SUPREME COURT OF FLORIDA

Case No. 90,747

District Court of Appeal
4th District No. 96-1418

Allen Green,
Petitioner,

v.

Life & Health of America,
Respondent.

BRIEF AMICUS CURIAE OF AMERICAN COUNCIL OF LIFE INSURANCE

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STATEMENT OF THE CASE AND OF THE FACTS

ACLI adopts the Statement of the Case and of the Facts in the Brief of Respondent Life & Health of America ("Life & Health") . In brief, the issue is whether an insurance application that asks the applicant to state that his answers "are full, true and complete to the best of [his] knowledge and belief" prevents the insurer from rescinding the policy for innocent misrepresentations, despite the insurer's right to rescind under section 627.409, Florida Statutes.

In this case, Mr. Harold Green applied for a policy of insurance with Life & Health. In response to specific application questions, he stated that he did not suffer from kidney failure or chronic obstructive lung disease. In fact, he suffered from both conditions at the time he submitted his application. For purposes of this appeal, it is assumed that Mr. Green was unaware of the extent of his health impairment, and that his misrepresentations, while material, were innocently made.[1]

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[1] The record shows, however, that Mr. Green had consulted a physician and was aware that his health was impaired at least to some degree. See Petitioner's Initial Brief at 2-3.

Life & Health issued the policy in April 1991. Mr. Green made a claim for benefits in May 1992. At that time Life & Health discovered the true state of Mr. Green's health, and notified him that the policy was being rescinded on the ground of material misrepresentation.

After Mr. Green's death, his personal representative, Allen Green, sued Life & Health for wrongful denial of policy benefits. The trial court entered judgment in favor of Life & Health based on section 627.409 and Continental Assurance Co. v. Carroll, 485 So. 2d 406 (Fla. 1986). The decision was affirmed by the Fourth District below. The Fourth District certified a conflict between this case and a decision of the First District in Carter v. United of Omaha Life Ins., 685 So. 2d 2 (Fla. 1st DCA 1996), and this appeal followed.

SUMMARY OF ARGUMENT

Whether and under what circumstances to allow an insurer to rescind coverage for misrepresentations in an insurance application is a perennial issue in courts across the country. There are equitable arguments on both sides of the issue, and state legislatures and courts have balanced the equities in many different ways.

In Florida, the Legislature has taken a position, embodied in section 627.409, Florida Statutes, that permits

insurers to rescind for material misrepresentations, even if the representations are innocently made. This Court has so held in Carroll, 485 So. 2d 406, and Life Ins. Co. v. Shifflet, 201 So. 2d 715 (Fla. 1967). The court below abided by the Legislature's policy choice and this Court's long-standing precedent, and held that the insurer could rescind coverage where the insured's application did not accurately reflect the risk the insurer assumed.

Petitioner seeks to have this Court reverse its earlier decisions in Carroll and Shifflet, and substitute its judgment for that of the Legislature by reading into the statute an exception that does not exist. If this Court were to accept Petitioner's argument, some policyholders clearly would benefit from the change. But the benefit would come at the expense of all other policyholders, who must pay the price for risks that the insurer never intended to undertake.

That is not the balance the Legislature struck in enacting section 627.409. This Court should not question the wisdom of the Legislature's choice, but should apply the statute as written, in accordance with its prior holdings, and affirm the decision of the Fourth District.

ARGUMENT

A. THAT AN APPLICANT ATTESTS TO THE TRUTH OF HIS ANSWERS BASED ON "KNOWLEDGE AND BELIEF" DOES NOT ABROGATE THE INSURER'S STATUTORY RIGHT TO RESCIND FOR MATERIAL MISREPRESENTATION.

Section 627.409 provides that an insurer may rescind coverage for incorrect statements if the statements are fraudulent, if they are material either to the acceptance of the risk or the hazard assumed by the insurer, or if the insurer would not have issued the policy had the truth been known. Petitioner (Initial Brief at 13-14) and amicus Academy of Florida Trial Lawyers (Brief at 4) agree that the statute permits an insurer to rescind for material misrepresentations, even if innocently made.

