A Review of Property Insurance Law in Canada and the United States

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THIS article provides a summary of some of the key principles applicable to property insurance contracts in North America. We focus on insurers, brokers, adjusters, managing general agents and lawyers attempting to navigate the law and the insurance market in jurisdictions that may not be their home territory. We will briefly review common law principles and statutory provisions regarding misrepresentations and fraudulent omissions, material changes of risk and the availability of relief from forfeiture.

I. Canada: The structure of the insurance industry and general principles

Although Canada is a large country geographically, some 3,855,100 sq mi, it has a relatively small population of approximately 38 million people. There are 10 provinces and 3 territories. Each province in Canada has enacted its own insurance legislation. This legislation governs contract formation and provides for permissible and mandatory terms and conditions. Although the legislation is largely uniform, there are differences which may be of significance in an individual case. With the exception of Quebec, which is governed by a Civil Code that was historically modelled on French civil law, the interpretation of insurance contracts is governed by common law principles.

A fundamental common law principle applicable to insurance relationships in Canada is the concept of *uberrimae fidei*, or utmost good faith. The House of Lords in England articulated this principle as the bedrock of the law of insurance and the relationship between insurer and insured. The insured's duty of disclosure is a corollary of this principle. Lord Mansfield put it in these terms in *Carter v. Boehm*:[1]

> First. Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.
>
> The keeping back such circumstance is a fraud, and therefore the policy is

[1] (1766), 3 Burr 1905, 97 ER 1162, 1164.

> void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived, and the policy is void; because of the risque run is really different from the risque understood and intended to be run, at the time of the agreement.

In simple terms, the insured had a duty of utmost good faith to honestly disclose all matters relevant to the risk whether asked by the insurer or not. This principle reflected the insurance industry at that time when underwriters were arranging coverage for shipowners and their cargoes in circumstances where the only source of information was the insured and there was no way for the underwriter to verify the information disclosed or withheld. While legislation has modified the common law in part (an innocent misrepresentation of a material fact will still render a property insurance policy voidable but an omission must be fraudulent to have that effect), *Carter v. Boehm* still lives on in common law Canada. The good faith obligations imposed upon insurers have been expanded beyond their original scope. In Quebec, likewise, the duty of good faith is enshrined in the Civil Code. Although the principles of construction applicable to insurance contracts are generally the same as those applicable to ordinary commercial contracts, the nature of the insurance contract is such that the principles of construction have undergone considerable refinement. In a leading decision, the Supreme Court of Canada stated[2] as follows:

> [22] The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole.
>
> [23] Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction. For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties, so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the

[2] Progressive Homes Ltd. v. Lombard, [2010] 2 S.C.R. 245 (internal citations omitted).

contemplation of the parties at the time the policy was concluded. Courts should also strive to ensure that similar insurance policies are construed consistently. These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.

[24] When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* — against the insurer. One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly.

II. The United States: The structure of the insurance industry and general principles

The geographical footprint of the United States is 3,531,905 sq mi, a little more than 300,00 sq mi smaller than Canada. The population of the United States, however, is much larger than its northern neighbor with nearly 333 million people. Historically, the fifty state governments regulate the insurance industry in the United States through state legislation and the creation of state departments of insurance. Over the years, the federal court has sought to regulate the industry. In 2010, the United States Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the Federal Insurance Office of the Department of the Treasury. Under the Act, the Federal Insurance Office (FIO) is authorized to monitor all aspects of the insurance industry, except for health insurance, some long-term care insurance, and crop insurance, and determine whether any gaps may exist in the regulation of insurance companies that might contribute to a financial crisis.

Recognizing the need for some uniform insurance standards, the insurance commissioners in the states originally formed the National Insurance Convention in 1871, which is now the National Association of Insurance Commissioners (NAIC), to establish standards and best practices as well as conduct regulatory oversight.

In January 1990, the NAIC adopted the Unfair Claims Settlement Practices Act, a guide for states to adopt to establish the standards for the investigation and disposition of claims arising under policies or certificates of insurance. The Act defines those actions that

would be deemed to constitute an unfair claims practice. At the heart of each action enumerated is the concept of good faith.

Unlike Canada, common law does not govern the basic concepts for interpreting an insurance contract. Each state has developed its own rules, as developed by case law or established by state statute. Therefore, those involved in the insurance industry in the United States must be aware of the applicable state's principles and rules governing the interpretation of a policy of insurance as well as the associated duties arising therefrom.

III. Misrepresentation and Fraudulent Omissions

A. Canada

Legislation has modified the insured's duty of utmost good faith to a certain extent with respect to omissions. At common law, there was no distinction between innocent misrepresentations and innocent omissions. Either would entitle the insurer to void the policy. Almost 100 years ago, however, this was changed by legislation with respect to certain classes of insurance. Insofar as property insurance is concerned, the common law provinces, through legislation, have drawn a distinction between innocent misrepresentations and innocent omissions. In British Columbia, for example, the following Statutory Condition is deemed by law to be a part of every insurance contract (apart from life insurance, accident and sickness insurance, and contracts of reinsurance):[3]

> Misrepresentation
> 1. If a person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance that is material to be made known to the insurer in order to enable it to judge the risk to be undertaken, the contract is void as to any property in relation to which the misrepresentation or omission is material.

Another relevant section is this:[4]

> Misrepresentation and nondisclosure
> 17 (1) A contract is not rendered void or voidable by reason of any

[3] Statutory Condition 1, Insurance Act, R.S.B.C. 2012, c 1 (emphasis added).
[4] *Id*. at c 17.

> misrepresentation, or any failure to disclose on the part of the insured in the application or proposal for the insurance or otherwise, unless the misrepresentation or failure to disclose is material to the contract.
> (2) The question of materiality is one of fact.

