Memo To: Sample Alexsei Memo
Jurisdiction: Ontario, Canada
Date: June 22, 2019
Regarding: Misrepresentation on life insurance denials

Issue

What are the evidentiary burdens of proving fraudulent misrepresentation and innocent misrepresentations in life insurance denials?

Conclusion

Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. To prevent a false statement being fraudulent, there must always be an honest belief in its truth.

Specifically, with respect to life insurance, the starting point is that the relationship between an insurer and an insured is contractual in nature. The doctrine of 'uberrimae fides' holds parties to an insurance contract to a standard of utmost good faith in their dealings with each other. Applicants for insurance coverage are obligated to provide full disclosure to the insurance company of all information relevant to the nature and extent of the risk that the insurer is being asked to assume.

The *Insurance Act*, RSO 1990, c. I8 provides that where a contract of insurance has been in effect for two years during the lifetime of the person whose life is insured, a failure to disclose or misrepresentation of a fact does not, in the absence of fraud, render the contract voidable. Therefore, whether misrepresentations are fraudulent or innocent does not become an issue where the policy has not been in force for more than two years during the lifetime of the insured.

Where the policy is in place for less than two years, the policy is void even if the insured inadvertently fails to communicate all relevant facts to the insurer. A fact is relevant or material if it would influence a prudent insurer in deciding whether to issue the policy or in determining the amount of the premium. Whether a misrepresentation or non-disclosure is material is a matter of fact. The motive or intention of the insured is not relevant so long as the misrepresentations

are of a fact known to the insured which could be regarded by a reasonable insurer as material to the risk. In those circumstances, the consequence of non-disclosure or misrepresentation of a material fact by the insured is that the insurer is entitled to void the insurance contract ab initio.

Where the contract of insurance has been in place for more than two years, the insurer must prove fraud. Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. If fraud is proved, the motive of the person guilty of it is immaterial. It doesn't matter that there was no intention to cheat or injure the person to whom the statement was made. To prevent a false statement being fraudulent, there must always be an honest belief in its truth.

Law

The *Insurance Act*, RSO 1990, c. I8 provides that in the case of a contract of insurance which has been in effect for two years during the lifetime of the person whose life is insured, a failure to disclose or misrepresentation of a fact does not, in the absence of fraud, render the contract voidable:

> Exceptions
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> 184 (1) This section does not apply to,
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> (a) a misstatement of age of a person whose life is insured; or
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> (b) insurance undertaken by an insurer as part of a contract of life insurance whereby the insurer undertakes to pay insurance money or to provide other benefits in the event that the person whose life is insured becomes disabled as a result of bodily injury or disease. 2002, c. 18, Sched. H, s. 4 (23); 2012, c. 8, Sched. 23, s. 19 (1).
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> Incontestability, general
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> (2) Subject to subsection (3), where a contract, or an addition, increase or change referred to in subsection 183 (3) has been in effect for two years during the lifetime of the person whose life is insured, a failure to disclose or a misrepresentation of a fact required to be disclosed by section 183 does not, in the absence of fraud, render the contract voidable. R.S.O. 1990, c. I.8, s. 184 (2); 2012, c. 8, Sched. 23, s. 19 (2).
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> ...

Although in the context of a loss arising from fire damage, misrepresentations in contracts of insurance were discussed in *Sagl v. Chubb Insurance Company of Canada*, 2009 ONCA 388.

The standing point is that the relationship between an insurer and an insured is contractual in nature. However, special rules apply -- in particular, the doctrine of 'uberrimae fides' holds parties to an insurance contract to a standard of utmost good faith in their dealings with each other. Applicants for insurance coverage are obligated to provide full disclosure to the insurance company of all information relevant to the nature and extent of the risk that the insurer is being asked to assume. A fact is relevant or material if it would influence a prudent insurer in deciding whether to issue the policy or in determining the amount of the premium. Whether a misrepresentation or non-disclosure is material is a matter of fact to be determined by the trier of fact. There is also a subjective element to the test - the non-disclosure or misrepresentation must have induced the insurer to enter into the contract:

