm Bureau Cas. Ins. Co. v. Ausborn, 249 S.C. 627, 638, 155 S.E.2d 902, 908 (1967). See also generally Shenandoah Life Ins. Co. v. Smallwood, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Ct.App. 2013) (2013 WL 238866, filed 23 January 2013) (Williams, J., dissenting) (citing Sadel v. Berkshire Life Ins. Co. of Am., 473 Fed. Appx. 152, 156 (3d Cir.2012) (affirming the trial court's order granting the insurance company summary judgment on its rescission counterclaims because clear and convincing evidence indicated the insurer's application included fraudulent statements, namely denying past drug use and treatment for drug use); Burkert v. Equitable Life Assur. Soc. of Am., 287 F.3d 293, 297–98 (3d Cir.2002) (noting that under Pennsylvania law, misrepresentations

regarding alcohol abuse in a life insurance application are deemed to be made in bad faith as a matter of law and extending those holdings to drug abuse); Life Ins. Co. of Ga. v. Helmuth, 357 S.E.2d 107, 108–09 (Ga.Ct.App.1987) (reversing the trial court's denial of an insurance company's directed verdict motion based on undisputed evidence that the insured concealed information about her past treatment for drug and alcohol use)).

#### **(F) Changes Between Time of Application and Issuance of Policy**

The United States Supreme Court has held that a life insurance applicant was obligated to advise the insurer fully and completely about all post-application, but pre-policy delivery, changes in the applicant's physical condition seriously affecting his health. See Stipcich v. Metropolitan Life Ins. Co., 277 U.S. 311, 316-317 (1928). There are, however, no South Carolina state court or federal court appellate decisions directly addressing this issue.

#### **(G) Relationship between Insured's Misrepresentation and Insured's Loss**

There is no requirement the insured's loss be causally related to the insured's material misrepresentation in order to void an insurance policy. Darling v. Savers Life Ins. Co., 131 F.3d 133 (4<sup>th</sup> Cir. 1997 (Table) (1997 WL 768545 \*5); Cantu v. John Hancock Mut. Life Ins. Co., 991 F.2d 787 (4<sup>th</sup> Cir. 1993); Carroll v. Jackson Nat'l Life Ins. Co., 307 S.C. 267, 414 S.E.2d 777 (1992).

#### **(H) Insured's Remedies**

An insurer may use an insured's material misrepresentation in an application for insurance offensively in a declaratory judgment action seeking rescission of the policy, or defensively as a defense to a claim for policy benefits. Where an insurer establishes

it issued a policy based on material misrepresentations in the application, it is entitled to rescission of the policy and/or a declaration that the policy is void *ab initio*. See Darling v. Savers Life Ins. Co., 131 F.3d 133 (1997 WL 768545); United Ins. Co. of Am. v. Stanley, 277 S.C. 463, 289 S.E.2d 407 (1982); Government Employees Ins. Co. v. Chavis, 254 S.C. 507, 176 S.E.2d 131 (1970).

## **2. Defenses**

### **(A) Knowledge of Insurer's Agent**

The insurance agent's knowledge concerning facts material to the information sought in an insurance application will often be imputed to the insurance company. South Carolina Farm Bureau Mut. Ins. Co. v. Mayer, 314 S.C. 102, 441 S.E.2d 824 (1994); Marlowe v. Reserve Life Ins. Co., 261 S.C. 23, 198 S.E.2d 267 (1973). Generally, even if the agent does not communicate these facts to the insurer, the agent's knowledge is imputed to the insurer, thereby preventing the insurer from avoiding the policy. See Marlowe v. Reserve Life Ins. Co., 261 S.C. at 27-28, 198 S.E.2d at 269-270; Cauthen v. Metropolitan Life Ins. Co., 189 S.C. 356, 1 S.E.2d 147 (1939); Rearden v. State Mut. Life Ins. Co., 79 S.C. 526, 60 S.E. 1106 (1908). The agent's knowledge, however, will not be imputed to the insurer where there is collusion between the agent and the insured. Cf. Gavin v. North Carolina Mut. Ins. Co., 265 S.C. 206, 217 S.E.2d 591 (1975).

### **(B) Errors in Recording Information**

Where the insured provided accurate and truthful answers to the questions on an insurance application, but the answers were incorrectly transcribed by the agent, the insurer is estopped from denying the validity of the insurance coverage. See Marlowe

*v. Reserve Life Ins. Co.*, 261 S.C. at 28-29, 198 S.E.2d at 270. Imputing the agent's conduct to the insurer is consistent with the principle that regardless of the type of relationship that exists between the agent and the company, insurers are bound by the representations and acts of their agents acting within the scope of their authority. See *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 242, 489 S.E.2d 470, 472 (1997) ("[T]he authorized acts of an agent are the acts of the principal."). Whether there is an agency relationship between the insurer and the insurance agent is a question of fact to be resolved by the trier-of-fact. *Holmes v. McKay*, 334 S.C. 433, 513 S.E.2d 851 (Ct.App. 1994) (discussing differences between an insurance agent and an insurance broker).