The test for materiality has remained consistent for many years in Canada. As originally stated, the test is:

> … whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.[5]

Since materiality is measured by the standard of the reasonable insurer, the fact that either the insured or the insurer thought that the facts were or were not material is irrelevant. As noted by the Supreme Court of Canada in *Henwood v. Prudential Insurance Co. of America*,[6] a misrepresentation does not become material "simply because it has been elicited in answer to a question devised by the insurance company." In cases where materiality is an issue, it is customary for expert evidence to be led on the point.[7]

Some have argued that this test may not be fair to the insured. In *Rethinking the Materiality Requirement for Non-Disclosure and Misrepresentation in Insurance Contracts*,[8] Elizabeth Adjin-Tettey argued:

> … the nature and scope of the disclosure duty, the construction of materiality (including the presumption of materiality), and the remedy for breach of the disclosure duty

[5] Mutual Life Insurance Co. of New York v. Ontario Metal Products Co., [1925] A.C. 344, 351-352 (P.C.). *See also* Fidelity and Casualty Co. of New York v. General Structures Inc., [1977] 2 S.C.R. 1098 (S.C.C.).

[6] [1967] S.C.R. 720, 726 (S.C.C.).

[7] Stevenson v. Simcoe & Erie General Insurance, [1981] I.L.R. 1-1434 (Alta. Q.B.); Fellowes, McNeil v. Kansa General International Insurance Co., [2000] O.J. No. 3309, 22 C.C.L.I. (3d) 1 (Ont. C.A.), leave to appeal granted [2000] S.C.C.A. No. 543 (S.C.C.) (notice of discontinuance filed May 8, 2002).

[8] 89 CANADIAN B. REV. 241, 244-245 (2010).

(nullification), can constitute an unfortunate trap for unsuspecting insureds and threaten the supposed peace of mind and self-reliance promised by insurance contracts. Such an outcome may be devastating for individuals and families who are socio-economically marginalized with limited or no non-insured assets to rely on at a time when they are most vulnerable and can expect little or no assistance from the state. The nullification remedy is drastic, especially in cases in which insurers might still have provided coverage albeit on different terms. The unfairness of this result is compounded given that the breach is often innocent and insuring oneself is generally viewed as a responsible measure. Several jurisdictions have recognized the need for change and have adopted legislation, policies and practices to ensure better protection for insureds while preserving the sustainability of the insurance industry. Drawing from the law on other types of insurance contracts in common law jurisdictions in Canada and the law in other jurisdictions, I make suggestions for reforming the disclosure duty, the determination of materiality and the remedies for breach in the context of personal insurance. These suggested reforms are aimed at promoting the objectives of insurance, to preserve the importance of the disclosure duty and foster confidence in the insurance industry.

Notwithstanding the merits of tempering the test for materiality, neither courts or legislative bodies have shown interest in doing so. Nor have Canadian courts or legislative bodies, unlike other common law jurisdictions (such as the United Kingdom and Australia), shown any interest in changing the one-size-fits-all approach to the consequences of an innocent but material misrepresentation. Such a misrepresentation renders the policy void with respect to the property affected. This is so even where the misrepresentation has no bearing on the loss and even though the policy still would have been issued, albeit on modified terms or for an increased premium. With respect to misrepresentation, intention is irrelevant. It matters not whether the misrepresentation was innocent, fraudulent, reckless,

or negligent. With respect to omissions, however, the insurer must prove fraudulent intent in order to void the policy. In this regard, proof of actual fraud is required.[9]

It is sometimes most difficult to distinguish between true misrepresentations and fraudulent omissions. The British Columbia Court of Appeal provided clarification in this analysis in *Nagy v. BCCA Insurance Corporation*[10] a decision handed down by a unanimous court on October 7, 2020. Relevant facts may be summarized as follows:

> 1. The insureds, at the relevant time in 2016, owned three properties, two in British Columbia, and one in Port Roberts, Washington.
> 2. Over the years, they had made various claims for insurance coverage for fire, theft, and roof damage.
> 3. The insureds' prior broker advised them that their former insurer, Wawanesa, would not be renewing the existing policy as a result of claims frequency and changes in occupancy.
> 4. The insureds then sought coverage on their own with BCCA, a company of which one insured was a member. The insured provided information over the phone, BCCA agreed to provide coverage, and an application was sent to the insured who signed it, scanned it, and returned it to BCCA. The Policy was bound that day based on

[9] Taylor v. The London Assurance Corporation, [1935] S.C.R. 422.

[10] 2020 B.C.C.A. 270.

the information in the application.

5. In the phone conversation and the application, the insured was asked to list all previous losses for 10 years. Only one such loss was disclosed. The insured was also asked whether any prior insurer had cancelled, declined, refused, or imposed any special conditions. The insured answered no.

6. A fire loss occurred at one of their properties. BCCA declined coverage, alleging the policy was void as a result of misrepresentations, omissions, or a material change in risk.

7. The parties proceeded to a summary trial on affidavits and judgment was granted to the insureds by reasons published at 2019 BCSC 930.

8. BCCA appealed. They did not take issue with the material change of risk issue. They alleged the trial judge made errors in relation to the misrepresentations and omissions.

The main issues on appeal were whether the admitted inaccuracies regarding the prior losses and the declination of insurance coverage from the prior insurer were misrepresentations or omissions. When the insured responded to the question "State all losses or claims. . .in the past 10 years" with the answer "One theft claim", when in fact there were two more, was this a misrepresentation or omission? While it was true that there had been a theft claim the suggestion that there was only one such claim was false.

The court explained the distinction between a misrepresentation and an omission in part as follows at paras. 45-46:

> [45] A false representation of fact, an assertion that something is so when it is not, or that something is not so when it is, constitutes a misrepresentation. As Professor Boivin put it, misrepresentations are active in operation, whereas omissions are passive.
>
> Misrepresentations are words, writings or gestures that communicate misinformation and can be judged objectively by comparing them to the truth. But as Professor Billingsley noted, the delineation is not always

> clear, particularly in the case of half-truths.
> [46] Accordingly, distinguishing a misrepresentation from an omission becomes problematic where the statement is literally true, but practically false, and therefore misleading—not because of what it said but because of what it left unsaid.[11]

The court's further analysis included the following:

- A positive statement that is untrue is a misrepresentation.
- A half-truth is generally an omission.
- To characterize a half-truth as a misrepresentation does not assist in the analysis.
- The failure to refer to other losses, as here, was found by the trial judge as an omission, and it would only void the policy if fraudulently made.
- The statement that his prior insurer had declined to renew was not an omission, or half-truth; it was a positive representation that was false.
- Based on the errors made by the trial judge regarding the burden of proof and "heightened scrutiny, the conflation between misrepresenttations and omissions, the trial judgment could not stand.

