Illinois

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Formation of a Life Insurance Contract

Insurable Interest Requirement

In Illinois, "a life insurance policy must not be sold to or be procured by an individual who has no insurable interest in the life of the insured. Illinois law has long required that the procurer of an insurance policy on the life of another must have an insurable interest in the other's life." *Bajwa v. Metro. Life Ins. Co.*, 776 N.E.2d 609, 616–17 (Ill. App. Ct. 2002) (citing *Guardian Mut. Life Ins. Co. of N.Y. v. Hogan*, 80 Ill. 35, 39, 1875 WL 8703 (1875)). "This requirement is grounded in public policy, which forbids a person with no interest in the continuation of a life to obtain insurance on that life." *Bajwa*, 776 N.E.2d at 617.

"An insurable interest means 'an interest in having the life of the insured continue,' *Colgrove v. Lowe*, 175 N.E. 569, 571 (Ill. 1931), rather than an interest in the insured's early death, *Ohio Nat'l Life Assurance Corp. v. Davis*, 803 F.3d 904, 908 (7th Cir. 2015) (citing *Grisby v. Russell*, 222 U.S. 149, 155 (1911))." *Lincolnway Cmty. Bank v. Allianz Life Ins. Co. of N. Am.*, No. 11 C 5907, 2015 WL 7251931, at *2 (N.D. Ill. Nov. 6, 2015). Thus, "under Illinois law, a life insurance contract without an insurable interest is treated as a wagering contract." *Penn Mut. Life Ins. Co. v. Greatbanc Trust Co.*, 887 F. Supp. 2d 822, 830 (N.D. Ill. 2012) (citing *Dresen v. Metro. Life Ins. Co.*, 195 Ill. App. 292, 293 (1st Dist. 1915)). "Wagering contracts are illegal and therefore void *ab initio*." *Id.* at 830.

An insurable interest can arise from various relationships, such as "a creditor of or surety for the insured" and "ties of blood or marriage… as will justify a reasonable expectation of advantage or benefit from the continuance of [one's] life." 22 Ill. Law & Prac. Insurance §114 (citing *Colgrove*, 75 N.E. 569). In addition,

> [w]ith respect to a more remote blood relationship, such as grandparents and grandchild, uncle or aunt, and nephew or niece, it is not unreasonable to suppose that the courts of Illinois would hold that the same requirements would have to be complied with as in the case of parent and child, that is, that there be a reasonable expectation of pecuniary advantage in addition to the relationship.

Id. (citing *Bruce v. Ill. Bankers Life Ass'n*, 207 Ill. App. 555, (1917)).

A person may insure his or her own life "'for the benefit of another having no insurable interest therein.'" *Bajwa*, 776 N.E.2d at 617 (quoting *Colgrove*, 175 N.E. at 571). "In other words, the requirement of having an insurable interest is imposed only with respect to the procurer of the policy, not the ultimate beneficiary." *Bajwa*, 776 N.E.2d at 617.

Regarding the employment context, the Illinois Insurance Code provides, in pertinent part, that:

> [n]otwithstanding any other Section of this Code, an employer or an employer sponsored trust for the benefit of its employees has an insurable interest in the lives of the employer's directors, officers, managers, nonmanagement employees, and retired employees and may insure those lives on an individual or group basis with the consent of the insured. The consent requirement will be satisfied if the insured is provided written notice of the coverage and does not reject such coverage within 30 days of receipt of such notice. The extent of the employer's or the trust's insurable interest for nonmanagement and retired employees shall be limited to an amount commensurate with the employer's projected unfunded liabilities to nonmanagement and retired employees for welfare benefit plans, as defined by the Employee Retirement Income Security Act of 1974, Public Law 93-406, 88 Stat. 829, calculated according to accepted actuarial principles. An

> insurable interest must exist at the time the contract of life or disability insurance becomes effective, but need not exist at the time the loss occurs.… As used herein, "employer" means an individual, sole proprietorship, partnership, firm, corporation, association, or any other legal entity that has one or more employees and is legally doing business in this State.

215 Ill. Comp. Stat. 5/224.1; *see also* 22 Ill. Law & Prac. Insurance §114 ("A corporation has an insurable interest in the lives of its officers or principal shareholders where it would suffer a pecuniary loss from their death") (citing *Wagner v. Nat'l Engraving Co.*, 30 N.E.2d 750 (Ill. App. Ct. 1940)).

The termination of an insurable interest will not necessarily affect the life insurance policy. "A policy is not avoided by the cessation of the insurable interest unless such be the necessary effect by the provisions of the policy itself." *Speroni v. Speroni*, 92 N.E.2d 63, 66 (Ill. 1950). Accordingly, if a spouse is named as a beneficiary of his or her spouse's life insurance policy, a judgment of dissolution of marriage does not affect the rights of the divorced spouse-beneficiary, unless otherwise specified by the life insurance policy. *Id.* at 65–66; *see also Meehan v. Transamerica Occidental Life Ins. Co.*, 499 N.E.2d 602, 604 (Ill. App. Ct. 1986) ("A dissolution of marriage does not terminate the insurable interest of a spouse on the life of the former spouse"). *See also* "**Changes in the Beneficiary: Revocation of Death Benefits by Divorce or Annulment**," *infra*.

Must the Insured Sign the Application?

Illinois requires an insured to consent to a policy being taken out on his or her life. *Bajwa*, 804 N.E.2d at 528–29. Insurers have a duty to inform proposed insureds of applications on their lives, and an insurer that issues a policy without taking reasonable precautions to determine that the insured has in fact consented opens itself up to possible claims for wrongful death or negligent issuance of a life insurance policy. *Id.*; *see also Bovan v. Am. Family Life Ins. Co.*, 897 N.E.2d 288, 295 (Ill. App. Ct. 2008) (duty does not extend to insurance agent acting on insurer's behalf). While neither *Bajwa* nor any other case explicitly requires the proposed insured to sign the application, obtaining the applicant's signature would work toward satisfying this duty.

