California

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Formation of a Life Insurance Contract

Insurable Interest Requirement

In California, no life insurance contract is valid unless the insured has an "insurable interest." Cal. Ins. Code §280. An insurable interest is defined as "an interest based upon a reasonable expectation of pecuniary advantage through the continued life, health, or bodily safety of another person and consequent loss by reason of that person's death or disability or a substantial interest engendered by love and affection in the case of individuals closely related by blood or law." Cal. Ins. Code §10110.1(a). However, "an interest in the life or health of a person insured must exist when the insurance takes effect, but need not exist thereafter or when the loss occurs." Cal. Ins. Code §286. Nevertheless, "any device, scheme, or artifice designed to give the appearance of an insurable interest where there is no legitimate insurable interest violates the insurable interest laws." Cal. Ins. Code §10110.1(e). Specifically, any arrangement by which a life insurance policy is initiated for the benefit of a "third party investor" who has no insurable interest in the insured's life at the time the policy is issued is deemed stranger-owned life insurance (STOLI), which is a prohibited "fraudulent life settlement act." Cal. Ins. Code §§10113.1(w), 10113.2, 10113.3(s).

Must the Insured Sign the Application?

"[T]he signature of an insured to an application is not necessary to predicate the issuance of a valid insurance policy, and this is so even though the policy inferentially requires the signature of the insured to the application…." *Meyer v. Johnson*, 46 P.2d 822, 826 (Cal. App. 1935); *see also Crump v. Northwestern Nat. Life Ins. Co.*, 45 Cal. Rptr. 814, 818 (Cal. App. 1965). It is not always essential in order to create a binding contract of insurance that a proposed insured shall himself personally sign the application for the policy. *Meyer*, 46 P.2d at 826.

In *Crump*, the company argued that because the named insured did not personally sign the application, "there was never a meeting of the minds as between the insurer and the insured, and that the purported policy was void ab initio." The *Crump* court found a valid contract under its facts as there was conclusive evidence showing ratification of the insurance contract by the insured. *See id.* at 818; *see also Kincer v. Reserve Ins. Co.*, 90 Cal. Rptr. 94, 96 (Cal. App. 1970) ("that [the insured] did not sign the application form and someone else did is immaterial"); *Bloom v. Pacific Mutual Life Ins. Co.*, 259 P. 496 (Cal. App. 1927) (holding failure to sign the life insurance application was immaterial).

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

Under California law, a contract of temporary insurance may arise from completion of an application for insurance and payment of the first premium "if the language of the application would lead an ordinary lay person to conclude that coverage was immediate." *Ahern v. Dillenback*, 1 Cal. Rptr. 2d 339, 345 (Cal. App. 1991); *see also Thompson v. Occidental Life Ins. Co. of Calif.*, 109 Cal. Rptr. 473, 477–478 (Cal. 1973) (insurance implied where language in application and receipt and agent's explanation as to when insurance would take effect were ambiguous). If a life insurance applicant has paid the initial premium, benefits may be payable if he or she dies before the policy is issued. *Wilson v. Western Nat'l Life Ins. Co.*, 1 Cal. Rptr. 2d 157, 161 (1991) ("As a general rule, interim life insurance arises at the time a purchaser

pays the initial premium and coverage exists if the insured dies before the company issues a policy.").

The terms of the interim coverage are often set forth in a "conditional receipt," sometimes referred to as a "binder." *Smith v. Westland Life Ins. Co.*, 123 Cal. Rptr. 649, 651 & fn. 3 (Cal. 1975); *see also Hodgson v. Banner Life Ins. Co.*, 21 Cal. Rptr. 3d 907, 908 (Cal. App. 2004). Coverage is mandated by statute where (1) an applicant makes a first premium payment concurrently with submitting a life insurance application; (2) the applicant receives the insurer's form receipt for the premium or the insurer receives the payment at its home office; and (3) the insurer approves the application for the class of risk and amount applied for, pursuant to its underwriting practices. *See* Cal. Ins. Code §10115. The statute "imposes a coverage obligation whenever the conditions for issuance of a policy of insurance have been satisfied but the formalities of issuance and delivery have not occurred." *Hodgson*, 21 Cal. Rptr. 3d at 917. Where the statutory conditions are met, if the insured dies before the policy is issued, the insurer must pay "such amount as would have been due under the terms of the policy… as if such policy had been issued and delivered on the date the application was signed by the applicant." Cal. Ins. Code §10115. The insurer may limit its liability, however, by stating in the application that temporary insurance is limited to either "an amount not less than its established maximum retention" or $50,000. *Id.*

The application form (or conditional receipt for premium payment) may state that coverage is subject to the insurance company's acceptance and approval of the application. Despite the conditional language, such provisions are generally interpreted as giving rise to a contract of temporary insurance immediately upon receipt of the application and payment of the premium, subject to termination upon notice from the company that the applicant is not insurable. *Ransom v. The Penn Mut. Life Ins. Co.*, 274 P.2d 633, 635 (Cal. 1954) ("[T]he proviso that the company shall be satisfied that the insured was acceptable at the date of the application creates only a right to terminate the contract if the company becomes dissatisfied with the risk before a policy is issued."). The rationale for ignoring the conditional language is the strong expectation that immediate coverage arises upon payment of the initial premium. That expectation will be protected at least until the insurer notifies the applicant that it has rejected the application. *Id.*; *see also Smith v. Westland Life Ins. Co.*, 123 Cal. Rptr. 649, 658 (Cal. 1975).

However, an insurance company is not fully precluded from imposing conditions precedent to the effectiveness of insurance coverage despite advance payment of the first premium, provided that the conditions are stated in "conspicuous, unambiguous and unequivocal language which an ordinary layman can understand," *Thompson v. Occidental Life Ins. Co. of Calif.*, 109 Cal. Rptr. 473, 477 (Cal. 1973), and are specifically called to the applicant's attention when the initial premium is paid. *Smith*, 123 Cal. Rptr. at 657.

The temporary insurance created by the conditional receipt and premium payment remains in effect until the insurer has (a) communicated appropriate notice of rejection to the applicant; and (b) actually refunded the premium payment. *Smith*, 123 Cal. Rptr. at 654 (insurer notified applicant but had not refunded premium at date of death).

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

California follows the conditional receipt rules noted above with respect to potential coverage arising from an insured's payment of premium. In the rescission context, an insurer's acceptance of premiums and delay may constitute waiver of the right to rescind. *Washington Nat'l Ins. Co. v. Reginato's Estate*, 272 F. Supp. 1016, 1022 (C.D. Cal. 1966), *aff'd*, 382 F.2d 1021 (9th Cir. 1967) (finding waiver where insurer waited eleven months to rescind after learning of facts constituting basis for rescission). An insurer may lose its right to rescind by retaining premiums and failing to give timely notice of rescission so as to constitute undue delay. The rationale is that an insurer is given a reasonable time to investigate the basis for rescission. *Civil Serv. Emp. Ins. Co. v. Blake*, 53 Cal. Rptr. 701, 706 (Cal. App. 1966). Thus, where notice of rescission is made within a reasonable period of time, courts are inclined to find no waiver based on the payment of premiums, but if there is

unreasonable delay, waiver may be invoked. *See*, *e.g.*, *Jaunich v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 647 F. Supp. 209, 215–16 (N.D. Cal. 1986) (finding no waiver where the insurer waited three months after learning of the basis for rescission to rescind the policy); *Wells Fargo Bank, N.A. v. Am. Nat. Ins. Co.*, 2010 WL 8522163, at *6 (C.D. Cal. Aug. 4, 2010) (the two premiums accepted prior to plaintiff's filing of suit did not constitute waiver, as insurer was entitled to a reasonable time to investigate the basis for rescission), *aff'd*, 493 F. App'x 838 (9th Cir. 2012).