In view of the errors made by the trial judge, the court set aside the order of the trial judge and remitted the case to the Supreme Court for a new trial. The analysis of the Court of Appeal should be of assistance to the insurance industry and the legal profession in general in the years to come.

B. The United States

Generally, the word "misrepresentation" in policies of insurance means a false statement relating to a matter material to the risk for which the insurance carrier has agreed to insure.[12] Misrepresentation or fraudulent omission may arise in statements contained in the application for insurance or in connection with an insurance claim submitted by the insured to its carrier. Some states apply different standards regarding how a false statement in the application or in a claim may affect the claim sought by an insured.

1. Application Misrepresentation

An Application misrepresentation is a false statement made by an applicant on an insurance application. The insurer must prove that the statement in issue was actually made. In determining whether a false representation was

[11] *Id.* at paras. 45-46 (internal citations omitted).

[12] COUCH ON INSURANCE LAW 2d, § 37.259 (1959).

made, United States courts generally look at the role an agent played in obtaining the information on the application. Another consideration is whether the agent was a company employee or an independent agent. The acts of an independent agent are more likely to be considered the acts of the insured than those of an agent who is a company employee (e.g., Allstate, State Farm). Even so, whether the agent is the "company's" or the "insured's" depends on the specific facts of each case, including especially whether an independent agent has binding authority with the company.

The general rule is that if an agent can place business with a number of different carriers, the agent will be considered a broker representing the insured. This is especially so when the agent does not have an agency contract with the company issuing the policy involved. If an agent is the insured's broker, then any statements made by the broker on the insured's behalf to the insurer will bind the insured. This is as though the insured made the statements herself.

The fact that an agent is "an agent for" an insurance company does not necessarily mean that he is that company's agent in a particular transaction. In some cases, it becomes very important to determine what type of agency agreement the agent has with the insurer. If an agent is merely a "soliciting agent", he is generally considered the agent of the insured. A "soliciting agent" can sell insurance, receive applications and forward them to the company, forward policies to the insured, and collect premiums. The difference between a soliciting agent and a "general agent" is that a general agent is usually authorized to accept risks and, in some cases, agree upon the terms of policies.

The importance of this distinction is that the facts known by a general agent are more likely to be "attributed to" the insurer, while those known to a soliciting agent may not. The key fact is whether the agent has the right only to submit applications to an insurer, or whether the agent also has the right to bind coverage. A common situation involves an independent agent who is an agent of an insurer with binding authority, but who also "acts as agent for" an applicant. Some courts hold that an agent cannot represent adverse parties in a transaction without the knowledge of both principals. If one of the parties does not know of the "dual agency," that party may be entitled to void the contract.[13] Other United States courts presume that both parties know about and have consented to the dual agency

[13] FDIC v. Aetna Cas. & Sur. Co., 947 F.2d 196 (6th Cir. 1991).

in an insurance situation. Where someone other than an "insurance agent" assists in the application process, that person is considered the agent of the party who hired him.

Unless the agent is purely a broker without an agency agreement or a soliciting agent without binding authority, the "agent" is likely to be treated as the insurer's agent. If the agent is the "insurer's agent", his acts will bind the company as to the completion of the application.[14]

Many states have specific statutes addressing application misrepresentation. These statutes generally provide that an insurance company may rescind the policy by proving: (1) that the answer given was fraudulent; (2) that the matter which was misrepresented was material to either the acceptance of the risk or the hazard assumed by the insurer; or (3) that the insurer would not have written the policy, or would have written it only for a higher premium, had it known the true facts.

2. Misrepresentation in the Presentation of an Insurance Claim

Whereas application misrepresentation is generally addressed by state statutes, misrepresentation in the presentation of an insurance claim is generally determined by the applicable language of the policy as interpreted by courts. Some states, such as the State of Alabama, codify both types of misrepresentation via statutory provisions.[15]

Most insurance policies in the United States contain a Concealment or Fraud provision that provides there is no coverage if the insured has intentionally concealed or misrepresented any material fact or circumstance, engaged in fraudulent conduct, or made false statements relating to the insurance. Therefore, courts typically require the misrepresentation made by the insured after a loss to bar recovery under the policy if the insured knowingly intended to deceive the insurance company and the misrepresentation concerned a matter material to the claim.

Appendix A provides a table documenting the statutes or case law addressing misrepresentation in the 50 United States' states.

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[14] *See also* discussions *infra* of independent knowledge of agent and attributing knowledge of agent to company.

[15] *See* ALA. CODE § 27-14-28 (1975).

IV. Material Changes of Risk

A. Canada

We now turn to the issue of material changes of risk in Canada. Statutory Condition 4 is the relevant provision in the British Columbia Insurance Act, and comparable provisions appear in corresponding legislation in the rest of common law Canada:[16]

> Material change in risk
> (1) The insured must promptly give notice in writing to the insurer or its agent of a change that is
> (a) material to the risk, and
> (b) within the control and knowledge of the insured.
> (2) If an insurer or its agent is not promptly notified of a change under subparagraph (1) of this condition, the contract is void as to the part affected by the change.

The test for materiality is the same as for misrepresentation and fraudulent omissions:

> The question of materiality is a question of fact for the court.
>
> The burden of proof of materiality is on the insurer. It is a question of fact in each case whether, if the matters misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline a risk or to have stipulated for a higher premium.[17]

A material change in the risk is not something that happens at the beginning of the policy. Rather a change in the risk takes place after the policy goes into force. The burden of proof is on the insurer to show that (a) a material change has occurred and (b) the change was in the control and knowledge of the insured. If the insurer meets that standard, then the contract is void with respect to the part affected by the change in risk.

An interesting question involves the concept, or rather the law, that each policy period is a separate contract. In renewals, there is generally not a new written application for insurance but rather an offer from the insurer to renew the existing policy which is accepted or rejected by the insured. Some writers have questioned whether an insurer would be

[16] Insurance Act, RSBC 2012, c 1, s. 29.

[17] Kehoe v. The British Columbia Insurance Company, 1993 CANLII 400 (B.C.C.A.)

precluded from raising misrepresentation or non-disclosure as a defense under a renewal,[18] an issue which arose in a recent case in British Columbia for which judgment is pending.