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

In Illinois, an insurance application is simply an offer and does not create any rights for the applicant or impose any duties on the insurer. *Hampton v. Hartford Life Ins. Co.*, No. 04 C 4619, 2008 WL 244169, at *4 (N.D. Ill. 2008). Insurers often seek to further insulate themselves from claims that an application is more than a mere offer, and courts will generally give effect to application language providing that no policy will be effective if the applicant dies before performing certain conditions. *Id.*

"Although a [conditional] receipt is not a policy, principles concerning insurance policies are applicable." *Garde v. Am. Family Life Ins. Co.*, 498 N.E.2d 292, 294 (Ill. App. Ct. 1986). The terms of a conditional receipt determine whether coverage is in effect. "The insurer must phrase the receipt in language sufficiently clear for a layman to understand…. When this is done, an application and receipt which make coverage dependent upon either approval of the application or insurability under the company's underwriting rules will be upheld." *Id.* at 295; *see also Anetsberger v. Metro. Life Ins. Co.*, 14 F.3d 1226, 1232 (7th Cir. 1994) ("The language used in the Receipt clearly and plainly describes when, and under what circumstances, temporary insurance would take effect.t"). As the Illinois Appellate Court noted in *Mijes v. Primerica Life Insurance Co.*, 740 N.E.2d 1160 (Ill. App. Ct. 2000), "[a] condition precedent is an act which one party to a contract must perform before the other party's obligation under the contract begins." *Id.* at 1163. Thus, "'the contract is neither enforceable nor effective until the condition is performed or the contingency occurs.'" *Id.*

In *Mijes*, a husband and wife applied for a life insurance policy. "The Conditional Premium Receipt… provided "…no insurance will be in effect before a Policy is issued and delivered unless all of the Conditions below are met.'" 740 N.E.2d at 1161–62. The conditions were that "'[a]ll items requested by the Company concerning… insurability must have been

received by the Company,' and those items included, but were 'not limited to, medical examinations, blood and/or urine studies, attending physicians statements (APS) and electrocardiograms (EKG).'" *Id.* at 1162. The husband and wife signed the agreement and receipt, and "Primerica requested blood and urine samples from [the wife]." *Id.* The wife went on vacation in Mexico before submitting the samples that Primerica requested, and she died as the result of a car accident while on vacation. *Id.* Agreeing with the trial court, the *Mijes* court found that the policy unequivocally denied recovery because conditions precedent to the policy becoming effective were not satisfied. *Id.* at 1163. It also explained: "Illinois courts do not require materiality: 'Unless the conditions precedent to coverage are fulfilled, no interim coverage takes effect.'" *Id.*

Courts applying Illinois law also generally enforce restrictions in temporary insurance agreements. In *Anetsberger v. Metropolitan Life Insurance Co.*, 14 F.3d 1226 (7th Cir. 1994), an agent gave an applicant's children a receipt providing that temporary insurance coverage would start on the date of the receipt, but "if a medical examination of a person to be insured is initially required by our underwriting rules," coverage would not start until after the examination. *Id.* at 1229. Several days later the agent advised one of the children that an examination would be required, but the applicant died before having the examination. *Id.* at 1230. The insurer subsequently denied the application. *Id.*

The applicant's children sued the insurer, alleging the term "initially" in the temporary insurance agreement was ambiguous and should be interpreted against the insurer. *Id.* at 1231. They argued that initially implied "at the beginning," but the agent did not tell them an examination would be required until after the application process began. *Id.* Applying Illinois' general insurance contract interpretation rules—interpreting provisions in the factual context of the case and construing ambiguities in favor of coverage—the Seventh Circuit held the language was unambiguous. *Id.* at 1232. The receipt was clear that the insurer could seek additional health information after the application process began and temporary insurance would not begin when the application was initially completed if the insurer's underwriting rules required an examination. *Id.* Accordingly, no temporary insurance went into effect. *Id.*; *see also Harbin v. Sun Life Assurance Co. of Can.*, 710 F. Supp. 1167 (N.D. Ill. 1989) (no temporary insurance where temporary insurance agreement provided coverage began on date selected in application as due date for first premium payment and the "date of issue" was selected as the due date in the application because no policy was issued).

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

A binding insurance contract arises when there is an offer and acceptance, the amount and rate of insurance are understood, and the premium is paid (if demanded). *Pekin Life Ins. Co. v. Schmid Family Irrevocable Trust*, 834 N.E.2d 531, 535 (Ill. App. Ct. 2005) (life policy did not become effective because insurer did not receive premiums due). Payment of a premium alone generally will not create a contract. *See Moore v. Ins. Co. of N. Am.*, 200 N.E.2d 1 (Ill. App. Ct. 1964) (no contractual relationship existed where applicant submitted application with initial premium but insurer rejected the application several months later, after the applicant died). In *La Barre v. Prudential Insurance Co. of America*, 2 N.E.2d 354 (Ill. App. Ct. 1936), the court found the insurer was not liable on a preliminary receipt that conditioned the existence of life insurance on the insurer's acceptance of the application and the applicant's sound health, where the insurer rejected the application before the applicant died and had not yet returned the premium to the applicant or his representative. *Id*; *see also Garde v. Inter-Ocean Ins. Co.*, 842 F.2d 175, 179 (7th Cir. 1988) (life insurer that accepted a premium deposit was not estopped under Illinois law from conducting investigation permitted by conditional receipt and denying coverage before the policy was delivered).