The doctrine of waiver by acceptance of payment of premiums may also arise in certain circumstances regarding alleged errors by the agent. *See*, *e.g.*, *Elfstrom v. New York Life Ins. Co.*, 63 Cal. Rptr. 35, 432 P.2d 731 (Cal. 1967) (agent told insured to sign enrollment card, inserted incorrect information on the application, and collected premiums without the insured's knowledge of qualifications for coverage); *John Hancock Mut. Life Ins. Co. v. Dorman*, 108 F.2d 220 (9th Cir. 1940) (agent determined that director who was not an employee could apply under term contract of employee group insurance, issued certificate, and collected monthly premium for more than the one-year period of incontestability).

Good Health Requirement at Time of Delivery

Some life insurance applications are conditioned on the applicant's continued good health. Such provisions are valid and enforceable where the applicant became aware of a material change in his or her health between the date of application and issuance of the policy. *See Lunardi v. Great-West Life Assur. Co.*, 44 Cal. Rptr. 2d 56, 62 (Cal. App. 1995) (leukemia diagnosed shortly after application and before issuance of policy). However, a "good health" provision cannot be invoked where the insured had no knowledge of his or her illness before delivery of the policy and believed in good faith that his or her medical status was acceptable to the insurer. *See New England Life Ins. Co. v. Signorello*, 119 F. Supp. 2d 1052, 1058 (N.D. Cal. 2000) (applying California law) (beneficiary was bound by good health provisions even though insurer's agent did not point it out, and the fact that the insurer's medical examination failed to detect cancer did not override good health provision); *Casey v. Old Line Life Ins. Co of America*, 996 F. Supp. 939, 946 (1998) (applying California law) (insurer justified in rescinding policy where application unambiguously informed applicant that "good health" representations must still be true when policy was delivered); *Metropolitan Life Ins. Co. v. Devore*, 56 Cal. Rptr. 881, 888 (Cal. 1967) (applicant's fatal illness had been diagnosed by his doctor but applicant was unaware of it before delivery of policy); *Brubaker v. Beneficial Standard Life Ins. Co.*, 278 P.2d 966, 969 (Cal. App. 1955) (insured unaware that nodules on abdomen were early symptom of cancer).

Free Look Period After Policy Delivery

All life insurance policies delivered or issued for delivery in California must contain notice of a "free-look" period. California Insurance Code §10127.9(a)(1) provides:

> Every individual life insurance policy and every individual annuity contract that is initially delivered or issued for delivery in this state on and after January 1, 1990, shall have printed on the front of the policy jacket or on the cover page a notice stating that, after receipt of the policy by the owner, the policy may be returned by the owner for cancellation by mail or other delivery method to the insurer or to the agent through whom it was purchased. The period of time set forth by the insurer for return of the policy by the owner shall be clearly stated and this period shall be not less than 10 days nor more than 30 days.

For policies issued to senior citizens, California Insurance Code §10127.10 provides:

> Every policy of individual life insurance and every individual annuity contract that is initially delivered or issued for delivery to a senior citizen in this state on and after July 1, 2004, shall have printed on the front of the policy jacket or on the cover page a notice stating that, after receipt of the policy by the owner, the policy may be returned by the owner for cancellation by mail or other delivery method to the insurer or agent from whom it was purchased. The period of time set forth by the insurer for return of the policy by the

> owner shall be clearly stated in the notice and this period shall be not less than 30 days.

Electronic Signature Requirements

General Principles

California's Uniform Electronic Transactions Act ("UTEA") under Civil Code §1633, *et seq*., provides that as of January 1, 2000, an electronic record or signature can satisfy a law requiring a record to be in writing or requiring a signature. Cal. Civ. Code, §§1633.3(a), 1633.4, 1633.7(c), (d); Cal. Ins. Code §38.5(a). The UETA establishes rules and procedures for sending and receiving electronic records and signatures (Civ. Code, §1633.8), for forming contracts using electronic records (Civ. Code, §1633.14), for making and retaining electronic records and signatures (Civ. Code, §§1633.11, 1633.12), and for dealing with changes and errors in electronically transmitted records (Civ. Code, §1633.10). The law provides that a contract, with some exceptions, may not be denied legal effect or enforceability simply because an electronic signature or record is used in its formation. Cal. Civ. Code §1633.7(b). It also establishes the admissibility of electronic records in legal proceedings. Civ. Code, §1633.13.

A signature or transaction under the UETA is not enforceable unless the parties to the transaction agree it can be conducted by electronic means. Cal. Civ. Code, §1633.5(b). Courts have recently debated the sufficiency and intent behind an "electronic signature," defined as an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record. Cal. Civ. Code, §1633.2(h). Such cases emphasize the need for parties to adopt procedures for complying with the statutory requirements to form a contract, including proof that the electronic signature is the act of the person who purportedly signed. *See J.B.B. Investment Partners, Ltd. v. Fair*, 182 Cal. Rptr. 3d 154, 167–168 (Cal. App. 2014) (holding that the printed name on an e-mail may qualify as a signature for purposes of enforcing a settlement agreement under Code of Civil Procedure §664.6, but that insufficient evidence existed to prove defendant's signature at the end of the pertinent email was made "with the intent to sign the electronic record"); *Ruiz v. Moss Bros. Auto Group, Inc.*, 181 Cal. Rptr. 3d 781,787–789 (Cal. App. 2014) (finding defendant failed to establish e-signature was act of plaintiff to enforce arbitration agreement); *but see Tagliabue v. J.C. Penney Corporation, Inc.*, 2015 WL 8780577, at *3 (E.D. Cal. Dec. 15, 2015) (finding defendants presented sufficient evidence to establish plaintiff electronically signed agreement to arbitrate).

Limitations of the UTEA

The UETA has limitations. It does not apply to the creation and execution of wills, codicils, or testamentary trusts, certain transactions governed by the California Uniform Commercial Code, and any specifically identifiable text or disclosures in a record or a portion of a record that a law requires to be separately signed or initialed. Cal. Civ. Code, §1633.3(b), (c). In the life, health and disability context, Section 1633.3(c) of the UTEA prohibits electronic signatures, notice, or transactions for various documents, including, but not limited to: free look period notices for all disability policies and for group life policies for persons 65 and older (Cal. Ins. Code §786); application forms for medical supplemental policies (Cal. Ins. Code §10192.18); notice of cancellation of group disability coverage (Cal. Ins. Code §10199.44); notice of cancellation for group hospital service plan (Cal. Ins. Code §10199.46); long-term care replacement questions on application and replacement notices (Cal. Ins. Code §10235.16); authorization for release of medical information (Cal. Civ. Code §56.11); and release of genetic testing (Cal. Civ. Code §56.17).