Two further, and still unresolved, issues are whether the insured's knowledge of materiality should be judged subjectively or objectively, and whether there is a duty on the insurer to advise the insured of what matters are considered to be material. The latter issue has raised the ire of some judges. In *Aviva v. Thomas*,[19] the insurer had denied indemnity for a material change of risk where the insured had installed a woodstove on the back deck. The trial judge rejected this defense saying:

> In Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Ltd., 2009 ONCA 388, [2009] O.J. No. 1879 (QL), the insurer relied upon Statutory Condition 1 to resist a claim for indemnity as a result of a fire loss. It was argued the insured had breached that condition by failing to disclose her serious financial problems and the fact that she was not the sole owner of the home destroyed by fire. The trial judge rejected that defence for the following reasons:
>
> Only an insurer knows what it considers a "material fact" in relation to a risk it is assuming. How does an insured know what a "material fact" is unless so advised by the insurer? I am incensed that an insurer can hide behind this express condition without advising an insured of what the insurer considers to be a "material fact". [para. 138]
>
> […]
> But fairness requires that an insurer also act in the utmost good faith. It is my view that an insurer cannot rely on the above express condition unless the applicant for insurance is advised of what the insurer considers to be material facts, and the consequences of concealment and misrepresentation. Chubb failed to act in the utmost good faith toward the plaintiff at the time she requested insurance coverage. [para. 151]

[18] CRAIG BROWN, INSURANCE LAW IN CANADA, para. 6-9 (Carswell 2013).

[19] 2011 NBCA 96.

In the recent decision in *Schellenberg v. Wawanesa Mutual Insurance Company*,[20] the British Columbia Court of Appeal left this issue open. On the particular facts of that case, the subjective test was satisfied, and the court held that the policy was void. The trial decision provides a compendium of the conflicting law in jurisdictions throughout Canada.[21] It is likely that the Supreme Court of Canada will have to decide this issue.

B. The United States

State statutes and judicial opinions offer various standards to determine whether the misrepresentation had a material connection with the risk. For example, matters which would likely affect the risk from an underwriting standpoint would include whether a house was occupied or whether the insured had a history of fire losses.

Some specific misrepresentations are generally considered material to the risk. In the life insurance context, misrepresentations regarding the applicant's smoking history are usually found material.[22] In the majority of cases, misrepresentation of a fact material to the risk can void the policy even if the risk involved in the misrepresentation did not actually cause any loss.[23]

There are some matters which are held material "as a matter of law" (i.e. the insurer does not have to prove that the "factor" was material). These are generally

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[20] 2020 BCCA 22.
[21] 2019 BCSC 196.

[22] *See* New York Life Ins. Co. v. Johnson, 923 F.2d 279 (3d Cir. 1990) (applicant who had smoked for 13 years, but nevertheless said that he had never smoked made a material misrepresentation).

[23] *See* Rangers Ins. Co. v. Kovach, 63 F. Supp.2d. 174 (D. Conn. 1999); *see also* American Cont'l Ins. Co. v. Estate of Gerkens, 591 N.E.2d 774 (Ohio App. 1990) (liability coverage voided for misrepresentation re qualifications of pilot even though not clear that pilot error caused crash); Massachusetts Mut. Life Ins. Co. v. Manzo, 584 A.2d 190 (N.J. 1991) (misrepresentation about diabetes voided policy, even though insured was shot to death). *But see* Derickson v. Fidelity Life Ass'n, 77 F.3d 263 (8th Cir. 1996) (Missouri law) (matter misrepresented in life insurance application must actually have "contributed" to insured's cause of death under Missouri statute).

medical conditions, such as diabetes, heart disease, and similar disorders. Matters found to be material include the amount of policies written by an insurance agency;[24] long-term treatment for stress and depression;[25] speed of boat;[26] and written health questionnaire answers.[27] Matters held to be immaterial include a small difference in property value,[28] marital status,[29] and the cancellation of previous insurance policies.[30]

Some state statutes alternatively require a showing that a particular insurer would not have written a particular policy had it known the true facts. This alternative is the easiest to prove because it focuses on the "subjective" materiality of the matter misrepresented to the insurer, and it allows for the company's exercise of its own underwriting judgment. This standard is based on the belief that insurers have the right to set up their own underwriting standards, and to utilize their own experience and that of others in evaluating risks.[31]

Some state statutes specifically provide the insurer with the right to void a policy based on an insured's application misrepresentation if either it would not have written the policy at all, if it would only have written the policy with less coverage, or if it would have written the policy only at a higher premium.[32]

A final approach to materiality is a requirement found by some courts that a misrepresentation must be such that a "prudent insurer" would not have taken the risk. Under this approach, the insurer must have some reasonable basis for tying the misrepresentation to an underwriting consideration.[33] The

[24] Royal American Managers Inc. v. International Surplus Lines Ins. Co., 760 F. Supp. 788 (W.D. Mo. 1991) (errors and omissions policy).
[25] Northwestern Mut. Life Ins. Co. v. Iannacchino, 950 F. Supp. 28 (D. Mass. 1997) (disability policy).
[26] Martino v. New Hampshire Ins. Co., Nos. 88-4876, 88-7210, 1990 WL67223 (E.D. Pa. 1990) (marine property policy).
[27] Tharrington v. Sturdivant Life Ins. Co., 443 S.E.2d 797 (N.C. App. 1994).
[28] Evora v. Henry, 559 A.2d 1038 (R.I. 1989) (misrepresentation that house purchased by insured for $33,000 was worth $50,000 was not material because insurer would have issued policy even if "correct" value had been given).
[29] American States Ins. Co. v. Ehrlich, 701 P.2d 676 (Kan. 1985).
[30] Nappier v. Allstate Ins. Co., 766 F. Supp. 1166 (N.D. Ga. 1991) (homeowner's policy).
[31] *See* Modisette v. Foundation Reserve Life Ins. Co., 427 P.2d 21 (N.M. 1967).
[32] *See* Curtis v. American Cmty. Mut. Ins. Co., 610 N.E.2d 871 (Ind. Ct. App. 1993); Old Line Life Ins. Co. v. Superior Court, 281 Cal. Rptr. 15 (Cal. Ct. App. 1991).
[33] *See* Utah Power & Light Co. v. Federal Ins. Co., 983 F.2d 1549 (10th Cir. 1993) (whether reasonable insurer could regard the fact as one which substantially increases the change that the risk insured against will happen).

prudent insurer rule thus is intended to prevent a company from rescinding a policy after loss on the basis that any misrepresentation was material unless there is some real underwriting basis for rescission.