Good Health Requirement at Time of Delivery

Unless there is a contractual provision to the contrary, subject to waiver by the insurer or its agent, Illinois law does not require that the insured be in good health at the time of delivery of a life insur-

ance policy. *See*, *e.g.*, *Mousette v. Monarch Life Ins. Co.*, 32 N.E.2d 1004 (Ill. App. Ct. 1941) (judgment for insured affirmed where insurer's agent had knowledge that the insured was not in good health at the time of policy delivery). A contractual promise requiring good health is enforceable, however. In *Fidelity & Guaranty Life Insurance Co. v. Payne*, No. 02 C 8605, 2003 WL 22143249, at *2–3 (N.D. Ill. 2003), the court granted the insurer's motion for judgment on the pleadings where the life insurance application contained a good health requirement upon delivery and the proposed insured did not disclose his cancer diagnosis which was made after he completed the policy application. *See also Kioutas v. Life Ins. Co. of Va.*, 35 F. Supp. 2d 616, 621–22 (N.D. Ill. 1998) (proposed insured did not meet the good health condition precedent to insurance coverage).

Free Look Period After Policy Delivery

Illinois has long required policies to contain provisions giving insureds at least 10 days to cancel a policy after receipt. Specifically, the Illinois Insurance Code provides that:

> [a]fter the first day of July, 1937, no policy of life insurance other than industrial, group or annuities and pure endowments with or without return of premiums or of premiums and interest, may be issued or delivered in this State, unless such policy contains in substance the following provision[]: A provision, or a notice attached to the policy, to the effect that during a period of ten days from the date the policy is delivered to the policy owner, it may be surrendered to the insurer together with a written request for cancellation of the policy and in such event, the insurer will refund any premium paid therefor, including any policy fees or other charges. The Director may by rule exempt specific types of policies from the requirements of this subsection.

215 Ill. Comp. Stat. 5/224(1)(n); *see Rich v. Principal Life Ins. Co.*, 875 N.E.2d 1082, 1096 (Ill. 2007) (noting policy provided 10-day free look period as support for finding that plaintiff knew of relevant limitation in disability policy and upholding summary judgment for insurer).

Electronic Signature Requirements

Illinois' Electronic Commerce Security Act places electronic signatures on almost the same level as their pen and paper counterparts. 5 Ill. Comp. Stat. 175/5-120(a); *see also id.* at 175/5-120(c)(1) (although a handwritten signature may be required if demonstrated by the "manifest intent of the lawmaking body," language simply requiring a "signature" or that a record be "signed" does demonstrate such intent). This Act also gives parties a good deal of leeway in proving the legitimacy of a signature, as it may be "proved in any manner." *Id.* at 175/5-120(b). *But see* 5 Ill. Comp. Stat. 175/10-110, 120 (applying stricter requirements for secure electronic records and signatures, which give rise to rebuttable presumptions that records have not been altered and signatures are accurate).

Courts will still require some sort of electronic signature, however, as the text of an email alone will not suffice. *Legacy Seating, Inc. v. Commercial Plastics Co.*, 65 F. Supp. 3d 542, 554 (N.D. Ill. 2014) (statement in email that something "looks ok" does not constitute an electronic signature).

The Act applies to the insurance industry, but does limit its application in certain areas of the law, including wills, trusts, healthcare powers of attorney, and negotiable instruments. 5 Ill. Comp. Stat. 175/5-120(c)(2)–(3). And although the Illinois Insurance Code does not explicitly address electronic signatures, it does generally permit insurers to post insurance policies on their websites instead of mailing the policies and to email notices or documents (with the applicant, insured, or owner's consent) provided such practices conform to the Electronic Commerce Security Act. *See* 215 Ill. Comp. Stat. 5/143.33, 143.34.

Maintenance of a Life Insurance Policy

Grace Period

The Illinois Insurance Code requires life insurance policies issued after July 1, 1937, to provide the insured has a 30 day (or one month) grace period to make any past-due premium payment. 215 Ill. Comp. Stat. 5/224(1)(b). Coverage will still be provided if the insured dies and the beneficiary submits a claim during the grace period, but any outstanding premi-

ums will be deducted from any payment. *Id.* "A grace period does not constitute extended coverage," however, and a beneficiary will not be able to recover if the insured dies after the grace period expires. *Nieder v. Jackson Nat'l Life Ins. Co.*, No. 10 C 6766, 2011 WL 3798224, at *3 (N.D. Ill. Aug. 22, 2011); *Petry v. Nw. Mut. Life Ins. Co.*, No. 12 C 5246, 2015 WL 1119566, at *8 (N.D. Ill. Mar. 10, 2015) (granting summary judgment for insurer when the grace period ended before insured's death, beneficiary sent the premium payment after insured's death, and insurer cashed the premium check without knowing insured had died).

Lapse for Failure to Timely Pay Premiums

An insurer cannot lapse a life insurance policy within six months after a premium default unless it provides sufficient notice. 215 Ill. Comp. Stat. 5/234(1). The notice must be written or printed and state the amount of the premium due, where the premium will be paid, the name of the payee, and that the policy will be void unless the premium is paid. *Id.* It further must be properly stamped and "duly addressed and mailed" to the insured's or assignee's last known address at least 15 days, but not more than 45 days, "prior to the day when the same is due and payable, before the beginning of the period of grace." *Id.*

Although insurers have the burden of proof on this point, they only have to show they "addressed and mailed" the notice, and need not demonstrate the intended recipient actually received the notice. *Hotaling v. Chubb Sovereign Life Ins. Co.*, 241 F.3d 572, 579 (7th Cir. 2001); *Cullen v. N. Am. Co.*, 531 N.E.2d 390, 392 (Ill. App. Ct. 1988). Insurers can meet this burden through an employee or agent's affidavit that a notice complying with all statutory requirements was properly stamped, addressed, and mailed. Cullen, 531 N.E.2d at 392; 215 Ill. Comp. Stat. 5/234(1). Affidavits are not the only way insurers may carry this burden; they may also rely on their customary practices to show compliance. *Hotaling*, 241 F.3d 580–81.

