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“I Never Said That!” Defeating Allegations That Answers on Application Were Recorded Inaccurately

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After rescinding a life insurance policy for material misrepresentations on the application, life insurers often find themselves in litigation. Although these cases may turn on questions of credibility, life insurers can achieve a favorable outcome on summary judgment.

Perhaps in the face of insurmountable medical records evidencing misrepresentations on the application, a plaintiff may admit that the application contains false information but deny awareness or involvement in recording the information. The plaintiff may blame the producer for recording the information incorrectly or for not asking all of the questions on the application. These allegations seek to absolve applicants and insureds from false statements on the application.

Plaintiffs’ lawyers may think it is an effective strategy to shift blame in cases where the falsity of the representations cannot be disputed. But insurers can and often do prevail in these circumstances, even at the summary judgment stage.

It is important to begin by exploring the extent to which the producer’s recollection differs from the plaintiff’s allegations. More likely than not, the producer will not recall the specific circumstances of the application process. But this does not necessarily mean that the insurer will be unable to counter the plaintiff’s evidence. Absent a specific recollection concerning the circumstances of the application, the producer may be able to provide testimony that he or she followed standard protocol in completing the application materials. If the producer routinely asks all questions verbally, for example, the producer can offer evidence of this practice even if he or she lacks a specific memory. Perhaps set forth in an affidavit or declaration, a producer’s general recollection of adhering to his or her standard protocol is admissible evidence that can be offered in support of summary judgment.

In addition to exploring the producer’s recollection of the application process, the insurer will want to review the language of the application materials. Language of the relevant documents, such as a provision on the application requiring the insured/applicant to review the application himself or herself, may play a key role in the insurer’s defense. Assuming the plaintiff has not alleged that the signatures on the application materials were forged, the insurer may rely on an attestation from the insured/applicant that the answers on the application are true and correct to the best of his or her knowledge.

Although plaintiffs' lawyers may contend that their blame-shifting strategy requires credibility determinations (thereby avoiding summary judgment), courts have occasionally adjudicated these cases as a matter of law. Judicial decisions vary among jurisdictions, but recent decisions have demonstrated that insurers can win summary judgment in the face of unsubstantiated allegations from plaintiffs concerning their lack of involvement in and/or awareness of the information recorded on the application.

Working with the producer, reviewing the language on the application materials, and confirming the authenticity of the signatures on the application materials are prudent steps to take during the preliminary stages of the case. With the proper documentary evidence and an effective litigation strategy, an insurer can prevail – without having to face trial.

Sample Cases

- *Gary v. USAA Life Ins. Co.*, No. PWG-15-1998, 2017 U.S. Dist. LEXIS 5889 (D. Md. Jan. 17, 2017) (summary judgment in favor of insurance company despite allegation that insured's responses to telephone application questions were not recorded "verbatim").

- *Dunford v. Bankers Life & Cas. Co.*, No. 2:14-cv-02304 JWS, 2016 U.S. Dist. LEXIS 116670 (D. Ariz. Aug. 26, 2016) (summary judgment in favor of insurance company despite allegations that agent knew falsity of representations when second medical questionnaire, which was admittedly completed by medical examiner, not agent, contained misrepresentations).

- *Radmer v. Royal Neighbors of Am.*, No. 15-CV-770-JPS, 2016 U.S. Dist. LEXIS 106975, at *19-20 (E.D. Wis. Aug. 12, 2016) (denying, in part, insurer's motion for summary judgment based on, *inter alia*, allegations that agent "instructed" insured to respond "no" to subject questions).

- *Patel v. New York Life Ins. Co.*, No. 4:10-cv-04195, 2015 U.S. Dist. LEXIS 34963 (W.D. Ark. Mar. 20, 2015) (denying, in part, insurer's motion for summary judgment based on, *inter alia*, allegations of fraud, including that the agent completed the application and the insured was unaware of its contents).

Tactical Tip

Consider dispositive motions at an early stage. Motions for summary judgment and/or motions for judgments on the pleadings may be available – and advisable – as soon as the pleadings close. In addition to serving as a useful advocacy tool, dispositive motions may be an effective exit strategy.

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