V. Relief from Forfeiture

A. Canada

Each of the common law jurisdictions in Canada have adopted legislative provisions allowing for relief from forfeiture in certain cases. Some of these provisions are of general application, and some are specific to insurance contracts or more particularly to certain types of policies. With respect to property policies, the most widely litigated of these provisions is as follows:

> **520** If the Court considers it inequitable that there has been a forfeiture or avoidance of insurance, in whole or in part, on the ground that there has been imperfect compliance with (a) a statutory condition, or (b) a condition or term of a contract as to the proof of loss to be given by the insured or the claimant or another matter or thing done or omitted to be done by the insured or the claimant with respect to the loss, the Court may relieve against the forfeiture or avoidance on any terms it considers just.[34]

This provision creates a distinction between imperfect compliance and non-compliance. Only in the former case may relief from forfeiture be granted.[35] In *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co*., the Supreme Court of Canada described the distinction between imperfect compliance and non-compliance as follows:

> The distinction between imperfect compliance and

[34] Insurance Act, RSA 2000, c I-3, s 520. Comparable sections in other jurisdictions are as follows: Insurance Act, RSBC 2012, c 1 s 13; Insurance Act, C.C.S.M., c I40, s 130; Insurance Act, RSNB 1973, c I-12, s 110; Insurance Contracts Act, RSNL 1990, c I-12, s 10; Insurance Act, RSNS 1989, c 231, s 33; Insurance Act, R.S.O. 1990, c. I.8, s. 129; Saskatchewan Insurance Act, S.S. 2015, c I-9.11, s 8-12.

[35] Caputo v. Novak and Lawyers Professional Indemnity Company, 2019 ONSC 1283.

> non-compliance is akin to the distinction between breach of a term of the contract and breach of a condition precedent. If the breach is of a condition, that is, it amounts to non-compliance, no relief under s. 109 is available.[36]

In determining whether or not to grant relief against forfeiture under the legislation, courts are guided by equitable considerations. The test to be applied is whether, in all of the circumstances of the case, it is just and equitable that relief be granted. The two factors most often considered by the courts in granting relief are the insured's conduct and lack of prejudice to the insurer:

> Section 103 is an ameliorating clause. It is not to be used to allow contracts entered into in good faith to be broken with a careless disregard for the rights of the insurer so as to cause actual or potential injury to the insurer's position. On the other hand, it should not be so encrusted with authorities as to become a circumscribed rule of law rather than a principle of equity to be exercised with judicial discretion. ...
>
> I have reviewed dozens of cases and it has become clear that recourse to s. 103, and its counterpart in other jurisdictions with relation to other kinds of insurance, has always depended on the particular facts of the case, and on whether there was clearly some actual proven prejudice to the insurer, or potential prejudice which could not be quantified after the event. In addition, regard was had to the conduct of the insured, whether he had, for example, deliberately misled or lied to the insurer. There is no suggestion in this case that the plaintiff has been guilty of bad faith, or deliberate misrepresentation or concealment.[37]

A legislative provision which provides generally for relief against

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[36] [1989] 2 S.C.R. 778 at para. 17. *See, however*, Colliers McClocklin Real Estate Corp. v. Lloyd's Underwriters, [2003] S.J. No. 581, [2003] I.L.R. I-4246 (Sask. Q.B.), revd [2004] S.J. No. 308, 2004 SKCA 66 (Sask. C.A.), in which the Saskatchewan Court of Appeal sought to qualify this analysis.

[37] Canadian Equipment Sales & Service Co. v. Continental Insurance Co., [1976] O.J. No. 2355, 59 D.L.R. (3d) 333, 342, 343 (Ont. C.A. 1975).

penalties and forfeitures, and is not confined to policies of insurance, is found in all of the common law jurisdictions in Canada. In British Columbia this provision is found in the Law and Equity Act:[38]

> Relief against penalties and forfeitures
> 24 The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

The leading case with respect to relief under this provision is *Saskatchewan River Bungalows v. Maritime Life Assurance Company*.[39] The particular matter under consideration was the court's discretion to relieve against forfeiture for late payment of a premium:

> The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach: *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691 (H.L.); Snell's Equity (29th ed. 1990), at pp. 541-42.

Further:

> As the respondents are barred by their conduct from recovering, it is not necessary to determine whether our general power to relieve against forfeiture under s. 10 of the *Judicature Act* applies to contracts regulated by the *Insurance Act*. However, I would note that the existence of a statutory power to grant relief where other types of insurance are forfeited does not preclude application of the *Judicature Act* to contracts of life insurance. The *Insurance Act* does not "codify" the whole law of insurance; it merely imposes minimum standards on the industry. The appellant's argument that the "field" of equitable relief is occupied by the *Insurance Act* must therefore be rejected.[40]

[38] Law and Equity Act, RSBC 1996, c. 253.
[39] [1994] 2 S.C.R. 490, 504.
[40] *Id.* at 505.

A more recent, and somewhat revolutionary, provision which effectively permits relief from forfeiture arises from the application of Section 32 of the British Columbia Insurance Act and its counterparts in other jurisdictions:

> Unjust contract provisions
> 32 If a contract contains any term or condition, other than an exclusion prescribed by regulation for the purposes of section 33 (1) or established by section 34 (2) or (3), that is or may be material to the risk, including, but not restricted to, a provision in respect of the use, condition, location or maintenance of the insured property, the term or condition is not binding on the insured if it is held to be unjust or unreasonable by the court before which a question relating to it is tried.[41]

As noted earlier, there are certain statutory conditions, such as those related to misrepresentation, fraudulent omissions, and material changes of risk, that are required by law to be a part of every property insurance policy. Can the application of these statutory conditions ever be considered to be unjust or unreasonable?