Additional Provisions for Life Insurance

The California legislature created specific UTEA-related statutes for life insurers. Subject to the limitations of the UTEA outlined above, California Insurance Code §38.6(e) allows life insurance to be transacted with electronic signatures and by electronic transactions. California Insurance Code §38.8 mandates that life insurers establish specific protocols for insureds to opt in and out of electronic transactions:

> Insurers shall maintain a system for electronically confirming a policyholder's decision to

> opt in to an agreement to conduct transactions electronically and a system that will allow the policyholder to electronically opt out of the agreement to conduct business electronically as specified in subdivision (c) of Section 1633.5 [a party agreeing to an electronic transaction may refuse to conduct other electronic transactions]. The insurer shall maintain the electronic records for the same amount of time the insurer would be required to maintain those records if the records were in written form. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

Effective January 1, 2016, Insurance Code §38.6 establishes more explicit rules for electronic records, signatures, and transactions in the life insurance context. For life insurance matters, a "valid signature shall be sufficient for any provision of law requiring a written signature, if not excluded by Civil Code §1633(b) or (c)." Cal. Ins. Code §38.6(a). The statute applies to "licensees," defined as life insurers, agents, brokers, and any other persons required to be licensed by the Insurance Department, and "persons," defined as any policy owner policyholder, applicant, insured, or assignee or designee of an insured." Cal. Ins. Code §38.6(a)(2) & (3).

Insurance Code Section §38.6(b) imposes strict requirements for insurers when insureds opt in or out of electronic transactions, including procedures for ensuring that contact information is current. A person's consent to opt in to electronic transactions may be acquired verbally, in writing, or electronically; if consent is acquired verbally, the licensee shall confirm consent in writing or electronically. Cal. Ins Code §38.6(b)(1).

Section 38.6(b)(8) also allows life insurers to send electronic notice of the cessation of a life policy with proof of delivery: "Notwithstanding any other law, a notice of lapse, nonrenewal, cancellation, or termination of any product subject to this section may be transmitted electronically if the licensee demonstrates proof of delivery as set forth in paragraph (7) and complies with the other provisions in this section." Section 38.6(b)(7) states:

> Notwithstanding subdivision (b) of Section 1633.8 of the Civil Code [which requires ongoing compliance with any other notice required by law], if a provision of this code requires a licensee to transmit a record by return receipt, registered mail, certified mail, signed written receipt of delivery, or other method of delivery evidencing actual receipt by the person, and if the licensee is not otherwise prohibited from transmitting the record electronically under Section 1633.3 of the Civil Code and the provisions of this section, then the licensee shall maintain a process or system that demonstrates proof of delivery and actual receipt of the record by the person consistent with this paragraph. The licensee shall document and retain information demonstrating delivery and actual receipt so that it is retrievable, upon request, by the department at least five years after the policy is no longer in force. The record provided by electronic transmission shall be treated as if actually received if the licensee delivers the record to the person in compliance with applicable statutory delivery deadlines. A licensee may demonstrate actual delivery and receipt by any of the following:
>
> (A) The person acknowledges receipt of the electronic transmission of the record by returning an electronic receipt or by executing an electronic signature.
>
> (B) The record is made part of, or attached to, an email sent to the email address designated by the person, and there is a confirmation receipt, or some other evidence that the person received the email in his or her email account and opened the email.
>
> (C) The record is posted on the licensee's secure Internet Web site, and there is evidence demonstrating that the person logged onto the licensee's secure Internet Web site and downloaded, printed, or otherwise acknowledged receipt of the record.
>
> (D) If a licensee is unable to demonstrate actual delivery and receipt pursuant to this paragraph, the licensee shall resend the record by regular mail to the person

> in the manner originally specified by the underlying provision of this code.

Insurance Code §38.6(c) also clarifies that an agent or broker is not liable for any deficiencies in the system used by the insurer to conduct electronic transactions.

The UETA and derivative life insurance-specific statutes are in force until January 1, 2019, unless later enacted statutes delete or extend that date. Cal. Civ. Code §1633.3(h); Cal. Ins. Code §38.5(d).

Maintenance of a Life Insurance Policy

Grace Period

Each group and individual life insurance policy issued or delivered in California must contain a provision allowing a grace period of not less than 60 days from the premium due date, during which time the policy remains in force. Cal. Ins. Code §10113.71(a), (c). That grace period does not include any period of paid coverage. Cal. Ins. Code §10113.71(a). A renewal premium paid during the grace period must be treated the same as a payment before the grace period.

An insured's voluntary cancellation of a policy may forfeit the policy's grace period for premium payments. *Coe v. Farmers New World Life Ins. Co.*, 257 Cal. Rptr. 411, 416 (Cal. App. 1989). However, an insured may challenge the holding in *Coe* by arguing it was decided before the California legislature enacted the mandatory "grace period" statute.

Lapse for Failure to Timely Pay Premiums

An insurance policy can only lapse for failure to pay premiums if the insurer provides sufficient notice under California Insurance Code §10113.71. At least 30 days before the effective date of termination for nonpayment of premium, an insurer must send notice of pending lapse and termination to (1) the named policy owner; (2) any designee identified by the policy owner for individual life insurance (Cal. Ins. Code §10113.72(a), (c)); and (3) a known assignee or other person having an interest in the individual life policy. Cal. Ins. Code §10113.71(b)(1). Notice must be given by first-class United States mail within 30 days after a premium is due and unpaid. Cal. Ins. Code §10113.71(b)(3); *see* Cal. Ins. Code §38 ("The affidavit of the person who mails the notice, stating the facts of such mailing, is prima facie evidence that the notice was thus mailed"). California Insurance Code §38.6(b)(8), effective January 1, 2016, also appears to allow a lapse notice to be sent electronically, if the insured has agreed to electronic notification and the insurer has proof of delivery. Insurance Code §38 already expressly allows that electronic notice be sent to assignees of the life policy with the assignee's consent.

The 30-day written notice requirement does not apply to non-renewal situations. Cal. Ins. Code §10113.72(b)(2). If an insurer has provided renewal premium notices to an insured as a "regular course of conduct," it must notify the insured that it intends to discontinue that practice. Cal. Ins. Code §500.

At least one district court has held that notice of pending lapse at the beginning of the policy's 61-day grace period can constitute sufficient notice of lapse. In *Elhouty v. Lincoln Benefit Life Insurance Company*, 121 F. Supp.3d 989 (E.D. Cal. 2015), notice mailed to the owner of a life insurance policy 61 days before coverage lapsed satisfied the required notice of cancellation or lapse, when the policy mandated written notice of lapse to the owner's most recent address at least 30 days before coverage lapsed. The court rejected the owner's claim that additional notice was required 30 days before the lapse because enough time was given to pay the required premium. The notice advised of the 61-day grace period, the amount of the overdue premium, and the lapse date if full premium was not received. *Id.* at 994–997.