Both argue, however, that language on Life & Health's application form referring to the applicant's "knowledge and belief" of the truth of his answers somehow alters the result. Their arguments are based on decisions of other courts which are not binding on this Court and which do not accurately reflect Florida law.[2]

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[2] As more fully explained in Life & Health's Brief, the application involved in Carroll included "knowledge and belief" language, Carroll is clearly the controlling authority as the court below held.

The case principally relied on is William Penn Life Ins. Co. v. Sands, 912 F.2d 1359 (11th Cir. Fla. 1990). Sands in turn relies on a decision of the District of Columbia Court of Appeals in Skinner v. Aetna Life & Cas., 804 F.2d 148 (D.C. Cir. 1986), interpreting District of Columbia law.

These cases hold that where answers **in an insurance** application are stated to be true to the best knowledge and belief of the applicant, an incorrect statement innocently made will not avoid the policy. Why this should be so is never explained. Clearly no person can answer a question truthfully, or presume to answer a question truthfully, except based on what that person knows or believes to be true.

Whether the person understands what is being asked of him **or** misunderstands the question, or whether he is completely **aware of the true state of his health or confused or misinformed,** his answers must be based on what he knows or believes to be true. If they are not, they are deliberate falsehoods.

Thus, whether or not the insurer includes specific "knowledge and belief" language on the application, the result is the same. The applicant either answers truthfully, according to his best knowledge and belief, or he lies.

If this is so -- and it cannot be otherwise -- there is no rational basis on which to depart from the legislative policy

set forth in section 627.409. A misrepresentation of the true state of affairs, if material, is grounds for rescission. Here, Mr. Green did not accurately represent the true state of his health on the application. The record was uncontroverted that his misrepresentations, though innocent, materially affected the risk assumed by the insurer. As a matter of law, therefore, the policy issued on the basis of those misrepresentations may be rescinded.[3]

B. ALLOWING AN INSURER TO RESCIND COVERAGE FOR MATERIAL MISREPRESENTATIONS, EVEN IF INNOCENTLY MADE, BENEFITS ALL POLICYHOLDERS.

To permit rescission for innocent misrepresentations may initially appear harsh in a particular case, such as this one. It is important to look beyond this one claim, however, to evaluate the effect this Court's ruling will have on all insurers and all policyholders in Florida.

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[3] Petitioner Green (Initial Brief at 16) and amicus Trial Lawyers (Brief at 4) emphasize the language of the statute that a statement by an insured in an application is "a representation and is not a warranty." Fla. Stat. § 627.409 (1996). This language is irrelevant to the question before the Court. 'The touchstone of a warranty at common law was that an immaterial breach avoided the contract. However, a representation had to be material before it could be held to avoid the policy." Bertram Harnett & Irving I. Lesnick, The Law of Life and Health Insurance. § 4.01[5] (1997); see also Kenneth Black, Jr. and Harold D. Skipper, Jr., Life Insurance 191 (12th ed. 1994) (a warranty must be true, and a forfeiture will result if the statement is false, irrespective of its materiality). Materiality is not at issue in this case.

1. HIGH RISK INDIVIDUALS WHO ARE MISCLASSIFIED BECAUSE OF MISREPRESENTATIONS IN THE APPLICATION WILL CAUSE UNEXPECTEDLY GREATER LOSSES WHICH MUST BE PAID FOR BY OTHER POLICYHOLDERS.

"[T]o keep the cost of insurance within reasonable bounds it is necessary for the insurer either to reject the applicant who is in poor health or otherwise uninsurable at standard rates, or to offer him a policy at an increased premium rate." Buist M. Anderson, Anderson on Life Insurance, § 8.21 (1991) ("Anderson"), The process of making these important distinctions among insurance applicants begins with the application.

'The application for insurance is one of the most important and fundamental of the underwriter's risk assessment tools" and 'serves as the basis of the contract between the company and the policyholder." Life Office Management Association, Underwriting in Life and Health Insurance Companies, 53 (Richard Bailey ed., 1985). If an insurance underwriter, because of incorrect information in an application, wrongly accepts an individual for coverage, or wrongly classifies that person as a lower risk and charges him a lower premium based on that perceived lower risk, the insurer will suffer a financial loss when the insured or beneficiary makes a claim. Id. at 7. Those financial losses are distributed among the insurer's

policyholders in the form of higher costs for insurance. Id.; Black & Skipper, supra, at 639 ("If one person is allowed to pay less than his or her fair share, it necessitates an overcharge against other persons.")