> [51] The starting point in the analysis of this ground of appeal attracts no debate. The relationship between an insurer and an insured is contractual in nature. But contracts of insurance are no ordinary contracts; special rules apply. Chief among these is the doctrine of uberrima fides that holds the parties to a standard of utmost good faith in their dealings with each other. It places a heavy burden on applicants for insurance coverage to provide full disclosure to the insurance company of all information relevant to the nature and extent of the risk that the insurer is being asked to assume: *Coronation Insurance Co. v. Taku Air Transport Ltd.*, 1991 CanLII 16, [1991] 3 S.C.R. 622, at p. 636. A fact is relevant or material if it would influence a prudent insurer in deciding whether to issue the policy or in determining the amount of the premium: *Mutual Life Insurance Co. v. Ontario Metal Products Co Ltd.*, 1924 CanLII 336 (UK JCPC), [1925] 1 D.L.R. 583 (P.C.), at p. 588; *Gauvremont v. Prudential Insurance Co. of America*, 1940 CanLII 65 (SCC), [1941] S.C.R. 139, at p. 160; *Fidelity & Casualty Co. of New York v. General Structures Inc*, 1976 CanLII 213 (SCC), [1977] 2 S.C.R. 1098, at p. 1110. Whether a misrepresentation or non-disclosure is material is a matter of fact to be determined by the trier of fact: see s. 124(6) of the *Insurance Act*, RSO 1990, c. I8 , and *Mutual Life* at p. 588. However, there is a subjective element to the test as well. The non-disclosure or misrepresentation must have induced the insurer to enter into the contract: see s. 124(4) of the Insurance Act; see also *Taylor v. London Assurance Corp*, 1935 CanLII 2 (SCC), [1935] S.C.R. 422, at p. 429.

The duty to disclose all material facts applies even in the absence of questions from the insurer, but absence of a question may be evidence that the insurer does not consider a fact to be material. This is so even if the information would have been regarded as relevant by a prudent insurer. The consequence of non-disclosure or misrepresentation of a material fact by the insured is that the insurer is entitled to void the insurance contract ab initio:

> [52] The duty to disclose all material facts applies even in the absence of questions from the insurer, although the absence of questions may be evidence that the insurer does not consider a fact to be material: *Gregory v. Jolley*, 2001 CanLII 4324 (ON CA), 54 O.R. (3d) 481 (C.A.), at paras. 31-32 and 37, and *W.H. Stuart Mutuals Ltd. v. London Guarantee Insurance Co.* (2004), 16 C.C.L.I. (4th) 192 (Ont. C.A.), at para. 11, leave to appeal refused, [2005] 1 S.C.R. xvii. The consequence of non-disclosure or misrepresentation of a material fact by the insured is that the insurer is entitled to void the insurance contract ab initio: see *Lloyd's London, Non-Marine Underwriters v. National Armoured Ltd.*, 1996 CanLII 8104 (ON SC), 142 D.L.R. (4th) 506 (Ont. Gen. Div.), affirmed by [2000] I.L.R. I-3751 (Ont. C.A.).
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> [59] As previously mentioned in para. 52, while the applicant has a duty to disclose all material facts, an insurer's conduct may be relevant to the analysis of whether a particular fact is material. An insurer's failure to ask a question may be evidence that the particular insurer does not consider the issue to be material, even if, objectively, the information would have been regarded as relevant by a prudent insurer: see *Great Northern Insurance Co. v. Whitney*, 1918 CanLII 42 (SCC), 57 S.C.R. 543; see also *Fodorchuk v. Car & General Ins. Corp. Ltd.*, 1931 CanLII 313 (AB QB), [1931] 3 D.L.R. 387 (Alta. S.C.), at p. 390, citing *Newsholme Bros. v. Road Transport and General Insurance Co.,* [1929] 2 K.B. 356, where, at p. 363, the court stated that insurance companies "run the risk of the contention that matters they do not ask questions about are not material, for, if they were, they would ask questions about them." An insurer who accepts the risk without requiring an answer to a question asked, for example by not pursuing an unanswered question in an application form, has been found to have waived the question: see *Hamzeh v. Safeco Insurance Company of America*, 1988 CanLII 3466 (AB QB), 32 C.C.L.I. 83 (Alta. Q.B.).
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> [60] A recent decision by this court has confirmed the principles expressed in those cases. In *Gregory v. Jolley,*[2] at para. 37, this court cited Craig Brown and Julio

