



NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Maria T. Vullo
Superintendent

Circular Letter No. 1 (2017)
January 26, 2017

To: All Insurers Authorized to Write Life Insurance in New York and All Fraternal Benefit Societies (collectively, “Insurers”)

Re: Life Insurance Unfair Claim Settlement Practices during the Contestability Period

STATUTORY REFERENCES: Insurance Law §§ 2403, 2601, 3105, 3201, 3203, 4510 and Article 24.

The New York State Department of Financial Services (“Department”) has uncovered in examinations and investigations that some insurers authorized to write life insurance in New York (“insurers”) have contested numerous life insurance claims following the death of the insured during the two-year contestable period, in the absence of actual evidence of misrepresentation, and improperly have shifted the burden of proof to beneficiaries.

Insurance Law § 3203(a)(3) requires that all life insurance policies delivered or issued for delivery in New York must provide that the policy will be incontestable after being in force during the life of the insured for a period of two years from its date of issue or, as to certain increases or changes, from the effective dates of those increases or changes.¹ In addition, Insurance Law § 3105(b) provides that only a material misrepresentation will permit the insurer to avoid or defeat recovery under any insurance policy. Accordingly, an insurer may contest a claim or seek to rescind a policy *only* based upon actual proof of a material misrepresentation within two years of the policy’s date of issue or the effective date of the increase or change.

Under Insurance Law § 3105(d), a presumption of materiality attaches to a misrepresentation that an applicant for a life insurance policy has not had previous medical treatment, consultation or observation only if, in any legal action to rescind any such policy or to recover thereon (1) the insurer proves misrepresentation *and* (2) the insured or any other person having or claiming a right under the policy prevents full disclosure and proof of the nature of the medical impairment.

Some insurers have asserted a right to contest a life insurance claim based solely on the fact that the insured’s death occurred within two years of the policy’s date of issue. Some insurers also have asserted a right to rescind the life insurance policy after the insured’s death when the

¹ The Superintendent of Financial Services (“Superintendent”) may approve policy provisions that the Superintendent deems to be more favorable to the policy owner.

insurer cannot or does not obtain access to the deceased insured's medical records. These insurers impermissibly have been placing the burden on the beneficiary to obtain the deceased insured's medical records in order to assist the insurer in pursuing a claim investigation so that the insurer may determine whether there was a misrepresentation in the first place. These insurers appear to be using these tactics to withhold claim payments under the policy.

In some instances in which insurers are engaging in this practice, a beneficiary may have no legal standing to waive the deceased insured's physician-patient privilege and obtain the necessary medical records; in other instances, the beneficiary may have standing but chooses not to assist the insurer with obtaining medical records. In both scenarios, a beneficiary has no legal obligation to cooperate with an insurer by providing the insurer with the deceased insured's medical records. Greene v. New England Mut. Life Ins. Co., 108 Misc. 2d 540, 547 (Sup. Ct. N.Y. Co. 1981). Moreover, an insurer may not speculate as to the existence of a misrepresentation in order to compel a beneficiary to disclose the deceased insured's medical records. Id. While Insurance Law § 3105(d) provides that a presumption of materiality attaches when a beneficiary prevents full disclosure and proof of the nature of the medical impairment, Section 3105(d) *first* requires that the insurer prove a misrepresentation before the presumption of materiality can be triggered and applies only "in any action to rescind . . . or recover [on]" an insurance contract.²

Pursuant to Insurance Law § 2601(a)(4), an insurer must attempt in good faith to effectuate prompt, fair and equitable settlements of claims submitted to the insurer in which liability has become reasonably clear. Insurers are advised that any business practice by an insurer that, absent any evidence of a material misrepresentation, requires a beneficiary to furnish claim information, including medical records, so that an insurer may investigate whether an applicant made a misrepresentation when applying for life insurance, is not attempting to effectuate prompt, fair and equitable settlements of claims in good faith. Such activity also may be an unfair or deceptive act or practice in violation of Insurance Law Article 24.

In addition, pursuant to Insurance Law § 3201(c)(2), any policy form provision that imposes a duty or obligation upon a beneficiary to waive the deceased insured's physician-patient privilege and furnish, or assist in furnishing, the insurer with the deceased insured's medical records or other claim information about the insured, other than proof of death in order to receive the death benefits, will be deemed by the Superintendent to be unfair.

Even where an insurer, after the death of the insured or the filing of a claim during the two-year contestable period, commences an investigation into whether a particular policy was induced through fraud or misrepresentation the insurer must make prompt payment on a claim where there is no proof of an actual misrepresentation or that such misrepresentation is material. While an insurer in this circumstance has the right to bring a legal action to rescind an insurance contract, an insurer may not unilaterally refuse to pay a life insurance claim unless the insurer has actual proof that the applicant made a material misrepresentation when applying for the life insurance

² Only a beneficiary that is the personal representative, surviving spouse, or next of kin of the decedent has the authority to waive the physician-patient privilege under Civil Practice Law and Rules § 4504(c)(1). If the beneficiary is not the personal representative, surviving spouse, or next of kin of the decedent, then the beneficiary has not prevented full disclosure within the meaning of § 3105(d) and the presumption of materiality cannot attach. As noted above, this provision cannot be interpreted to eliminate the insurer's burden of proof on the existence of a misrepresentation.

policy. The failure or inability of a beneficiary to supply medical records is not proof of a material misrepresentation.

In this regard, it has come to the Department's attention that some insurers have rescinded life insurance policies unilaterally, with or without notice to a beneficiary. When the parties' respective positions are the same as when they entered into the insurance contract, rescission may be obtained on notice. McNaught v. Equitable Life Assurance Soc'y, 136 A.D. 774, 776 (2nd Dep't 1910). However, New York law does not permit an insurer to rescind a policy unilaterally after a change in the respective positions of the parties, such as the death of the insured or the filing of a claim, except through judicial determination or by obtaining the agreement of all beneficiaries after they are made aware of their right to contest the rescission. Fed. Ins. Co. v. Kozlowski, 18 A.D.3d 33, 39–40 (1st Dep't 2005). If an insurer prevails in a rescission action by proving a misrepresentation in the procurement process and that the misrepresentation was material, the policy may be void ab initio. Cont'l Cas. Co. v. Marshall Granger & Co., 6 F. Supp. 3d 380, 389 (S.D.N.Y. 2014). In all cases, after obtaining a judicial determination or agreement with all beneficiaries to rescind a life insurance policy, the insurer shall return the premiums to the insured or her estate. LaRocca v. John Hancock Mut. Life Ins. Co., 286 N.Y. 233, 238 (1941).

Please direct all questions regarding this circular letter to Lisa Fernéz, Chief, Life Bureau, at (212) 480-5023 or by email at Lisa.Fernez@dfs.ny.gov.

Sincerely,

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