Regardless of the applicant's good faith, if he in fact presents a greater risk he should not impose the burden of his exceptional risk on the healthier individuals in the group. It is this concern for all policyholders that lies behind section 627.409, enabling insurers to rescind coverage for material misrepresentations, even if innocently made.

2. IF THE STANDARD IS CHANGED TO REQUIRE INQUIRY INTO THE APPLICANT'S MOTIVES, MORE LITIGATION WILL ENSUE, INVOLVING THE COURTS IN HAIR-SPLITTING TO DETERMINE WHICH MATERIAL MISREPRESENTATIONS WILL AVOID THE CONTRACT AND WHICH WILL NOT.

Many states, like Florida, permit insurers to rescind coverage based on innocent misrepresentations.[4] See, e.g., Golden Rule Ins. Co. v. Hopkins, 788 F. Supp. 295 (S.D. Miss. 1991); John Hancock Mut. Life Ins. Co. v. Weisman, 27 F.3d 500 (10th Cir. N.M. 1994); Tharrington v. Sturdivant Life Ins. Co.,

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[4] Florida's position represents the majority view. See Tinale v. Pac. Mut. Life Ins. Co., 837 F. Supp. 191, 192 (W.D. La. 1993). The court in Tinale noted that the majority view is based on "general contract law" principles. Id. at 193. Convinced of the logic and equity of this position, the court adopted it as a matter of "federal common law" under ERISA (29 U.S.C. §§ 1001 et seq.).

443 S.E.2d 797, 801 (N.C. Ct. App. 1994); All Am. Life & Cas. Co. v. Krenzelok, 409 P.2d 766 (Wyo. 1966). It is true, however, that other states require the insurer to prove the applicant had an intent to deceive. See, e.g., Estate of Rivera v. North Am. Co. for Life & Health Ins., 635 A.2d 598 (N.J. Super. App. Div. 1993); Coolspring Stone Supply, Inc. v. Am. States Life Ins. Co., 10 F.3d 144 (3d Cir. Pa. 1993). In those states, even where the fact of the misrepresentation and its materiality to the insurer are undisputed, the courts become embroiled in litigation over the applicant's state of mind.

The result is that individuals who are identically situated in terms of their physical condition and the risk they present to the insurer are treated differently. Some high risk individuals are permitted to take advantage of their misrepresentations, at the expense of other policyholders, while other high risk individuals are not permitted to do so.

The patient whose doctor keeps him in the dark (such as was alleged in this case) has an advantage over the patient who insists on being well-informed about his condition and treatment options. The person who claims to be less intelligent or not to understand the application questions is better off than the one who is brighter or makes a greater effort to know what is required of him. See Coolspring, 10 F.3d at 150 (insufficient

evidence that applicant who drank a quart of whiskey a week and whose doctor was treating him for alcohol-related liver disease believed he "used alcoholic beverages to excess"). The illiterate or non-English speaking applicant should stay ignorant because he has an advantage over the literate person. See Parsaie v. Wnited Olvmnic Life Ins. Co., 29 F.3d 219 (5th Cir. Tex. 1994); Rivera, 635 A.2d 598. The incentive, in other words, is to be (or claim to be) uninformed, illiterate, or ignorant of one's health status, a rather perverse incentive for the law to provide.

Such disparate treatment is unfair to lower risk individuals who must pay the price for the improper risk classification of those misrepresenting their condition. It is also unfair to the better informed, more literate and less ignorant people who do not misrepresent their health status and are either denied coverage or charged a higher premium commensurate with their risk.

The Florida Legislature has established, and this Court has previously concluded, that it is fair to permit insurers to rescind coverage for material misrepresentations, to encourage accuracy in the application process, for the protection of policyholders as a whole. This interpretation of section 627.409 is the correct one, and should be reaffirmed.

3. VERIFYING AN APPLICANT'S HEALTH BY CONDUCTING THOROUGH MEDICAL EXAMINATIONS WOULD BE COSTLY AND TIME-CONSUMING, TO THE DISADVANTAGE OF ALL POLICYHOLDERS.