> Menezes, Insurance Law in Canada, looseleaf (Toronto: Thomson Carswell, 2002)with approval:
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> The significance of the insurer not insisting upon a written application, in my view, is similar to the failure of an insurer to ask a question on the application. As Brown points out, at p. 5-4, the insurer's failure to inquire may provide evidence that the insurer does not consider the information relevant.

The Court in *Lachman Estate v. Norwich Union Life Insurance Co.*, 1998 CanLII 14854 similarly considered the effect of certain misrepresentations made by an insured with respect to a contract of insurance. The insured was murdered, and the estate brought an action against the insurer to recover the proceeds. The misrepresentations concerned the insured's job and net worth.

The Court held that whether misrepresentations are fraudulent or innocent does not become an issue where the policy has not been in force for more than two years during the lifetime of the insured. The policy is void even if the insured inadvertently fails to communicate all relevant facts to the insurer. The motive or intention of the insured is not relevant so long as the misrepresentations are of a fact known to the insured which could be regarded by a reasonable insurer as material to the risk:

> As to the legal arguments, counsel for the defendant relies on s. 183 of the Insurance Act and submits that the contract may be voidable by the insurer for misrepresentations which need not be fraudulent and that negligent or innocent misrepresentations are sufficient. She relies on the case of *Coronation Insurance Co. v. Taku Air Transport Ltd.*, 1991 CanLII 16 (SCC), [1991] 3 S.C.R. 622, 85 D.L.R. (4th) 609, which dealt with misrepresentation by an air carrier as to its accident record and number of passenger seats in the aircraft. The contract of insurance was governed by Air Carrier Regulations, C.R.C. 1978, c. 3, which provided that the policy is void in the case ofmaterial misrepresentation. The position was proffered that a reasonably competent insurer would have discovered the carrier's accident record by searching the records of the Aviation Safety Board or at least by searching its own records. The court held at p. 651 S.C.R., p. 613 D.L.R. that, "[t]he failure of an insurer to investigate a risk should not, by itself, deprive the insurer of the right to avoid the contract on the basis of a failure by the insured to disclose material facts." The court also reiterated that there is a burden on the party seeking insurance to make full and complete disclosure of all relevant information when making

application. The Supreme Court of Canada cited Lord Mansfield's comments on the duty of disclosure in an insurance contract in *Carter v. Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162 and held that if the insured fails even inadvertently to fulfil the duty to communicate all relevant facts to the insurer; then the policy would be void. At p. 636 S.C.R., 621 D.L.R., Cory J. described the principle of insurance law that an insured when applying for insurance has a heavy burden to make full and complete disclosure of material facts:

> The ubberima fides doctrine is a longstanding tenet of insurance law which holds parties to an insurance contract to a standard of utmost good faith in their dealing. It places a heavy burden on those seeking insurance coverage to make full and complete disclosure of all relevant information when applying for a policy.
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> Whether the misrepresentations are fraudulent or innocent does not become an issue where the policy has not been in force for two years during the lifetime of the insured. The motive or intention of the insured is not relevant as long as the misrepresentations are of a fact known to the insured which could be regarded by a reasonable insurer as material to the risk.

Gregory v. Jolley, 2001 CanLII 4324 concerned a denial of a claim for certain accident and sickness insurance benefits. The Court considered a clause very similar to the one in the life insurance portion of the act:

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> The right of the insurer to avoid the policy for misrepresentation of non-disclosure is limited by the "incontestability" provision:
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> 309(1) Subject to section 312 and except as provided in subsection (2),
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> (a) where a contract, including renewals thereof, except a contract of group insurance, has been in effect continuously for two years with respect to a person insured, a failure to disclose or a misrepresentation of a fact with respect to that person required by section 308 to be disclosed does not, except in the case of fraud, render the contract voidable;

> (b) where a contract of group insurance, including renewals thereof, has been in effect continuously for two years with respect to a group person insured or a person insured, a failure to disclose or a misrepresentation of a fact with respect to that group person insured or person insured required by section 308 to be disclosed does not, except in the case of fraud, render the contract voidable with respect to that group person insured or person insured.