### **(C) Innocent Misrepresentations**

In South Carolina, two necessary elements in a material misrepresentation claim or defense are the insured's (i) knowledge of the falsity of statements and (ii) intent to deceive and defraud the insurer. See *United Ins. Co. of Am. v. Stanley*, 277 S.C. 463, 465, 289 S.E.2d 407, 408 (1982) (stating elements required to prove material misrepresentation in insurance application); *Reese v. Woodman of the World Life Ins. Co.*, 221 S.C. 193, 69 S.E.2d 919 (1952) (same). Moreover, an assertion that the misrepresentation was innocently made is a valid defense because, "[f]alse representations alone will not void a policy." *Gasque v. Voyager Life Ins. Co. of S.C.*, 288 S.C. 629, 632, 344 S.E.2d 182, 184 (Ct.App. 1986). The insured's intent and good faith in making the allegedly false statements, therefore, is always an issue in the case. *Southern Farm Bureau Cas. Ins. Co. v. Ausborn*, 249 S.C. 627, 638, 155 S.E.2d 902, 908 (1967).

**(D) Failure to Read**

South Carolina law prescribes that when the truth could have been ascertained by reading the instrument, one cannot complain of fraud based on the misrepresentation of the contents of a written instrument in his possession because one entering into a contract should read it and exercise every reasonable opportunity to understand its contents and meaning. See Doub v. Weathersby-Breeland Ins. Agency, 268 S.C. 319, 233 S.E.2d 111 (1977); Reid v. George Washington Life Ins. Co., 234 S.C. 599, 109 S.E.2d 577 (1959). This rule also applies where the party against whom the fraud is asserted actually signed the document and had the opportunity to read it. See Reid, 234 S.C. at 602, 109 S.E.2d at 579. In insurance cases, however, this principle is less stringently applied. See Kelly v. S.C. Farm Bureau Mut. Ins. Co., 316 S.C. 319, 325, 450 S.E.2d 59, 63 (Ct.App. 1994). Nevertheless, when an insured has the opportunity to read the contents of the application and fails to do so, and fails to make any inquiries of the agent, the insured may be bound by the misrepresentations contained therein because he failed to adhere to the duty to read the contract. See Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. 411, 423-424, 171 S.E.2d 486, 492 (1969); Doub, 268 S.C. at 326-327, 233 S.E.2d at 114.

**(E) Duty to Inquire**

Although there are no South Carolina decisions directly addressing this issue, South Carolina courts have observed, “The rule sanctioned by most of the courts is that where one party to a transaction induces the other party to enter into it by [a] willful misrepresentation, he cannot escape liability for his fraud by showing that such party could have investigated the representations made and would then have found that they

were untrue.” Government Employees Ins. Co. v. Chavis, 254 S.C. 507, 518-519, 176 S.E.2d 131, 136-137 (1970). Cf. Thomas v. American Workmen, 197 S.C. 178, 14 S.E.2d 886 (1941). Notwithstanding this observation, South Carolina courts also recognize “the rule that, ordinarily [an] ‘insurer’s failure to inquire into facts it considers material to the risk prior to issuance of the policy estops [the] insurer to object to the applicant's concealment unless the concealment is tainted with a fraudulent intent.” Hood v. Security Ins. Co. of New Haven, 247 S.C. 71, 80, 145 S.E.2d 526, 531 (1965). Indeed, the general rule is one ordinarily cannot complain of fraud based on misrepresentations in the contents of a written contract because, when the truth could have been ascertained by reading it, a party entering into that contract must avail himself of every reasonable opportunity to understand the terms of that contract. See Hutto v. Southern Farm Bureau Life Ins. Co., 259 S.C. 170, 172-173, 191 S.E.2d 7, 8 (1972).

#### **(F) Statute of Limitations**

Unless otherwise tolled or provided for under South Carolina law, a civil action must be filed within three years from the date it accrues. See S.C. Code Ann. §§ 15-3-530(1), (8) (West Group 2005 rev.); see also Kleckley v. Northwestern Nat’l Cas. Co., 338 S.C. 131, 526 S.E.2d 218 (2000); Bennett v. Metropolitan Life Ins. Co., 197 S.C. 498, 15 S.E.2d 743 (1941). Further, the discovery rule provides that the cause of action accrues when the claimant knew or reasonably should have known of the alleged wrong. See Holy Lock Distributors, Inc. v. Hitchcock, 332 S.C. 247, 503 S.E.2d 787 (Ct.App. 1999), *rev’d on other grounds*, 340 S.C. 20, 531 S.E.2d 282 (2000). The statute of limitations may be tolled if the plaintiff is a minor or is otherwise mentally

disabled, until the removal of the disability. See S. C. Code Ann. § 15-3-40 (West Group 2005 rev.). Any contractual provision attempting to decrease the statutory three-year statute of limitations period is void as a matter of law. See S.C. Code Ann. § 15-3-140 (West Group 2005 rev.)

Notably, an insurer must rescind a policy without undue delay after it discovers the misrepresentation. Stumpf v. State Farm Auto Ins. Co., 252 Md. 696, 713, 251 A.2d 362, 371 (1969). Moreover, the statute of limitations does not apply where there is a statutory requirement limiting the contestable period to less than three years.

### **(G) Estoppel/Waiver**

An insurer's acceptance of premiums in the face of facts and circumstances giving rise to grounds for policy rescission estops the company from denying the validity of the policy. See generally Hall v. Allstate Ins. Co., 284 S.C. 62, 324 S.E.2d 341 (Ct.App. 1984); Pitts v. New York Life Ins. Co., 247 S.C. 545, 148 S.E.2d 369 (1966); but see Alverson v. Minnesota Mut. Life Ins. Co., 287 S.C. 432, 339 S.E.2d 140 (Ct.App. 1985) (acceptance of premiums after notice of insured's death did not constitute a waiver of insurer's right to assert a defense to suicide clause in policy because suicide was excluded risk and doctrine of waiver could not operate to rewrite policy to make it a covered risk).