This question was answered in the affirmative by the Supreme Court of Canada in *Marche v. Halifax Insurance Company*.[42] In this case, the premises had been left vacant for a period of time, but were occupied at the time of the loss. This was agreed to have been a material change in risk (albeit one that had been rectified) that triggered the insurer's right to rescind the policy. The issue remained as to whether the insureds could claim relief from forfeiture. The Supreme Court of Canada, in upholding the trial decision granting relief, held:

> 32 . . . whether a change is "material to the risk" is a highly charged, fact-based question whose strict application may be unjust or unreasonable in the particular factual circumstances of a case. In this respect, C. Brown and J. Menezes conclude that "[o]ne basic statement of approach to the question of what is unjust or unreasonable, and which has appeared to have remained constant over the years, is that the question is to be determined on the facts in

[41] Insurance Act, RSBC 2012, c 1 (emphasis added).

[42] [2005] 1 S.C.R. 47.

> dispute in a particular case and not on purely abstract general terms".
>
> 33 The concrete approach enunciated by Brown and Menezes is required by the words of the section itself. As discussed earlier, the legislature could hardly be intended to mandate clauses that are unjust on their face. The words "unjust" and "unreasonable" in relation to a condition mean little unless they refer to the effects the condition may create. For this reason, few clauses in an insurance contract, viewed merely on their face without regard to their effect, could likely be called unjust or unreasonable. The question of how the clause will work when applied cannot be avoided, if we are to make sense of s. (32)1.
>
> 34 Finally, the principle enunciated by Brown and Menezes that "unjust or unreasonable" must be determined on the facts of particular cases and not in the abstract reflects the remedial purpose of s. (32). To hold that only the condition in the abstract must be unjust or unreasonable without regard to its effects when applied would not accord with the broad remedial purpose of the provision to protect the public against unjust or unreasonable insurance conditions.
>
> 35 Clearly "unjust or unreasonable" in s. (32) allows the Court to look at the application of the clause. It is not suggested that this would not be the case for optional, non-statutory, conditions. If this be so, there is no basis for arguing that when it comes to statutory conditions one must look only at the condition abstracted from the effects of its application. If one considers consequences, the argument that statutory conditions can by definition never be unjust or unreasonable vanishes. At this point the insurer's main argument — that s. (32) cannot apply because statutory conditions must always be just and reasonable — collapses.[43]

[43] *Id.* at paras. 32-36 (internal citations omitted).

In this test—are the consequences of forfeiture unjust or unreasonable—the focus is clearly on the consequences to the insured. The cases that consider relief from imperfect compliance or relief under the Law and Equity Act have little or no application to relief under Section 32. As the court held in *Kozel v. The Personal Insurance Company:*[44] "[p]lainly, *Marche* addressed the interpretation of a different statute, and its holding is not controlling on the case before us. Nonetheless, *Marche's* broad interpretative approach indicates that courts should give remedial provisions . . . a wide scope to relief where the result would be otherwise inequitable or unjust."

Just how wide a scope this provision entails remains to be seen. No doubt further guidance will be provided as this aspect of the law is developed in future cases.

B. The United States

Unlike Canada, there appear to be no specific state statutes or federal regulation enumerating any relief from the consequences of an insured's forfeiture under the terms of an insurance policy. Rather, U.S. courts will apply various equity doctrines, such as waiver or estoppel, to avoid an insured forfeiting coverage based on an insured's actions or conduct. For example, in Georgia, renewing an insurance policy after learning of the fraud of the insureds, results in the insurance company waiving its defenses of fraud committed by an insured. In *State Farm Fire and Cas. Co. v. Jenkins*,[45] the insured filed a claim for damages following a fire. After conducting an investigation, State Farm denied the claim under the concealment and fraud provision of the policy based on evidence revealing the loss was intentionally set and the insured had both the motive and opportunity to set the fire. The investigation also showed that the insured intentionally concealed and misrepresented certain material facts.

The Georgia Court of Appeals noted that State Farm learned of the misrepresentation before it mailed a premium notice and before it sent the denial letter in which the State Farm denied the claim for misrepresentation. After the denial letter, however, State Farm sent the insured a cancellation notice stating that if it received payment before the effective date of cancellation, the policy would be renewed and coverage continued. The Court of Appeals held that "[a]t no time did [State Farm) indicate that it considered the entire policy void or forfeited, but instead gave every indication to (the insured) that the

[44] 2014 ONCA 130, at para. 49.

[45] 167 Ga. App. 4, 305 S.E.2d 801 (Ga. App. 1983).

policy remained in full force and effect."[46]

The appellate court upheld the trial court's order striking State Farm's defense of concealment and fraud, identifying a waiver of an insurer's defense when an insurer accepts premiums following a forfeiture, or a breach of a condition of the contract on which it is based:

> A forfeiture occurs, if it results at all, immediately upon a breach of the condition of the contract on which it is based; and, forfeitures not being favored in law, a waiver of the forfeiture, once made, cannot be recalled. The demand for payment in full of a future premium subsequently to the breach of a condition which would have entitled the insurer to insist upon a forfeiture of the contract will be held to be a waiver of the forfeiture, and be treated as an acknowledgment that the delinquent policy-holder is still entitled to the benefits conferred by his contract.[47]

Therefore, insurers in the U.S. should proceed cautiously to avoid any waiver after learning of an insured's fraud.

[46] *Id.* at 803.

[47] *Id.* at 803-804 (internal citations omitted).

Appendix A
Statutes and Case Law in the U.S. addressing Misrepresentation by Insureds