By accepting premiums after the grace period has expired, an insurer risks waiving or being estopped from declaring the policy has lapsed for nonpayment of premiums. *See Page v. Washington Mut. Life Ass'n*, 125 P.2d 20, 23 (Cal. 1942) ("[P]ast course of conduct of acceptance by the insurer of payments of premiums after the grace period may establish a waiver by the insurer of the right to declare a forfeiture for failure to pay premiums exactly at the stipulated time, or the insurer may be said to be estopped to assert the forfeiture where the insured may be said to have been reasonably led to believe that payments made within a reasonable time after the grace period

would be acceptable."); *Pierson v. John Hancock Mut. Life Ins. Co.*, 68 Cal. Rptr. 487 (Cal. App. 1968) (insurer's retention of partial payment of quarterly premium, tendered with notation that remaining portion would be paid later, constituted waiver of right to rescind policy and amounted to recognition that policy was in full force and effect). A letter advising of the insurer's willingness to accept premiums, however, may not be sufficient to establish waiver or estoppel. *Silva v. National American Life Ins. Co.*, 130 Cal. Rptr. 211, 213 (Cal. App. 1976) (finding no waiver of policy lapse when insurer's letter, regardless of content, was written on the date of an insured's death, mailed the following day, and found unopened several days after discovery of the body).

Changes in the Beneficiary

Substantial Compliance Rule

As a general rule, California requires a change to a beneficiary designation to be made in accordance with the terms of the policy. "[I]f it is not, no change is accomplished, unless whatever occurred in that respect comes within one of more of the three exceptions to the rule." *Cook v. Cook*, 111 P.2d 322, 328 (Cal. 1941). The three exceptions are (1) when the insurer waives strict compliance with its own rules regarding the change; (2) when it is beyond the insured's power to comply literally with the insurer's requirement; or (3) when the insured has done all that he could to effect the change but dies before the change is actually made. *Id.* With respect to this third exception, the California Supreme Court has held:

> We think that where the insurer is not contesting the change the rule is not to [be] applied rigorously and where the insured makes every reasonable effort under the circumstances, complying as far as he is able with the rules, and there is a clear manifestation of intent to make the change, which the insured has put into execution as best he can, equity should regard the change as effected.

Pimentel v. Conselho Supremo De Uniao Portugueza Do Estado Da California, 6 Cal. 2d 182, 188, 57 P.2d 131, 134 (1936).

"[O]ne's intent to change a beneficiary designation must be clearly manifested and put into motion as much as practicable." *Life Ins. Co. of N. Am. v. Ortiz*, 535 F.3d 990, 994 (9th Cir. 2008); *see also Manhattan Life Ins. Co. v. Barnes*, 462 F.2d 629, 633 (9th Cir. 1972) ("California demands that substantial steps be taken to actually change a beneficiary before the formal requirements of the contract may be ignored.").

Revocation of Death Benefits by Divorce or Annulment

Although California law generally disinherits an ex-spouse with regard to most property claims automatically, life insurance is a specific exception to that general rule. Cal. Prob. Code §5600. Insureds who desire to change their beneficiary designations after divorce must do so in compliance with the terms of the policy or fall within one of the three exceptions for substantial compliance described in *Cook v. Cook*, 17 Cal. 2d 639 (1941); *see, e.g., West Coast Life Ins. Co. v. Clark*, 24 F. Supp.3d 933, 939 (C.D. Cal. 2014) (finding decedent's arguably intended change not effectuated where the decedent did not obtain the necessary court order to make the change during his divorce proceedings or take any steps to institute the change in the eight days following finalization of his divorce before his death).

Payment of Life Claims

Interpleader

California's interpleader statute is codified in Code of Civil Procedure §386, which provides:

> Any person, firm, corporation, association or other entity against whom double or multiple claims are made, or may be made, by two or more persons which are such that they may give rise to double or multiple liability, may bring an action against the claimants to compel them to interplead and litigate their several claims.

Code Civ. Proc., §386(b). The purpose of interpleader is to prevent a multiplicity of suits and double vexation. "The right to the remedy by interpleader is founded, however, not on the consideration that a [person] may be subjected to double liability, but on

the fact that he is threatened with double vexation in respect to one liability." *Shopoff & Cavallo LLP v. Hyon*, 85 Cal. Rptr. 3d 268, 289 (Cal. App. 2008). "An interpleader action… may not be maintained 'upon the mere pretext or suspicion of double vexation; [the plaintiff] must allege facts showing a reasonable probability of double vexation', or a 'valid threat of double vexation'." *Westamerica Bank v. City of Berkeley*, 133 Cal. Rptr. 3d 883 (citations omitted).

An interpleader action typically has two phases. The court initially determines the right of the plaintiff to interplead the funds. Thereafter, the trial court adjudicates the issues raised by the interpleader action including: "the alleged existence of conflicting claims regarding the interpleaded funds; plaintiffs' alleged position as a disinterested mere stakeholder; and ultimately the disposition of the interpleaded funds after deducting plaintiffs' attorney fees." *Shopoff*, 167 Cal. App. 4th at 1513–1514, 85 Cal. Rptr. 3d at 289; *see also Dial 800 v. Fesbinder*, 12 Cal. Rptr. 3d 711 (Cal. App. 2004).

The plaintiff stakeholder may also recover attorneys' fees and costs. Under California Code of Civil Procedure §386.6(a):

> A party to an action who follows the procedure [for interpleader] set forth in [Code of Civil Procedure] Section 386… may insert in his motion, petition, complaint, or cross complaint a request for allowance of his costs and reasonable attorney fees incurred in such action. In ordering the discharge of such party, the court may, in its discretion, award such party his costs and reasonable attorney fees from the amount in dispute which has been deposited with the court. At the time of final judgment in the action the court may make such further provision for assumption of such costs and attorney fees by one or more of the adverse claimants as may appear proper.

Slayer Statute and Related Common Law Rule

California's Slayer Statute, codified in California Probate Code §250, *et seq.*, supports the common law doctrine that no person shall be allowed to profit from his or her wrongful acts. A beneficiary "who feloniously and intentionally kills" the insured is disqualified from receiving the decedent's life insurance proceeds. Cal. Prob. Code §252 (killing of decedent by beneficiary); *see also* Cal. Prob. Code §250 (no recovery from estate or non-probate transfer for killing of decedent); Cal. Prob. Code §251 (no right of survivorship for killing of joint tenant); Cal. Prob. Code §253 (no acquisition of property by killer). The life insurance policy becomes "payable as though the killer had predeceased the decedent." Cal. Prob. Code §252; *see also* Cal. Prob. Code §250(b).