At trial, the judge found that the incontestability clause applied, and that while the misrepresentations may have been material within the first two years, application of the clause would prevent voiding of the contract thereafter. The Court set out the appropriate test for civil fraud. Namely, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) recklessly carless as to the truth/without belief in its truth. For a false statement not to be fraudulent, there must be an honest belief in its truth:

> [15] It is common ground between the parties that the appropriate test for civil fraud to be applied here is that stated by Lord Herschell in Derry v. Peek (1889), 14 A.C. 337 at p. 374, [1886-90] All E.R. Rep. 1 (H.L.):
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> [f]raud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.
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> [16] The appellant submits that the trial judge failed to apply the third branch of this test relating to reckless statements and that, had he done so, he would necessarily have found that the respondent was reckless with respect to the truth of the representation he made as to his income.

For the mental element of civil fraud to be made out, it is sufficient if statements are made recklessly, without caring whether it was true or not. It is immaterial whether the intent of the statements was to defrau

> [20] With respect to the law, the trial judge's reasons show that he failed to consider whether the appellant had made out a case of fraud on the basis of recklessness. While he referred to a case that in turn referred to the test from Derry v. Peek, the reasons for judgment demonstrate to my satisfaction that the trial judge simply did not take into account the possibility that fraud could be made out if the respondent made misrepresentations of material fact without regard to their truth. The trial judge's reasons speak only of an intention to defraud or of statements calculated to mislead or misrepresent. He makes no reference to recklessness or to statements made without an honest belief in their truth. As Derry v. Peek holds, that state of mind is sufficient proof of the mental element required for civil fraud, whatever the motive of the party making the representation. In another leading case on civil fraud, *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459 at pp. 481-82, [1881-85] All E.R. Rep. 856 (C.A.), Bowen L.J. stated:
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> "[I]t is immaterial whether they made to statement knowing it to be untrue, or recklessly, without caring whether it was true or not, because to make a statement recklessly for the purpose of influencing another person is dishonest."
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> The failure to give adequate consideration to the contention that the respondent had been reckless with the truth in regard to the income figures he gave in order to obtain disability insurance constitutes an error of law justifying the intervention of this court.

The Court found the policy to be voidable on the facts before it:

> [38] I conclude, accordingly, that the trial judge erred in rejecting the appellant's claim of entitlement to avoid the policy on the ground that the respondent had failed to disclose material facts on his application for reinstatement in 1993. As the misrepresentation or failure to disclose was within two years of the date of the reinstatement of the policy, the incontestability clause has no application and it is unnecessary for the appellant to prove fraud. On this basis, the policy is voidable, and the appellant is not obliged to pay the benefits claimed by the respondent.

Authorities

Sagl v. Chubb Insurance Company of Canada, 2009 ONCA 388
Coronation Insurance Co. v. Taku Air Transport Ltd., 1991 CanLII 16
Mutual Life Insurance Co. v. Ontario Metal Products Co Ltd., 1924 CanLII 336
Gauvremont v. Prudential Insurance Co. of America, 1940 CanLII 65
Fidelity & Casualty Co. of New York v. General Structures Inc, 1976 CanLII 213

Insurance Act, RSO 1990, c. I8
Taylor v. London Assurance Corp, 1935 CanLII 2
Gregory v. Jolley, 2001 CanLII 4324
Lloyd's London, Non-Marine Underwriters v. National Armoured Ltd., 1996 CanLII 8104
Great Northern Insurance Co. v. Whitney, 1918 CanLII 42
Fodorchuk v. Car & General Ins. Corp. Ltd., 1931 CanLII 313
Hamzeh v. Safeco Insurance Company of America, 1988 CanLII 3466
Lachman Estate v. Norwich Union Life Insurance Co., 1998 CanLII 14854