Changes in the Beneficiary

Substantial Compliance Rule

With respect to changing the beneficiary of a life insurance policy, "Illinois courts recognize the doctrine of substantial compliance." *Minn. Life Ins. Co. v. Kagan*, 724 F.3d 843, 849 (7th Cir. 2013). "Where the insurer has specified in the policy the method for changing the beneficiary, some type of compliance with the policy terms is required," and "Illinois generally requires that the insured substantially comply with the policy terms." *Hoopingarner v. Stenzel*, 768 N.E.2d 772, 776 (Ill. App. Ct. 2002). "[A]n insured will be found to have successfully changed beneficiaries if the claimant can show: (1) a clear expression of the insured's intent to change beneficiaries; and (2) a concrete attempt by the insured to carry out his intentions as far as was reasonably within his power." *Page v. Am. Gen. Life Ins. Co.*, No. 13 C 6979, 2014 WL 7185290, at *3 (N.D. Ill. Sept. 11, 2014) (citing *Minn. Life Ins. Co.*, 724 F.3d at 851–52).

However, substantial compliance in this context has, by and large, been limited in application to interpleader actions. *Casey v. Am. Int'l Grp., Inc.*, No. 14 C 3541, 2014 WL 5073155, at *3 (N.D. Ill. Oct. 9, 2014) (requiring strict compliance in non-interpleader action and noting Seventh Circuit and Illinois Supreme Court cases applying substantial compliance were interpleader or interpleader-like matters); *Page*, 2014 WL 7185290, at *3 (same). This limitation may arise from the notion that insurers waive a strict compliance requirement when they bring an interpleader action, as technical compliance with policy provisions is solely for the benefit of insurers with the goal of protecting against double liability. *Page*, 2014 WL 7185290, at *3–4; *State Empls. Ret. Sys. of Ill. v. Taylor*, 476 N.E.2d 749, 751 (Ill. App. Ct. 1985); *Kitchen v. N. Am. Acc. Ins. Co.*, 118 N.E.2d 48, 49–50 (Ill. App. Ct. 1954).

Revocation of Death Benefits by Divorce or Annulment

Illinois has not adopted a "divestiture statute[] whereby a spouse's beneficiary status is automatically terminated by entry of a judgment for dissolution of marriage." Lisa M. Giese, *'Til Death Benefits Do Us Part: The Effect of Marital Settlement Agreements on Beneficiary Designations*, 22 DCBA Brief 24 (Mar. 2010); *see also Allton v. Hintzsche*, 870 N.E.2d 436, 438–39 (Ill. App. Ct. 2007) ("a divorce decree does not

affect the rights of the divorced [spouse] as beneficiary of the [other spouse's] life insurance policy").

The Illinois Marriage and Dissolution of Marriage Act provides, in pertinent part:

> [a]s to any existing policy of life insurance insuring the life of either spouse, or any interest in such policy, that constitutes marital property, whether whole life, term life, group term life, universal life, or other form of life insurance policy, and whether or not the value is ascertainable, the court shall allocate ownership, death benefits or the right to assign death benefits, and the obligation for premium payments, if any, equitably between the parties at the time of the judgment for dissolution or declaration of invalidity of marriage.

750 Ill. Comp. Stat. 5/503(b-5) (2016). "However, the rights of a divorced [spouse] could be affected if a property settlement specifically includes a termination of the beneficiary's interest." *Allton*, 870 N.E.2d at 438–39.

Payment of Life Claims

Interpleader

The purpose of an interpleader action is to relieve a stakeholder of the burden and peril of weighing the relative merits of adverse claims, as well as the harassment and expense of adverse claims. *Aetna Life Ins. Co. v. Strickland*, 337 N.E.2d 285, 287–88 (1975). Section 2-409 of the Illinois Code of Civil Procedure addresses interpleader, providing:

> Persons having claims against the plaintiff arising out of the same or related subject matter may be joined as defendants and required to interplead when their claims may expose plaintiff to double or multiple liability. It is not a ground for objection to interpleader that the claims of the several claimants or the titles upon which their claims depend do not have a common origin or are not identical, or are adverse to or independent of one another, or that the plaintiff avers that he or she is not liable in whole or in part to any of or all the claimants. A defendant under similar circumstances may obtain like relief by counterclaim. The provisions hereof are not a limitation upon the joinder of parties or causes of action.

735 Ill. Comp. Stat. 5/2-409. *See also* Fed. Rule Civ. Pro. 22; 28 U.S.C.A. §1335.

"A stakeholder may file an interpleader action to protect itself against 'potential, as well as actual, claims.'" *Metro. Life Ins. Co. v. Johnson*, No. 11 C 8210, 2012 WL 2192283, at *3 (N.D. Ill. June 13, 2012) (citations omitted). A stakeholder must act in good faith when asserting that adverse claims have been presented. *Strickland*, 337 N.E.2d at 288.

In general, the successful party's costs may, in the court's discretion, be taxed against the person making the unfounded claim to the death benefits. *See Cent. Pipe Line Co. v. Hutson*, 82 N.E.2d 624, 632 (Ill. 1948) (unsuccessful parties in interpleader not entitled to have costs taxed against the fund instead of against them because, otherwise, that would be the same as taxing the parties entitled to the fund).