A "final judgment of conviction of felonious and intentional killing is conclusive" to bar recovery by the "slayer." Cal. Prob. Code §254(a). Probate Code §254(b) provides that even if charges against the alleged slayer are dropped or an acquittal occurs, a court can still determine by a preponderance of the evidence whether the killing of the insured decedent was "felonious and intentional." *See ReliaStar Life Ins. Co. v. Northam*, 2013 WL 5703341, at *3 (E.D. Cal. Oct. 16, 2013) (enjoining defendants-in-interpleader from suing insurer which had interpleaded life proceeds, and likewise staying action during criminal trial pendency of one defendant-in-interpleader). "The burden of proof is on the party seeking to establish that the killing was felonious and intentional." Cal. Prob. Code §254(b).

In *Principal Life Insurance Co. v. Scott Peterson*, 67 Cal. Rptr. 3d 584 (Cal. App. 2007), the Court held that where the murderer's conviction was on appeal at the time of the insurance interpleader action, the non-final judgment of conviction was not conclusive evidence under the Slayer Statute. Conviction on appeal is "final judgment" for purposes of California Evidence Code §1300, but not a "final judgment" under Probate Code §254. Nonetheless, the estate ultimately recovered under the Slayer Statute because evidence of the first degree capital murder conviction of the beneficiary, unrebutted by any evidence he was not guilty of felonious and intentional killing of insured, was sufficient to establish that the beneficiary killed the insured. *See New York Life Ins. Co. v. Morales*, 2008 WL 5082163 (S.D. Cal. Nov. 25, 2008) (initially finding beneficiary husband's foreign conviction of intentional homicide of his wife was non-conclusive, but after awarded benefits to dece-

dent's estate after bench trial evaluating evidence from criminal trial).

Interest on Life Insurance Proceeds

California Insurance Code §10172.5(a) sets forth the interest an insurer must pay if it does not pay death benefits owed to a beneficiary within 30 days of the death of the insured. It provides, in relevant part:

> [E]ach insurer… that fails or refuses to pay the proceeds of, or payments under, any policy of life insurance issued by it within 30 days after the date of death of the insured shall pay interest, at a rate not less than the then current rate of interest on death proceeds left on deposit with the insurer computed from the date of the insured's death, on any moneys payable and unpaid after the expiration of the 30-day period.

Cal. Ins. Code §10172.5(a).

California Insurance Code §10172.5(c) requires the insurer to specify the rate of interest that will be paid:

> In any case in which interest on the proceeds of, or payments under, any policy of life insurance… becomes payable pursuant to [§10172.5(a)], the insurer shall notify the named beneficiary or beneficiaries at their last known address that interest will be paid on the proceeds of, or payments under, that policy from the date of death of the named insured. That notice shall specify the rate of interest to be paid.

Contested Life Insurance Claims

Contestability Period

California's incontestability clause statute is codified in Insurance Code §10113.5, which states:

> (a) An individual life insurance policy delivered or issued for delivery in this state shall contain a provision that it is incontestable after it has been in force, during the lifetime of the insured, for a period of not more than two years after its date of issue, except for nonpayment of premiums and except for any of the supplemental benefits described in Section 10271, to the extent that the contestability of those benefits is otherwise set forth in the policy or contract supplemental thereto. An individual life insurance policy, upon reinstatement, may be contested on account of fraud or misrepresentation of facts material to the reinstatement only for the same period following reinstatement, and with the same conditions and exceptions, as the policy provides with respect to contestability after original issuance.
>
> (b) (1) Notwithstanding subdivision (a), if photographic identification is presented during the application process, and if an impostor is substituted for a named insured in any part of the application process, with or without the knowledge of the named insured, then no contract between the insurer and the named insured is formed, and any purported insurance contract is void from its inception.
>
> (2) As used in this subdivision:
>
> (A) "Application process" means any or all of the steps required of a named insured in applying for a certificate under an individual policy of life insurance, including, but not limited to, executing any part of the application form, submitting to medical or physical examination or testing, or providing a sample or specimen of blood, urine, or other bodily substance.
>
> (B) "Impostor" means a person other than the named insured who participates in any manner in the application process for a certificate under an individual life insurance policy and represents himself or herself to be the named insured or represents that a sample or specimen of blood, urine, or other bodily substance is that of the named insured.

(C) "Named insured" means the individual named in an application form for a certificate under an individual life insurance policy as the person whose life is to be insured.

(c) This section shall not be construed to preclude at any time the assertion of defenses based upon policy provisions that exclude or restrict coverage.

(d) This section shall not apply to individual life insurance policies delivered or issued for delivery in this state on or before December 31, 1973.

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

Under California law, incontestability clauses in life insurance policies "bar the insurer from rescinding or otherwise invalidating the policy after the contestable period has expired, even in the face of gross fraud in procuring the policy." *United Fidelity Life Ins. Co. v. Emert*, 57 Cal. Rptr. 2d 14 (Cal. App. 1996). The California Supreme Court has explained:

> When an insurance policy by its provisions is made incontestable after a specified period, the intent of the parties is to fix a limited time within which the insurer must discover and assert any grounds it might have to justify a rescission of the contract. Accordingly, the insurer must make its 'contest of the policy' within the prescribed period, either by the institution of a suit to cancel the policy or by setting up misrepresentation or fraud in the procurement of the policy as a defense in an action brought by the insured or the beneficiary.

New York Life Ins. Co. v. Hollender, 237 P.2d 510 (Cal. 1951).

An incontestability clause can apply to a contest based on breach of a condition precedent. *Amex Life Assurance Co. v. Superior Court*, 930 P.2d 1264, 1273 (Cal. 1997) (rejecting insurer's argument that incontestability clause can be circumvented by contending that insured failed the condition precedent of obtaining a medical examination). However, the contestable clause does not preclude the insurer from relying on exclusions or limitations on coverage. Cal. Ins. Code §10113.5(c) (the incontestability clause "shall not be construed to preclude at any time the assertion of defenses based upon policy provisions that exclude or restrict coverage"); *Hollender*, 237 P.2d 510, 513 (Cal. 1951) (once the contestability period has run, the clause "means only this, that within the limits of the coverage, the policy shall stand, unaffected by any defense that was valid in its inception, or thereafter became invalid by reason of a condition broken"); *see also Galanty v. Paul Revere Life Ins. Co.*, 1 P.3d 658, 669 (Cal. 2000) (distinguishing incontestability clauses in life insurance policies from disability policies in finding that the disability insurer's argument that an incontestability clause cannot effect coverage was erroneous).

Where an incontestability clause is in effect, an insurance policy may still be challenged on the ground that it is *void ab initio* for lack of an insurable interest. *Paul Revere Life Ins. Co. v. Fima*, 105 F.3d 490, 492 (9th Cir. 1997) ("California law provides that a policy which is *void ab initio* may be contested at any time, even after the incontestability period has expired."); *Hartford Life & Annuity Ins. Co. v. Doris Barnes Family 2008 Irrevocable Trust*, 2011 WL 759554, at *3 (C.D. Cal. Feb. 22, 2011) (an incontestability clause does not preclude a challenge to a life insurance policy "on the ground that it is *void ab initio* for lack of insurable interest"); *see also Crump v. Northwestern Nat'l Life Ins. Co.*, 45 Cal. Rptr. 814, 819 (Cal. App. 1965).