If insurers cannot rely on the representations made in the application, the document becomes worthless for underwriting purposes. Insurers would then be compelled to attempt an independent verification of the health status of every applicant (or certainly of more applicants) by requiring the applicant to undergo a thorough medical examination.[5] The cost would be prohibitive, and the delays that would be incurred would operate to the disadvantage of all applicants.

The cost of conducting such examinations could not be passed on to those being examined. If the examination showed that the applicant was uninsurable, the applicant would not pay any premium and there would be no way for the insurer to recover the cost of the examination from the applicant.

If, instead, the result was a higher premium than the applicant expected, he may decide not to purchase the coverage, again leaving the cost to be paid by someone else. Even if the applicant purchases the coverage, he may not retain it long

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[5] A medical examination will not be sufficient if the applicant does not cooperate by being candid about the status of his health. "Without true answers as to medical history the medical examiner is at a disadvantage, The applicant often knows more about his physical condition than the doctor can discover even with a thorough examination." Anderson, § 8.21.

enough for the insurer to recover all the costs associated with issuing the policy, including the examination. Again, the costs would have to be passed on to all other policyholders. See Tingle, 837 F. Supp. at 193 (if insurers were precluded from voiding an insurance policy in which a material misrepresentation was made, the total cost of all premiums would go up because insurers would likely have to depend entirely on independent examinations to assess their relative risks).

This extra step in the underwriting process (and the additional cost and delay it would entail) has not previously been necessary under Florida law. It should not be made necessary now by a reversal of this Court's previous holdings.

4. THE LEGISLATURE HAS BALANCED THE INTERESTS OF THE APPLICANT AGAINST THE INTERESTS OF THE INSURER AND ITS OTHER POLICYHOLDERS BY REQUIRING THAT THE POLICY IS INCONTESTABLE AFTER TWO YEARS.

The potential adverse effect of an insurer's rescission under section 627.409 is largely mitigated by the statutorily-required incontestability clause. The incontestability clause cuts off the insurer's right to avoid the contract for misrepresentations after two years. See Fla. Stat. §§ 627.455, 627.560 and 627.607 (applicable to life insurance, group life insurance, and health insurance, respectively). Incontestability clauses represent a balancing of the interests of the insured in

obtaining the benefits applied for and the interests of the insurer (and policyholders as a whole) in properly assessing the risks assumed. The insurer is given the statutory contestable period, usually two years as in the Florida statutes cited above, to rescind coverage for misrepresentations. After that time, the insurer may not contest a claim on misrepresentation grounds, even in the most egregious circumstances. See, e.g., Bankers Sec. Life Ins. Soc. v. Kane, 885 F.2d 820, 822 (11th Cir. Fla. 1989) (there is "no set of facts upon which [the insurers] could succeed" in contesting a claim after two years, because there is no exception to Florida's life insurance incontestability statute (Fla. Stat. § 627.455)).

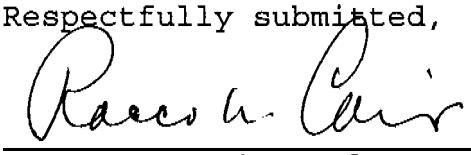
The incontestability clause represents a long-accepted trade-off. The insured and the beneficiary receive security in financial planning and freedom from litigation. But in exchange for knowing that the policy is incontestable after two years, the insured must recognize that the insurer has that same period of time to investigate incorrect statements in an application. In this case, the insurer availed itself of its right to investigate and to rescind the policy for misrepresentation within the statutory time allowed to contest the policy.

CONCLUSION

The decision whether to allow an individual to recover benefits at the expense of all other policyholders requires a balancing of the interests of one person against the interests of the whole. It is not a simple matter of deciding whether Mr. Green deserves to recover. It requires this Court to consider the effect a new interpretation of the statute would have on all insurers and their policyholders.

The Legislature has already undertaken to weigh the competing interests, and has decided that material misrepresentations justify policy rescissions within the limited contestable period allowed by law. This Court should accept the authority of the Legislature to make this judgment, affirm its prior holdings, and uphold the decision of the Fourth District below.

Respectfully submitted,



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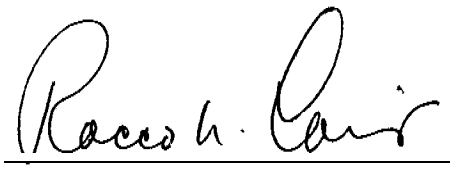

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