Without a stipulation, statutory authority, or a contractual obligation, the plaintiff in interpleader is not entitled to attorneys' fees out of the death benefits. *Minn. Mut. Life Ins. Co. v. Gustafson*, 415 F. Supp. 615, 616 (N.D. Ill. 1976) (applying Illinois law); *Ralston Purina Co. v. Killam*, 293 N.E.2d 750, 752–53 (Ill. App. Ct. 1973). Ordinarily, however, the insurer will not be required to pay interest on the admitted liability it deposits into a fund in an interpleader action in Illinois because it lacks sufficient information to determine the appropriate payee of the proceeds. *See* "**Payment of Life Claims: Interest on Life Insurance Proceeds**," *infra*.

Slayer Statute and Related Common Law Rule

Illinois' slayer statute prevents a beneficiary from receiving a life insurance policy's proceeds if the beneficiary intentionally and unjustifiably causes the insured's death. 755 Ill. Comp. Stat. 5/2-6; *Dougherty v. Cole*, 934 N.E.2d 16, 20–21 (Ill. App. Ct. 2010) (statute applies to life insurance policies). Instead, the proceeds will pass as though the beneficiary died before the insured. 755 Ill. Comp. Stat. 5/2-6. Although a criminal conviction is not required for the slayer statute to apply, a beneficiary convicted of first or second degree murder is conclusively presumed to have intentionally and unjustifiably

caused the insured's death. 755 Ill. Comp. Stat. 5/2-6; *Dougherty*, 94 N.E.2d at 22 (individual that escaped criminal conviction due to insanity still subject to slayer statute); *In re Estate of Vallerius*, 629 N.E.2d 1185, 1188 (Ill. App. Ct. 1994) (statute applies to aiders and abettors, coconspirators, and those who hire another to kill the insured). Illinois courts have determined the legislature intended the slayer statute to supersede the common law, so any common law rulings that predate the statute's enactment are of questionable validity. *Dougherty*, 94 N.E.2d at 20.

Interest on Life Insurance Proceeds

The Illinois Insurance Code provides 10 percent annual interest will accrue on life insurance policies from the time of the insured's death until payment is made. 215 Ill. Comp. Stat. 5/224(1)(*l*). No interest will accrue, however, if the insurer makes payment within 31 days of the latest of the date (1) the insurer receives proof of death; (2) the insurer receives "sufficient information to determine its liability, the extent of the liability, and the appropriate payee legally entitled to the proceeds;" or (3) "that legal impediments to payment of proceeds that depend on the action of parties other than the company are resolved and sufficient evidence of the same is provided to the company." *Id.* Section (2) of this provision thus provides a carve-out for insurers who promptly interplead rival claims or potential rival claims. An insurer that pays the full policy amount but does not pay the interest provided for in Section 224(1)(*l*) will have to pay interest on the interest. *Fid. Investments Life Ins. Co. v. Squire*, No. 09 C 2704, 2011 WL 1399259, at *3 (N.D. Ill. Apr. 13, 2011). Section 224(1)(*l*) controls over Illinois' general interest statute. *Nabor v. Occidental Life Ins. Co. of Ca.*, 396 N.E.2d 1267, 1272 (Ill. App. Ct. 1979).

Contested Life Insurance Claims

Contestability Period

The Illinois Insurance Code requires life insurance policies issued after July 1, 1937, to provide that the insurer cannot contest the policy after it has been in force during the insured's lifetime for two years. 215 Ill. Comp. Stat. 5/224(1)(c) (2016). Specifically, such policies must include:

> A provision that the policy, together with the application therefor, a copy of which shall be endorsed upon or attached to the policy and made a part thereof, shall constitute the entire contract between the parties and that after it has been in force during the lifetime of the insured a specified time, not later than 2 years from its date, it shall be incontestable except for nonpayment of premiums and except at the option of the company, with respect to provisions relative to benefits in the event of total and permanent disability, and provisions which grant additional insurance specifically against death by accident and except for violations of the conditions of the policy relating to naval or military service in time of war or for violation of an express condition, if any, relating to aviation, (except riding as a fare-paying passenger of a commercial air line flying on regularly scheduled routes between definitely established airports) in which case the liability of the company shall be fixed at a definitely determined amount not less than the full reserve for the policy and any dividend additions; provided that the application therefor need not be attached to or made a part of any policy containing a clause making the policy incontestable from date of issue.

Id. The policy may specify a shorter contestability period. *Id.* It is important to note the policy must have been in force for two years "during the lifetime of the insured" to become incontestable, so an action contesting the policy can be brought more than two years after the policy was issued as long as the insured died within two years of issuance. *Bageanis v. Am. Bankers Life Assurance Co. of Fla.*, No. 91 C 1261, 1991 WL 136016, at *2 (N.D. Ill. July 18, 1991). Without a contrary provision in the reinstatement paperwork, reinstatement does not create new contestability period, however. *Johnson v. Country Life Ins. Co.*, 1 N.E.2d 779, 786 (Ill. App. Ct. 1936). *But see Cohen v. N.Y. Life Ins. Co.*, 132 F.2d 494, 497 (7th Cir. 1942) ("[I]nsurer may, by proving fraud in the inducement, avoid the reinstatement of a policy even though a similar defense against fraud in the original contract would be precluded by expiration of the contestable period."). In practice, insurers include language in their reinstatement application that pro-

vides that the reinstatement can be contested within a specific time-frame.