Suicide

The California Insurance Code contemplates life insurance coverage for suicide. California Insurance Code §11066(h) provides, in pertinent part, that a life policy "shall be incontestable on the ground of suicide after it has been in force during the lifetime of the insured for a period of two years from date of issue." This rule even applies to group policies that are converted into individual policies. Under Insurance Code §10113.4, "If a group life insurance policy contains a provision that makes a certificate holder's coverage contestable on the grounds of suicide for a period following commencement of coverage, only the unexpired portion of that period shall be applied

to a certificate holder's individual conversion policy of an equal or lesser amount of coverage."

A suicide exclusion must be "plain and clear" and "conspicuous" to be enforceable. However, an insurer has no duty to identify and explain the suicide provision to an applicant. *Malcom v. Farmers New World Life Ins. Co.*, 5 Cal. Rptr. 2d 584, 589 (Cal. App. 1992). The California Supreme Court has held that the common phrase excluding liability for "suicide, whether sane or insane" is unambiguous. *Searle v. Allstate Life Ins. Co.*, 696 P.2d 1308, 1315 (Cal. 1985).

To properly deny a claim based on suicide, the insurer has the burden of proving the insured intended to commit suicide to overcome the presumption of accidental death. *Beers v. Cal. State Life Ins. Co.*, 262 P. 380 (Cal. App. 1927). The California Supreme Court has confirmed that this burden "requires more than proof of the act of self-destruction, the proof must further establish that the act was committed with suicidal intent, *i.e.*, the purposeful or intentional causing of death." *Searle*, 696 P.2d at 1315. An irresistible impulse, insanity, or other mental derangement cannot negate suicidal intent if the decedent is shown to have performed the self-destructive act with an understanding of its physical nature and consequences. 696 P.2d at 1318.

California Insurance Code §10111.5 affords life insurers unique legal protections for potential suicide claims if the coroner is precluded from performing an autopsy due to the decedent's religious beliefs. Under California Insurance Code §10111.5:

> [A]n insurer shall not be liable for payments claimed under an individual or group policy of life insurance if the duty to make those payments depends upon a factual determination of whether the death of the insured was an accident or a suicide and that fact cannot be established without an autopsy and the autopsy is prohibited under Section 27491.43 of the Government Code [bar to autopsy due to decedent's religious beliefs]. Insurers refusing or delaying payments in those circumstances in good faith shall not be liable for exemplary or punitive damages.

Life insurers cannot escape liability for a legally valid assisted suicide under California's End of Life Option Act, effective June 9, 2016. California Health & Safety Code §443.13(b) provides: "Notwithstanding any other law, a qualified individual's act of self-administering an aid-in-dying drug shall not have an effect upon a life, health, or annuity policy other than that of a natural death from the underlying disease."

STOLI/BOLI/COLI and Stranger Owned Annuity Contracts

In 2009, California adopted anti-"stranger-oriented life insurance" ("STOLI") legislation which became effective on January 1, 2010. Cal. Ins. Code §10110.1(d), (e). California Insurance Code §10110.1(e) provides that "Any device, scheme, or artifice designed to give the appearance of an insurable interest where there is no legitimate insurable interest violates the insurable interest laws." Cal. Ins. Code §10110.1(e). An arrangement by which a life insurance policy is initiated for the benefit of a "third party investor" who has no insurable interest in the insured's life *at the time* the policy is issued is deemed a STOLI. A STOLI policy is considered to be a "fraudulent life settlement act" prohibited by the Insurance Code. Cal. Ins. Code §§10113.1(w), 10113.2, 10113.3(s). An investor may not be the beneficiary of a trust or special purpose entity used to apply for and initiate issuance of insurance on the life of someone in whose life the investor has no insurable interest. Such an arrangement "violate(s) the insurable interest laws and the prohibition against wagering on life." Cal. Ins. Code §10110.1(d).

California's anti-STOLI amendments to the Insurance Code apply prospectively, not retroactively. *Hartford Life & Annuity Ins. Co. v. Doris Barnes Family 2008 Irrevocable Trust*, 2012 WL 688817, at *5 (C.D. Cal. Feb. 3, 2012) (recent amendments to Insurance Code sections 10110.1(d) and 10110.1(e) do not apply retroactively to policies that were issued before January 1, 2010); *Lincoln Life & Annuity Co. of N.Y. v. Berck*, No. D056373, 2011 WL 1878855 (Cal. App. May 17, 2011) (unpublished) (anti-STOLI law applied prospectively).

The retention of premiums on a rescinded STOLI policy is an undecided issue. Rescission normally requires the insurer to return the premiums paid

by the owner of the policy. However, the insurer may argue in favor of retaining premiums because a STOLI policy is a "fraudulent act," the policy owner has no right to seek a refund of premiums paid, and the insurer should recover damages for its expenses. *See*, *e.g.*, *PHL Variable Ins. Co. v. Clifton Wright Family Ins. Trust*, 2010 WL 1445186 (S.D. Cal. Apr. 12, 2010) (insurer's request to keep premiums to cover its consequential damages to rescind a STOLI policy was not barred); *Hartford Life & Annuity Ins. Co. v. Doris Barnes Family 2008 Irrevocable Trust*, 2011 WL 759554, at *4–5 (C.D. Cal. Feb. 22, 2011) (same).

Material Misrepresentations in the Application

Applicable State Statute

A claim or defense based on an alleged material misrepresentation by the insured in an insurance application begins with California Insurance Code §359, which states: "If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false."

Special rules apply to life and disability insurance. California Insurance Code §10113 states:

> Every policy of life, disability or life and disability insurance… shall contain and be deemed to constitute the entire contract between the parties and nothing shall be incorporated therein by reference to any… application or other writings, of either of the parties thereto or of any other person, unless the same are indorsed upon or attached to the policy; and all statements… by the insured shall, in the absence of fraud, be representations and not warranties.

See also Cal. Ins. Code §10381.5 (insured not bound by statement in application not attached to or endorsed on policy when issued).

Courts have interpreted this statute to mean that the insurer cannot rescind on the basis of claimed misrepresentations in an insurance application unless the application is attached to the policy. *See Ticconi v. Blue Shield of Calif. Life & Health Ins. Co.*, 72 Cal. Rptr. 3d 888, 900 (Cal. App. 2008) (insured not bound by statements in portion of application that had not been attached to the policy); *Wilson v. Western Nat'l Life Ins. Co.*, 1 Cal. Rptr. 2d 157, 162 (Cal. App. 1991).

California Insurance Code §10113, however, does not immunize *fraudulent* misrepresentations in the application even when it has not been attached to the policy. *Nieto v. Blue Shield of Calif. Life & Health Ins. Co.*, 103 Cal. Rptr. 3d 906, 923–924 (Cal. App. 2010). In *Nieto*, the Court found that Section 10113 does not apply to a situation where an insurer seeks to rescind a policy because of fraud or deceit by the insured in the application. Section 10113 "expressly applies 'in the absence of fraud' and may be harmonized with other Insurance Code provisions to permit an insurer to rescind a policy where the insured fraudulently conceals or misinterprets material information in the application." 103 Cal. Rptr. 3d 906, 923–924.