State	Statute	Reliance Required	Difference: in application or in claim
Alabama	ALA. CODE § 27-14-28 (1975)	Yes. *See* American Fire & Cas. Co. v. Archie, 409 So.2d 854 (Ala. Civ. App. 1981).	Yes. *Before loss*, a misrepresentation must be material to an increase in the risk of loss and must be relied on by the insurer to its prejudice. *After loss*, a misrepresentation need only be made with the actual intent to deceive and be related to a matter which is material.
Alaska	ALASKA STAT. § 21.36.210; § 21.42.110 (West 2016)	No. *See* Bennett v. Hedglin, 995 P.2d 668 (Alaska 2000).	No.
Arizona	ARIZ. REV. STAT. § 20-1109 (1955)	No. *See* Valley Farms, LTD. v. Transcon. Ins. Co., 78 P.3d 1070 (Ariz. Ct. App. 2003).	No.
Arkansas	ARK. CODE § 23-79-107 (West 2011)	Yes. *See* Twin City Bank v. Verex Assur. Inc., 733 F. Supp. 67 (E.D. Ark. 1990).	No.
California	CAL. INS. CODE § 359 (West 2021)	No. *See* LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co., 67 Cal. Rptr. 3d 917 (Cal. Ct. App. 2007).	No.
Colorado		Yes. *See* Hollinger v. Mut. Ben. Life Ins. Co., 192 Colo. 377 (Colo. 1977); Silver v. Colorado Cas. Ins. Co., 219 P.3d 324 (Colo. Ct. App. 2009)	No.
Connecticut		No. *See* Rego v. Connecticut Ins. Placement Facility, 219 Conn. 339 (Conn. 1991); McCants v. State Farm Fire & Cas. Co., 116 A.3d 844 (Conn. App. Ct. 2015).	No.
Delaware		No. *See* Oglesby v. Penn Mut. Life Ins. Co., 877 F. Supp. 872 (D. Del. 1995).	No.
Florida	FLA. STAT. § 627.409 (2014)	No. *See* Biscayne Cove Condo. Ass'n v. QBE Ins. Corp., 971 F. Supp.2d 1121 (S.D. Fla. 2013).	No.

Georgia	GA. CODE § 33-24-7 (West 1982)	No. *See* Pope v. Mercury Indem. Co., 297 Ga. App. 535, 677 S.E.2d 693 (Ga. App. 2009).	No.
Hawaii	HAW. REV. STAT. § 431:10-209 (1987)	No. *See* Park v. Gov't Emples. Ins. Co., 89 Haw. 394, 974 P.2d 34 (Haw. 1999).	No.
Idaho	IDAHO CODE § 41-1811 (West 1961), IDAHO CODE § 41-293 (West 2007)	No. *See* Wardle v. Int'l Health & Life Ins. Co., 97 Idaho 668, 551 P.2d 623 (Ida. 1976).	No.
Illinois	215 ILL. COMP. STAT. 5/154 (West 1996)	No. *See* Northern Life Ins. Co. v. Ippolito Real Estate Partnership, 601 N.E.2d 773, 234 Ill. App. 3d 792 (Ill. App. Ct. 1992); Golden Rule Ins. Co. v. Schwartz, 203 Ill.2d 456 (Ill. 2003).	No.
Indiana		Yes. *See* Jesse v. American Community Mut. Ins. Co., 725 N.E.2d 420 (Ind. Ct. App. 2000); Foster v. Auto-Owners Ins. Co., 703 N.E.2d 657 (Ind. 1998).	No.
Iowa		Yes. *See* Rubes v. Mega Life & Health Ins. Co., 642 N.W.2d 263 (Iowa 2002).	No.
Kansas		No. *See* Pink Cadillac Bar & Grill, v. U.S. Fid. & Guar. Co., 22 Kan. App. 2d 944 (Kan. Ct. App. 1996).	No.
Kentucky	KY. REV. STAT. 304.14- 110 (West 1994)	Yes. *See* Hornback v. Bankers Life Ins. Co., 176 S.W.3d 699 (Ky. Ct. App. 2005); Nationwide Mut. Fire. Ins. Co. v. Nelson, 912 F. Supp.2d 452 (E.D. Ky. 2012).	No.
Louisiana	LA. REV. STAT. § 22:860 (2011)	No. *See* Talbert v. State Farm Fire & Cas. Ins. Co., 971 So. 2d 1206 (La. App. 4 Cir. Nov. 4, 2007).	No.
Maine	ME. REV. STAT. TIT 24-A, § 2411 (1999)	Yes.	No.

		See N.E. Ins. Co. v. Young, 2011 ME 89, 26 A.3d 794 (Me. 2011).	
Maryland		Yes. *See* Prince George's Cty. v. Local Govt. Ins. Trust, 388 Md. 162, 879 A.2d 81 (Md. 2005); Hartford Acc. & Indem. Co. v. Sherwood Brands, Inc., 111 Md. App. 94 (Md. Ct. App. 1997).	No.
Massachusetts	MASS. GEN. LAWS ch. 175, § 186 (2008)	No. *See* Northwestern Mut. Life Ins. Co. v. Iannacchino, 950 F. Supp. 28 (D. Mass. 1997).	No.
Michigan	MICH. COMP. LAWS § 500.2218 (1957)	Yes. *See* Lake States Ins. Co. v. Wilson, 586 N.W.2d 113, 231 Mich. App. 327 (Mich. Ct. App. 1998); Mina v. Gen. Star Indem. Co., 555 N.W.2d 1, 218 Mich. App. 678, (Mich. Ct. App. 1996) rev'd in part, 455 Mich. 866, 568 N.W.2d 80 (1997).	Yes. *Before the loss*, rescission is justified without regard to the intentional nature of the misrepresentation, as long as it is relied upon by the insurer. *After the loss*, an insured's statement is "material," for purposes of determining whether insurance policy can be voided for misrepresentation of material fact, if statement is reasonably relevant to insurer's investigation of claim.
Minnesota	MINN. STAT. § 60A.08, subd. 9 (2017)	No. *See* Collins v. USAA Prop. & Cas. Ins. Co., 580 N.W.2d 55 (Minn. Ct. App. 1998).	No.
Mississippi		Yes. *See* Apperson v. United States Fid. & Guar. Co., 318 F.2d 438 (5th Cir. 1963); Watkins v. Cont'l Ins. Cos., 690 F.2d 449 (5th Cir. 1982).	Yes. *Before the loss,* intentional misrepresentation, by the applicant for an insurance policy, of a material fact, if relied on by the insurer, is ground for rescission. *After the loss, i*nsurer must only establish that statements made by the insured were 1) false and 2) material and 3) knowingly and willfully made.
Missouri		No. *See* Crewse v. Shelter Mut. Ins. Co., 706 S.W.2d 35 (Mo. Ct. App. 1985).	No.
Montana	MONT. CODE § 33-15-403(2) (2019);	No. *See* Schlemmer v. N. Cent. Life Ins. Co., 307 Mont. 203 (Mt. 2001); Schneider v. Minnesota Mut. Life Ins. Co., 247 Mont. 334 (Mt. 1991).	No.
Nebraska	NEB. REV. STAT. § 44-358 (1929)	No.	Yes.