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

In Illinois, insurers cannot contest a policy arising from a misrepresentation, even a fraudulent misrepresentation, outside of the contestability period. *Lauer v. Am. Family Life Ins. Co.*, 748 N.E.2d 260 (Ill. App. Ct. 2001) (*reversed on other grounds*). Section 224(1)(c) does provide a limited set of circumstances in which a policy may be contested after the period expired, including certain instances of nonpayment of premiums, benefits in the event of total and permanent disability, and provisions granting additional accidental death benefits. 215 Ill. Comp. Stat. 5/224(1)(c).

Suicide

In Illinois, any limitation of coverage in event of death by suicide must be confined within the contestability period of the policy. Ill. Admin. Code tit. 50, §1405.40. As noted above, the maximum contestability period allowed in Illinois is 2 years for policies issued after July 1, 1937. *See* "**Contested Life Insurance Claims: Contestability Period**," *supra*. So, suicide exclusions in Illinois are generally less than two years.

The insurer has the burden of proving the affirmative defense of suicide and must prove it by clear and convincing evidence. *Kettlewell v. Prudential Ins. Co. of Am.*, 122 N.E.2d 817, 818 (Ill. 1954). There is a legal presumption against suicide where circumstances are such that death might have resulted from negligence, accident or suicide. *Id.* at 819. This presumption against suicide disappears when contradictory evidence is produced and then the issue should be decided on the evidence without considering any presumption. *Id.* "While the burden of proving suicide is on the defendant, proof of motive is not essential. The legal presumption against suicide does not prevent the entry of judgment notwithstanding the verdict when evidence of suicide is clear." *Id.*

STOLI/BOLI/COLI and Stranger Owned Annuity Contracts

Illinois has long required those who take out a policy on another to have an insurable interest in that person's life. *Ohio Nat'l. Life Assurance Corp. v. Davis*, 803 F.3d 904, 909 (7th Cir. 2015) (applying Illinois law). Illinois enacted the Viatical Settlements Act of 2009, joining the growing number of states that codified prohibitions on stranger-originated life insurance policies. The Act provides, in relevant part, that: "[i]t is a violation of this Act for any person to enter into stranger-originated life insurance or STOLI as defined by this Act." 215 Ill. Comp. Stat. 159/50(a). Under the Act, stranger-originated life insurance or "STOLI" is defined as "an act, practice, or arrangement to initiate a life insurance policy for the benefit of a third-party investor who, at the time of policy origination, has no insurable interest in the insured." 215 Ill. Comp. Stat. 159/5.

Examples of STOLI practices are provided in the definition and include "cases in which life insurance is purchased with resources or guarantees from or through a person or entity who, at the time of policy inception, could not lawfully initiate the policy himself or itself and where, at the time of policy inception, there is an arrangement or agreement, whether verbal or written, to directly or indirectly transfer the ownership of the policy or policy benefits to a third party." *Id.* The statute also explains that trusts which are created to give the appearance of an insurable interest, but are used to initiate policies for investors, violate both insurable interest laws and the prohibition against wagering on life. *Id.*

In *Penn Mutual Life Insurance Co. v. Greatbanc Trust Co.*, 887 F. Supp. 2d 822 (N.D. Ill. 2012), the court declared a STOLI policy void ab initio but did not decide on whether premiums should be returned along with the rescission. *Id.* at 831. Finding that "Illinois law apparently requires the Court to drop like a hot potato the parties to an illegal contract," the court declined to make any provision for the premiums at the summary judgment stage. *Id.* On the other hand, the Seventh Circuit in *Ohio National Life Assurance Corp. v. Davis*, 803 F.3d 904 (7th Cir. 2015), allowed the insurer to keep the premiums paid for the illegal STOLI policies (which were

rescinded) and recover attorney's fees. *Id.* at 911. The court explained: "[b]eing to blame for the illegal contracts[,] the defendants have no right to recoup the premiums they paid to obtain them; allowing recoupment would, by reducing the cost, increase the likelihood of unlawful activity." *Id.* In so holding, the court followed the principle that "[g]enerally when an illegal contract is voided, the parties 'will be left where they have placed themselves with no recovery of the money paid for illegal services.'" *Id.* (citation omitted). Notably, the court did not allow retention of premiums as to one defendant because he was not involved in the conspiracy. *Id.*

Material Misrepresentations in the Application

Applicable State Statute

Like most states, Illinois permits insurers to contest life insurance policies in certain circumstances if a misrepresentation was made in the policy's application. Specifically, Section 154 of the Illinois Insurance Code provides:

> No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance, or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company. 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.

215 Ill. Comp. Stat. 5/154.

Prima Facie Case of Misrepresentation

Under Section 154, a statement in a life insurance application will only "defeat or avoid" a life insurance policy if the representation is false and either (a) made with actual intent to deceive, or (b) materially impacts the acceptance of the risk or the hazard assumed by the insurer. 215 Ill. Comp. Stat. 5/154; *Conti v. Health Care Serv. Corp.*, 882 N.E.2d 614, 620 (Ill. App. Ct. 2007); *State Farm Ins. Co. v. Am. Serv. Ins. Co.*, 773 N.E.2d 666 (Ill. App. Ct. 2002) (factors listed in Section 154 provide exclusive rationale to avoid policy, regardless of provisions in automobile policy permitting avoidance for other reasons).

