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Managing “Misinformation”
Issues for the Agent and Broker

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I. How does “misinformation” occur?

Issues of alleged misrepresentations surrounding the issuance of insurance policies have been occurring much more frequently within all lines of insurance. The rapid pace of communication and issuance within today’s insurance market compounds this problem. Coupled with this, the less formal nature of language and reduced requirement by carriers for a signed application creates more opportunities for misinformation to occur.

Misinformation in the application process principally occurs in two ways: (1) material information is misrepresented (commission or omission) by the assured in the application process, or (2) supplemental information supplied to the carrier separate from the application by or on behalf of the insured, often submitted in online web-based applications, may contain misinformation. The crucial issue for liability of the agent or broker depends upon the manner in which the application was submitted, the provable knowledge of the assured in the misrepresentation, the justifiable reliance upon the misinformation by the carrier and whether the policy language supports denying the claim or voiding the policy based upon the misinformation.

When a retail agent is soliciting quotes through wholesale brokers, the informality of the quote process can sometimes perpetuate misinformation as applications may be only

preliminarily completed, information is submitted on multiple companies' applications, and quotes are based upon imprecise underwriting information. Here, the potential for inaccurate information being conveyed is heightened. Other situations include completion of renewal applications without confirming the accuracy of the previous year's underwriting information.

In all instances, issues arise where the assured has not been given the opportunity to review the final application product and verify and approve all pertinent information. Also, to the extent the broker or carrier may have obtained information outside of the application relevant to the underwriting criteria without requiring written verification from the assured, misinformation can result.

II. What "misinformation" is actionable?

Actionable misinformation does not have to be relevant to the pending claim; actionable misrepresentation in most instances must be material to the underwriting consideration in the insurer's acceptance of the risk or the hazard assumed, and if the true facts had been known the carrier would not have issued the policy or contract, would not have issued it at the same premium rate, would not have accepted the risk, or accepted the amount of the exposure. *See*, for example, Florida Statute Section 627.409. Therefore, a misrepresentation on the application may have nothing to do with the pending claim but be relevant to whether the carrier would have underwritten the policy in the first place. Additionally, specific warranties in the policy may affect what misinformation is actionable and how it may affect a pending claim, for instance occupancy representations in a property policy, the nature of business conducted in liability safety endorsements which limit coverage for a fire claim in circumstances where protective safeguards are not in place. While technically these representations may not void a policy, the effect may lead to allegations of misrepresentation leveled against the agent or broker.

Additionally, language, in an insurance application which requires truthfulness to the best of the

assured's "knowledge and belief" may create an intent standard to prove misrepresentation which may not otherwise be required in the statute or under a policy recession standard.

Additionally, an insurance agent may be operating under a written contract with a broker or directly with a carrier which may impose certain legal duties or heightened legal responsibilities in the event of an assured's misrepresentation; however, these normally apply where the agent is also culpable in the misrepresentation.

III. Duties of agent or broker with respect to misinformation

The role of the retail agent or wholesale broker with respect to misinformation along the chain of communication to the carrier will depend upon what duty the agent or broker was undertaking, and for whom, at the point in which the misrepresentation occurred. Insurance agents and brokers can operate as dual agents - an agent of the assured for some purposes and an agent of the insurance company for other purposes. Further, the authority given to the agent or broker by the carrier for purposes of soliciting and binding coverage may also affect whether the agent is acting as an agent for the insured or an agent for the carrier. The role in which the agent or broker is acting for purposes of the information at issue will further determine whether the agent or broker may have a duty to investigate, verify, or even question the veracity of information supplied by the insured, if at all.

Initially, the agent or broker's responsibility is to transmit information accurately and completely and to convey accurate and complete information as to policy coverages based upon inquiry of the insured. In general, there is no duty to advise an insured or recommend coverages unless "special circumstances" exist between the insured and the agent whereby a heightened duty has been created. If the agent or broker is acting as the agent of the insured for purposes of submitting the application, generally no duty to investigate, verify or question information in the application would arise unless the information was obviously incorrect. In most circumstances,

whether the agent had a duty to further inquire would likely be subject to a reasonableness standard, particularly where collateral information available to the agent could call the information in question, such as prior applications in the agent's file, easily accessible public records, or information widely known to the agent.

IV. Obligations of carrier to recognize misinformation

Whether the carrier has an obligation to recognize misinformation pre-claim will depend on the nature of the misinformation, whether the misinformation was obviously incorrect, whether the carrier had contrary information readily available to it, and the extent of materiality of the misinformation. Certain underwriting information supplied by an assured is subjected to internal verification by the carrier, such as market value of a structure as a function of its size and construction. Other information may be easily ascertainable (credit history of assured, criminal history, etc.) but a carrier is permitted to rely upon answers given by the assured without having to separately verify the information. Ultimately, a carrier must prove that the information was material to its acceptance of the risk or the premium charged in order to rescind the policy or the information was material to the claim suffered if the carrier intends to merely deny the claim based upon the misrepresentation. As an element of that defense, the carrier must establish that its reliance on the misinformation was reasonable and it had no duty to otherwise verify or investigate the information prior to policy issuance.

V. Options / Remedies

A material misrepresentation, one which affected the carrier's acceptance of the risk or the premium charged, may lead to rescission of the policy, void *ab initio*, provided that the misrepresentation is clear and unambiguous, was signed or accepted by the assured, and the assured understood the importance of truthful and accurate information. Such action by the carrier must be taken immediately upon learning of the misrepresentation. Alternatively, the

carrier could defend under a reservation of rights while investigating the nature of the misrepresentation and its materiality, and then sue for rescission of the policy. This decision will be highly dependent upon the nature of the misrepresentation, the carrier's ability to prove the clear and unambiguous nature of the misrepresentation and its reliance thereon, and either the agent or assured's direct knowledge of the misrepresentation. Alternatively, if policy endorsements provided a means of denying the claim without rescinding the policy, based upon the misrepresentation, such strategy may be more potentially successful as courts are reluctant to rescind policies void *ab initio* due to alleged misrepresentations.

Defenses to either of these actions include lack of materiality of the alleged misrepresentation, waiver and estoppel of the misrepresentation based upon the carrier's direct or constructive knowledge of the information and lack of justifiable reliance on the misrepresentation. Additionally, to the extent that the agent or wholesale broker were involved in perpetuating the misrepresentation, the relative status of the agent or broker in relaying the information (is it an agent of the insured or an agent of the insurer for this purpose) and the agent or broker's knowledge of the correct information may defeat the carrier's assertion of reliance. Questions regarding the nature of the misrepresentation and the actual form application will affect the allegation of misrepresentation - was the question sufficiently clear, did the application contain both a "yes" and "no" box or simply a "yes" only box, did the carrier follow-up when questions were left blank in the application?

Last, is the misrepresentation subject to an objective or subjective standard? This issue may be affected by state statutes or by the specific language of the application. Many states do not require the carrier to prove that the insured intentionally misrepresented facts, simply that the insurer relied upon the misinformation and such misinformation was material to the acceptance of the risk. However, if the application signed by the insured contains a "to the best of your knowledge and belief" provision, some states have held this language to impose a subjective

intent standard into the misrepresentation, which then requires the carrier to prove that the insured intended to deceive the carrier, not merely negligently or unintentionally misrepresent the information. This question strongly affects the potential success of the carrier in rescinding the policy as void *ab initio* or attempting to deny the claim based upon the misrepresentation.