Prima Facie Case of Misrepresentation

Under California law, the following factors affect an insurer's to rescind: (1) whether the insured misrepresented or concealed information in its application for insurance; (2) whether the information misrepresented or concealed was material; and (3) whether the insured knew that it had made material misrepresentation or concealment. *Atmel Corp. v. St. Paul Fire & Marine Ins. Co.*, 416 F. Supp. 2d 802, 808 (N.D. Cal. 2006).

The insurer has a right to know all that the applicant for insurance knows regarding the risk to be assumed. Cal. Ins. Code §332. Misstatement or concealment of "material" facts is ground for rescission even if unintentional. The insurer need not prove that the applicant-insured actually intended to deceive the insurer. Cal. Ins. Code §§331, 359; *O'Riordan v. Federal Kemper Life Assur.*, 30 Cal. Rptr. 3d 507, 511 (Cal. 2005); *LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.*, 67 Cal. Rptr. 3d 917, 925 (Cal. App. 2007); *see also* Judicial Council Of Calif. Civil Jury Instruction 2308 at ¶2. "[T]he intent to defraud the insurer is necessarily implied when the misrepresentation is material and the insured willfully makes it with knowledge of its falsity." *TIG Ins. Co. of Michigan v. Homestore, Inc.*, 140 Cal. Rptr. 3d 528, 538, fn. 15 (Cal. App. 2006).

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

In California, the inclusion of "to the best of my knowledge and belief" language in a life insurance application does not create a heightened standard for the insurer to demonstrate an intentional misrepresentation. Material misrepresentations on an insurance application are grounds for the insurance company to rescind the policy regardless of whether the false representation was intentional. *Trinh v. Metro. Life Ins. Co.*, 894 F. Supp. 1368, 1372 (N.D. Cal. 1995); *Telford v. New York Life Ins. Co.*, 9 Cal. 2d 103, 105 (1937) ("A false representation or a concealment of fact whether intentional or unintentional, which is material to the risk vitiates the policy. The presence of an intent to deceive is not essential.").

Materiality

In California, courts are split on whether the insured's answers to questions in the insurance application must be regarded as material as a matter of law, or whether their materiality is a question of fact in each case. *See Mitchell v. United Nat'l Ins. Co.*, 25 Cal. Rptr. 3d 627, 638 (Cal. App. 2005).

One line of cases holds that the fact the insurer asked specific questions on the application makes the answers "material" as a matter of law. *Cohen v. Penn Mut. Life Ins. Co.*, 312 P.2d 241, 244 (Cal. 1957) ("The fact that defendant put the questions in writing and asked for written answers was itself proof that it deemed the answers material."); *see also Thompson v. Occidental Life Ins. Co. of Calif.*, 109 Cal. Rptr. 473, 480 (Cal. 1973); *West Coast Life Ins. Co. v. Ward*, 33 Cal. Rptr. 3d 319, 323 (Cal. App. 2005). "An insurer… has the unquestioned right to select those whom it will insure and to rely upon him who would be insured for such information as it desires…" *Robinson v. Occidental Life Ins. Co.*, 281 P.2d 39, 42 (Cal. App. 1955).

The other line of cases holds that the materiality of the insured's answers to questions on the application depends on the nature of the information. *Ransom v. Penn Mut. Life Ins. Co.*, 274 P.2d 633, 637 (Cal. 1954) ("An incorrect answer on an insurance application is not ground for rescission where the true facts, if known, would not have made the contract less desirable to the insurer."); *see also Imperial Cas. & Indem. Co. v. Sogomonian*, 243 Cal. Rptr. 639, 644 (Cal. App. 1988). Under this view, the fact the question was asked is not enough by itself to establish materiality. The insurer must prove that the false statement or omission was "material" to its underwriting decision. *Old Line Life Ins. Co. of America v. Sup.Ct. (Silvera Trust)*, 281 Cal.Rptr 15, 18 (Cal. App. 1991) ("The most generally accepted test of materiality is whether or not the matter misstated could reasonably be considered material in affecting the insurer's decision as to whether or not to enter into the contract, in estimating the degree or character of the risk, or in fixing the premium rate thereon."); *see also Merced County Mut. Fire Ins. Co. v. State of Calif.*, 284 Cal. Rptr. 680, 684 (Cal. App. 1991).

Lastly, if the policy so provides, misrepresentations in an insurance application may be deemed material as a matter of law. *See TIG Ins. Co. of Michigan v. Homestore, Inc.*, 40 Cal. Rptr. 3d 528 (Cal. App. 2006) ("Any statements in the Application and in any materials provided shall be deemed material to the acceptance of the risk or hazard assumed by the Insurer, and this Policy is issued in reliance upon the truth of such representations.").

Casual Connection

The insured's misrepresentation need not relate to the loss ultimately claimed by the insured. The issue is whether the insurer would have issued the policy had it known the true facts. In *Torbensen v. Family Life Ins. Co.*, 329 P.2d 596, 598 (Cal. App. 1958), the insured stated in the application that he was in good health and had never been diagnosed with heart disease, when he was actually being treated for a heart condition. Even though he died of a different condition (lung cancer), the insurer was still entitled to rescind the policy. Had the insurer known of the heart condition, it might not have issued the policy at all. *See also Bhakta v. Hartford Life and Annuity Ins. Co.*, 2015 WL 927443, at *3 (C.D. Cal. Mar. 3, 2015) (material misrepresentations in life insurance application pertaining to "excessive use of alcohol" established grounds for rescission of the policy); *Hartford Accident & Indem. Co. v Employers Ins. of Wausau*, 1995 WL 870851 *19 (Sup. Ct. S.F. May 26, 1995) (unpublished) ("[U]ndisclosed or misrep-

resented material may bar coverage regardless of whether it is related to the specific loss for which [the insured] seeks coverage.").

> Notably, California recently enacted Insurance Code §10295.5 as part of its continuing trend to step up regulatory enforcement of sales practices relating to Long Term Care products. Insurance Code §10295.5 requires applications for accelerated death benefits to contain unambiguous questions to ascertain the health condition of the applicant. A "caution" must also be printed on the application stating that misstated or untrue answers may entitle the insurer to deny benefits or rescind the accelerated death benefit coverage. If the insurer does not complete medical underwriting for the accelerated benefit *separate* from the underwriting for the life insurance policy, it can only rescind upon clear and convincing evidence of fraud or material misrepresentation of the risk. The State is interested in ensuring that agents are not selling life policies with accelerated death benefits as replacements for Long Term Care coverage.