Although Illinois courts give effect to the statutory language and only require an insurer to show the misrepresentation was made with the intent to deceive *or* that it was material, a number of courts have nevertheless defined misrepresentation as a statement that affects the risk undertaken by the insurer, delivering a degree of uncertainty to insurers wishing to avoid a policy due to the applicant's intentional but immaterial misrepresentation. *See Ill. State Bar Ass'n Mut. Ins. Co. v. Law Office of Tuzzolino & Terpinas*, 27 N.E.3d 67 (reading statute in the disjunctive); *Golden Rule Ins. Co. v. Schwartz*, 786 N.E.2d 1010, 1015 (Ill. 2003) (insurer must show either intent or materiality); *Essex Ins. Co. v. Galilee Med. Ctr. SC*, 988 F. Supp. 2d 866, 871–72 (N.D. Ill. 2013) (misrepresentation affects insurer's risk); *Ratcliffe v. Int'l Surplus Lines Ins. Co.*, 550 N.E.2d 1052, 1057 (Ill. App. Ct. 1990) (same).

An applicant's incomplete answer or failure to disclose information can constitute a misrepresentation. *Essex Ins. Co.*, 988 F. Supp. 2d at 871–72; *Garde by Garde v. Country Life Ins. Co.*, 498 N.E.2d 302, 308 (Ill. App. Ct. 1986). The language of the statute itself permits insurers to rely only on those misrepresentations made in the application or that make an appearance in the policy. *See* 215 Ill. Comp. Stat. 5/154 (no misrepresentation will defeat or avoid the policy unless the misrepresentation "shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefore").

Illinois generally permits insurers to rely on the truthfulness of applicants' representations in pol-

icy applications and does not require insurers to conduct any further investigation. *Royal Maccabees Life Ins. Co. v. Malachinski*, 161 F. Supp. 2d 847, 854 (N.D. Ill. 2001). This equation changes, however, if an insurer knew or should have known the representations were inaccurate. An insurer will be estopped from denying coverage due to a misrepresentation if the insurer knew the truth of the misrepresentation before issuing the policy. *New Eng. Mut. Life Ins. Co. v. Bank of Ill. in DuPage*, 994 F. Supp. 970, 982 (N.D. Ill. 1998) (insurer that knows truth of applicant's medical condition may not avoid policy due to misrepresentation about insured's health). Similarly, an insurer may be under a duty to investigate the applicant's responses if it is put on reasonable notice that the application has false responses. *Id.* at 980; *Meier v. Aetna Life & Cas. Standard Fire Ins. Co.*, 500 N.E.2d 1096, 1100 (Ill. App. Ct. 1986) ("[A] certain burden remains on the insurer issuing the policy to make timely inquiry into facts upon which insurer intends to rely in deciding whether to issue a policy where such facts are implausible or any doubtful representation by the insured exists.").

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

Although Section 154 permits a claim denial arising from a material misrepresentation that was made by mistake or in good faith, insurers must show actual intent to deceive if the application contains language providing the representations are made to the best of the applicant's knowledge and belief. *Essex Ins. Co.*, 988 F. Supp. 2d at 871–72; *Schwartz*, 786 N.E.2d at 1016–17 ("[T]he addition of the 'knowledge and belief' language to an application establishes a lesser standard of accuracy than that imposed under statutes akin to section 154."); *Siudut v. Banner Life Ins. Co.*, No. 12 C 1726, 2013 WL 4659563, at *7 (N.D. Ill. Aug. 20, 2013) (knowledge and belief language shifts focus to whether the applicant believed representations to be true). Whether a misrepresentation is made with the intent to deceive is generally a question for the trier of fact. *Schwartz*, 786 N.E.2d at 1017. Nevertheless, courts do place some restrictions on how far an applicant's knowledge and belief may go, as a court may find the applicant possessed such intent as a matter of law if his or her belief is "clearly contradicted by the factual knowledge on which it is based." *Id.* (internal citations omitted).

Materiality

"A misrepresentation, even if made by mistake or in good faith, will void a policy if the misrepresentation materially affected the insurer's acceptance of risk." *Siudut*, 2013 WL 4659563, at *7. "'Whether a misrepresentation occurred is determined objectively, on the basis of the facts known to the insured at the time of application, regardless of the insured's subjective belief as to the truth of the representations.'" *Essex Ins. Co.*, 988 F. Supp. 2d at 871–72 (quoting *W. World Ins. Co. v. Majercak*, 490 F. Supp. 2d 937, 941 (N.D. Ill. 2007)). Testimony from "an underwriter/employee may be sufficient to establish the materiality of a misrepresentation or omission in an application for insurance." *Id.* at 873 (quoting *W. World Ins. Co.*, 490 F. Supp. 2d at 943).

Causal Connection

In Illinois, "the fact that a potential insured does not die from the withheld ailment does not affect the materiality of the misrepresentation." *Bageanis v. Am. Bankers Life Assurance Co. of Fla.*, 783 F. Supp. 1141, 1145 (N.D. Ill. 1992); *Hatch v. Woodmen Accident & Life Co.*, 409 N.E.2d 540, 543 (Ill. App. Ct. 1980).

Impact of Agent's Knowledge and False Responses

Illinois generally recognizes a distinction between insurance agents, who are the insurer's agents, and insurance brokers, who are the insured's agents. *State Sec. Ins. Co. v. Burgos*, 583 N.E.2d 547, 551 (Ill. 1991). As the insurer's agent, the actions or knowledge of an insurance agent can be imputed to the insurer in certain situations:

> '[i]t has long been the rule … that when an applicant for insurance gives correct oral answers to questions propounded by an insurance agent but the insurer's agent incorrectly records these answers the insurer cannot rely upon the falsity of the answers to avoid the

> policy.' The insurer cannot rely on these incorrectly recorded answers even when the insured knows that the agent has entered answers different from the ones he gave where the incorrect answers are entered pursuant to the agent's advice, suggestion, or interpretation. … In these situations, the agent's knowledge of the truthfulness of the applicant's statement will be imputed to the insurance company.

Logan v. Allstate Life Ins. Co., 312 N.E.2d 416, 420 (Ill. App. Ct. 1974); *Allied Am. Ins. Co. v. Ayala*, 616 N.E.2d 1349, 1362 (Ill. App. Ct. 1993) ("when an insurance applicant gives correct answers to the insurer's agent and the agent fills in the application with incorrect answers, the insurer is estopped from denying its liability even if the application is signed by the applicant"). Illinois courts will not impute an insurance agent's knowledge to the insurer, however, if the applicant acted in bad faith or colluded with the agent. *New Eng. Mutual Life Ins. Co. v. Bank of Ill. in DuPage*, 994 F. Supp. 970, 978 (N.D. Ill. 1998); *Logan*, 312 N.E.2d at 420–21.

The knowledge of an insurance broker, conversely, generally will not be imputed to an insurer absent certain criteria being met, such as the insurer cloaking the broker with apparent authority. *See Burgos*, 583 N.E.2d at 551 (insurance broker can be considered the insurer's agent if he or she has the apparent authority to act as the insurer's agent); *Econ. Fire & Cas. Co. v. Bassett*, 525 N.E.2d 539, 542–43 (Ill. App. Ct. 1988) (refusing to impute insurance brokers' conduct to insurer).

Defenses

Statutes of Limitation/Contractual Limitations Period

"In the absence of specific and clear provisions limiting the period within which suits must be filed, the 10-year statute of limitations for actions on written contracts is applicable to actions by insureds against their insurers based on insurance policies." *Country Preferred Ins. Co. v. Whitehead*, 2012 IL 113365, ¶ 29, 979 N.E.2d 35, 43; *see also* 735 Ill. Comp. Stat. 5/13-206 (2016) (10-year statute of limitations for written contracts). "Although the statutory limitations period for breach of a written contract is 10 years, parties to a contract may agree upon a shortened contractual limitations period to replace a statute of limitations as long as it is reasonable." *Can. Life Assurance Co. v. Salwan*, 817 N.E.2d 1021, 1027 (Ill. App. Ct. 2004); *see Country Preferred*, 979 N.E.2d at 46–47 (two-year period for uninsured motorist claim reasonable).

Duty to Read Policy

"[T]he insured bears the burden of knowing the contents of insurance policies and has an affirmative duty to bring any discrepancies in the policy to the attention of the insurer." *Furtak v. Moffett*, 671 N.E.2d 827, 829 (Ill. App. Ct. 1996). Illinois places such an obligation on the insured even if he or she never received the policy, especially if the policy was otherwise available and nothing prevented the insured from reading it. *Nat'l Prod. Workers Union Ins. Trust v. Cigna Corp.*, 665 F.3d 897, 904 (7th Cir. 2011) (applying Illinois law). *But see Maxton v. Garegnani*, 627 N.E.2d 723, 728 (Ill. App. Ct. 1994) (automobile policy not available when insured had requested a copy 1.5 months before accident but never received it). Certain limitations apply in this context, as insureds do not have such a burden on modified renewal policies and may still be able to assert breach of fiduciary duty claims against brokers even if they did not read the policy. *Perry v. Econ. Fire & Cas. Co.*, 724 N.E.2d 151, 152 (Ill. App. Ct. 1999); *Cincinnati Ins. Co. v. Guccione*, 719 N.E.2d 787, 791 (Ill. App. Ct. 1999).

Waiver/Estoppel

"'Waiver is either an express or implied voluntary and intentional relinquishment of a known and existing right.'" *Cooke v. Jackson Nat'l Life Ins. Co.*, No. 15 C 817, 2016 WL 1070829, at *6 (N.D. Ill. Mar. 15, 2016) (quoting *Midway Park Saver v. Sarco Putty Co.*, 976 N.E.2d 1063, 1071 (Ill. App. Ct. 2012)). "'[W]aiver may be established by conduct indicating that strict compliance with… contractual provisions will not be required.'" *Cooke*, 2016 WL 1070829, at *6 (quoting *Bd. of Library Trs. of Midlothian v. Bd. of Library Trs. of Posen Pub. Library Dist.*, 34 N.E.3d 602, 614 (Ill. App. Ct. 2015)); *see Stewart v. Nw. Mut. Life Ins. Co.*, No. 15 C 11600, 2016 WL 1555715, at *4

(N.D. Ill. Apr. 18, 2016) ("Illinois courts have found implied waiver of the right to declare a policy lapsed only where the insurer not only negotiated the check, but also held it for a considerable amount of time or the insurer 'manifested its intention to reinstate the policy.'"). Waiver generally does not require prejudice or detrimental reliance. *Chatham Corp. v. Dann Ins.*, 812 N.E.2d 483, 494 (Ill. App. Ct. 2004). The party claiming waiver has the burden of proof through clear, precise, and unequivocal evidence. *Bushman v. State Mut. Life Assur. Co. of Am.*, 915 F. Supp. 945, 952 (N.D. Ill. 1996).

Illinois also recognizes the related doctrine of estoppel, under which a party claiming estoppel must demonstrate that: (1) it was misled by the other party's acts or misrepresentations; (2) it reasonably relied on the misrepresentations; and (3) prejudice or detriment as a result of the reliance. *Chatham Corp.*, 351 Ill. App. 3d at 366–67. One's intent to mislead is generally not a requirement. *Id.* at 367; *Laycock v. Am. Family Mut. Ins. Co.*, 682 N.E.2d 382, 386 (2d Dist. 1997). Like waiver, the party asserting estoppel (generally the insured) has the burden of proof and must carry its burden with clear, concise, and unequivocal evidence. *Laycock*, 68 N.E.2d at 386; *Ankus v. Gov't Emps Ins. Co.*, 674 N.E.2d 865 (Ill. App. Ct. 1996).

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