Impact of Agent's Knowledge and False Responses

Evidence that the applicant withheld or concealed material facts may be grounds for the insurer to avoid coverage. Cal. Ins. Code §§331 & 359. However, an agent's conduct may result in a finding that the misrepresentation has been waived, or that the insurer is charged with knowledge of the matters in question. For instance, an insurer may be estopped to rescind where the applicant, in good faith, made full disclosure of material facts to an agent of the insurance company who failed to include those facts in the application. *See Byrd v. Mutual Benefit Health & Acc. Ass'n*, 166 P.2d 901 (Cal. App. 1946) (evidence that insured disclosed facts to agent was admissible because if the omissions were the fault of the agent instead of the insured, the insurer may be estopped to deny coverage). In *O'Riordan v. Federal Kemper Life Assurance*, 114 P.3d 753, 757 (Cal. 2005), the Court held that the insurer could not rescind a policy where the applicant was allegedly led to believe by the insurance agent that the information called for was immaterial. The insured in *O'Riordan* had been a smoker in the past but had not smoked more than one or two cigarettes in the past five years. The agent informed her that she did not have to disclose her smoking history as long as she passed blood and urine tests. The Court held that once the agent "became Kemper's agent, [he] had a duty to disclose to Kemper any material information he had pertaining to Amy's life insurance policy, and Kemper is deemed to have knowledge of such facts." *Id.* at 757.

California courts have held that knowledge is not imputed where the applicant receives a copy of his application, unless some action by the agent prevents the applicant from reading the policy or leads the applicant to believe that the misstated or omitted answers are not material. *Rutherford v. Prudential Ins. Co. of America*, 44 Cal. Rptr. 697,701 (Cal. App. 1965). Further, the insured must be acting in good faith to defeat rescission. In *Telford v. New York Life Ins. Co.*, 69 P.2d 835, 838 (Cal. 1937), the California Supreme Court rejected a contention that because of knowledge imputed from its agent, the defendant insurer was not actually deceived by its insured's incomplete answer on the application for the policy. Noting case law recognizing that "the requirement of fair dealing is laid on both parties to the contract," the Supreme Court observed:

> This requirement entails a duty on the part of the insured to read the contract and the application in accordance with her representations and to report to the company any misrepresentations or omissions. There is no showing in the present case that the failure to read the application was due to any act of the defendant and under the decisions the facts herein do not make an exception so as to excuse the insured's failure to read it. By neglecting to inform the company of the material omissions, the insured became responsible for such misrepresentations or omissions.

Id. at 107.

Defenses

Statutes of Limitation/Contractual Limitations Period

California has a four-year statute of limitations period for breach of contract, which would apply to

life insurance policies. Cal. Code Civ. Proc. §337(1). For statute of limitations purposes, a cause of action accrues, at the latest, upon an unconditional denial of the claim for benefits. *State Farm v. Superior Court*, 258 Cal. Rptr. 413 (Cal. App. 1989).

Private contractual limitations provisions in insurance policies have "long been recognized as valid in California." *C & H Foods Co. v. Hartford Ins. Co.*, 211 Cal. Rptr. 765 (Cal. App. 1984). These provisions may be enforced "as long as the limitation is not so unreasonable as to show imposition or undue advantage." *Id.* (citing *Fageol T. & C. Co. v. Pacific Indemnity Co.*, 117 P.2d 669, 672 (Cal. 1941)). One year has been held to be a reasonable limitations period in California. *Id.*

Life policies with disability provisions must include a statutorily mandated contractual limitations period:

> Legal Actions: No action at law or in equity shall be brought to recover on this policy prior to the expiration of 60 days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished.

Cal. Ins. Code §10350.11.

Under California law, an insurance company cannot waive a contractual limitations defense when the limitations period has already run. *See Gordon v. Deloitte & Touche, LLP Grp. Long Term Disability Plan*, 749 F.3d 746, 752 (9th Cir. 2014). Insurers may still assert statutory limitations even if they have waived the right to assert contractual limitations. *See Chuck v. Hewlett Packard Co.*, 455 F.3d 1026, 1033–34 (9th Cir. 2006); *Heighley v. J.C. Penney Life Ins. Co.*, 257 F. Supp. 2d 1241, 1258 (C.D. Cal. 2003).

Duty to Read Policy

In California, it is well-settled that an insured has a duty to read the life insurance policy and application and is charged with notice of their contents. In the seminal case of *Telford v. New York Life Insurance Company*, 69 P.3d 835 (Cal. 1937), the California Supreme Court explained an insured's obligation:

> [D]ecisions recognize that the requirement of fair dealing is laid on both parties to the contract. This requirement entails a duty on the part of the insured to read the contract and the application in accordance with [the insured's] representations and to report to the company any misrepresentations or omissions… By neglecting to inform the company of the material omissions, the insured becomes responsible for such misrepresentations or omissions.

See also Hadland v. NN Investors Life Ins. Co., 30 Cal. Rptr. 2d 88, 93 (Cal. App. 1994); *Malcom v. Farmers New World Life Ins. Co.*, 5 Cal. Rptr. 2d 584, 589, fn. 6 (Cal. App. 1992); *Hackethal v. National Casualty Co.*, 234 Cal. Rptr. 853, 858 (Cal. App. 1987).

Waiver/Estoppel

An insurer may lose a contractual right either by waiver or estoppel.

"Waiver" is the intentional relinquishment of a known right after knowledge of the facts." *Waller v. Truck Ins. Exch., Inc.*, 44 Cal. Rptr. 2d 370, 387 (Cal. 1995). Waiver is generally a question of fact. *Aetna Cas. & Sur. Co. v. Richmond*, 143 Cal. Rptr. 75, 79 (Cal. App. 1977). A waiver may be either express, based on words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right. *Waller*, 44 Cal. Rptr. 2d at 387. A denial of coverage on one ground does not impliedly waive other grounds that the insurer did not mention in the denial. *Chase v. Blue Cross of Calif.*, 50 Cal. Rptr. 2d 178, 183 (Cal. App. 1996). Unlike estoppel, the insurer may be found to have waived a policy condition without any showing of detrimental reliance by the insured. 50 Cal. Rptr. 2d at 183.

An insurer may be estopped to assert a policy right or defense where, by words or conduct, the insurer has caused the insured reasonably to change position to his or her detriment. *See* Cal. Evid. Code §623; *Chase*, 50 Cal. Rptr. 2d at 188. Generally, four elements must be present to establish an equitable estoppel: (1) the insurer must be aware of the facts; (2) the insurer must intend that its conduct be acted upon (or must so act that the insured had a right to believe the insurer so intended); (3) the insured

must be ignorant of the true state of facts; and (4) the insured must rely upon the insurer's conduct to his or her injury. *See Colony Ins. Co. v. Crusader Ins. Co.*, 115 Cal. Rptr. 3d 611, 618 (Cal. App. 2010). The insured need not prove the insurer intended to mislead the insured. *Chase*, 50 Cal. Rptr. 2d at 188 ("An insurer is estopped from asserting a right, even though it did not intend to mislead, as long as the insured reasonably relied to its detriment upon the insurer's action."); *see also Waller*, 44 Cal. Rptr. 2d at 387.

The burden of proof is on the insured, as the party asserting these doctrines, to establish whatever facts are necessary to show waiver or estoppel. *Chase*, 50 Cal. Rptr. 2d at 188. Because waiver of a contractual right is not favored in the law, the insured must meet the higher "clear and convincing evidence" standard. *Waller*, 44 Cal. Rptr. 2d at 386; *Chase*, 50 Cal. Rptr. 2d at 188. There is no known California insurance case addressing the standard of proof necessary to establish estoppel.

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