		See Glockel v. State Farm Mut. Auto. Ins. Co., 400 N.W.2d 250, 224 Neb. 598 (Neb. 1987); McCullough v. State Farm Fire & Cas. Co., 80 F.3d 269 (8th Cir. 1996).	*Before the loss,* In Nebraska there is a common-law right to rescind or avoid insurance policies for material misrepresentations, which is recognized in and limited by §44- 358. *After the loss,* under § 44–358, an insurer may not void a policy because an insured misrepresents proof of loss unless the insurer relied on the misrepresentation to its injury.
Nevada		No. *See* Powers v. United Services Auto. Ass'n, 939 P.3d 1286, 115 Nev. 38 (Nev. 1999).	No.
New Hampshire	N.H. REV. STAT. 417-C:1 (2020)	No.	No.
New Jersey		No. *See* Longobardi v. Chubb Ins. Co., 582 A.2d 1257, 121 N.J. 530 (N.J. 1990); Dawn Restaurant, Inc. v. Penn Millers Ins. Co., Civil Action No. 10-2273 (MLC), 2011 U.S. Dist. LEXIS 120075 (D.N.J. Oct. 18, 2011).	No.
New Mexico	N. M. STAT. § 59A-18-11 (1984)	Yes. *See* Prudential Ins. Co. v. Anaya, 1967-NMSC-132, 78 N.M. 101, 428 P.2d 640 (N.M. 1967).	No.
New York	N.Y. INS. LAW § 3105 (McKinney 2011)	Yes. *See* Mutual Ben. Life Ins. Co. v. JMR Electronics Corp., 848 F.2d 30 (2d Cir. 1988); Sunbright Fashions, Inc. v. Greater N.Y. Mut. Ins. Co., 310 N.Y.S.2d 760 (N.Y. Sup. Ct. App. Div. 1970).	Yes. *Before the loss,* the materiality inquiry under New York law is made with respect to the particular policy issued in reliance upon the misrepresentation. *After the loss, f*alse statements in insurance claims made with the intent to deceive constitute insurance fraud and can be grounds for voiding the underlying policy.
North Carolina	N.C. GEN. STAT. § 58-3-10 (1901)	No. *See* Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (N.C. 1985); Federated Mut. Ins. Co. v. Williams Trull Co., Inc., 838 F. Supp.2d 370 (M.D.N.C. 2011).	No.
North Dakota	N.D. CENT. CODE § 26.1-29-25 (1985); § 26.1-29-24; § 26.1-29-17	Yes. See Lindlauf v. N. Founders Ins. Co., 130 N.W.2d 86 (N.D. 1964).	No.
Ohio		No. *See* Abon, Ltd. v. Transcon. Ins. Co., 2005-	No.

		Ohio-3052 (Ohio Ct. App. 2005); Nationwide Mut. Ins. Co. v. Skeens, 2008-Ohio-1875 (Ohio Ct. App. 2008).	
Oklahoma		Yes. *See* Adams v. Nat'l Cas. Co., 1957 OK 6, 307 P.2d 542 (Ok. 1957); Long v. Ins. Co. of N. Am., 670 F.2d 930 (10th Cir. 1982).	Yes. *Before the loss,* a misrepresentation must have been relied upon by the insurer, if it constitutes a ground for avoiding the policy. *After the loss,* regarding allegations of false swearing, a misrepresentation will be considered material if a reasonable insurance company, in determining its course of action, would attach importance to the fact misrepresented.
Oregon	OR. REV. STAT. § 742.013 (1965)	Yes. *See* Story v. Safeco Life Ins. Co., 179 Ore. App. 688, 40 P.3d 1112 (Or. App. Ct. 2002).	No.
Pennsylvania		No. *See* A.G. Allebach, Inc. v. Hurley, 373 Pa. Super. 41, 540 A.2d 289 (Pa. Super. Ct. 1988): Parasco v. Pacific Indem. Co., 920 F. Supp. 647 (E.D. Pa. 1996).	No.
Rhode Island	R.I. GEN. LAWS § 27-18-16 (West 2017)	No. *See* Evora v. Henry, 559 A.2d 1038 (R.I. 1989).	No.
South Carolina		Yes. *See* Primerica Life Ins. Co. v. Ingram, 616 S.E.2d 737 (S.C. Ct. App. 2005); United Ins. Co. of America v. Stanley, 277 S.C. 463, 289 S.E. 2d 407 (S.C. 1982).	No.
South Dakota	S.D. CODIFIED LAWS § 58-11-44 (2011)	No. *See* De Smet Farm Mut. Ins. Co. v. Busskohl, 2013 SD 52, 834 N.W.2d 826 (S.D. 2013); Fedderson v. Columbia Ins. Group, 2012 SD 90, 824 N.W.2d 793 (S.D. 2012).	No.
Tennessee	TENN. CODE ANN. § 56-7-103 (West 1932)	No. *See* Owens v. Tenn. Rural Health Improvement Ass'n, 213 S.W.3d 283 (Tenn. Ct. App. 2006); Matthews v. Auto Owners Mutual Ins.	No.

		Co., 680 F. Supp. 287 (M.D. Tenn. 1988).	
Texas		Yes. *See* Union Bankers Ins. Co. v. Shelton, 889 S.W.2d 278 (Tex. 1994); Koral Industries, Inc. v. Sec.- Connecticut Life Ins. Co., 788 S.W.2d 136 (Tex. App. 1990).	No.
Utah	UTAH CODE § 31A-21-105 (West 2003)	Yes. *See* Hardy v. Prudential Ins. Co. of Am., 763 P.2d 761 (Utah 1988).	No.
Vermont	VT. STAT. tit. 8 § 4205 (West 1947)	No. *See* 4205 Fireman's Fund Ins. Co. v. Knutsen, 132 Vt. 383, 324 A.2d 223 (Vt. 1974); McAllister v. AVEMCO Ins. Co., 148 Vt. 110, 528 A.2d 758 (Vt. 1987).	No.
Virginia	VA. CODE § 38.2-309 (West 1986)	No. *See* Montgomery Mut. Ins. Co. v. Riddle, 266 Va. 539, 587 S.E.2d 513 (Va. 2003).	No.
Washington	WASH. REV. CODE § 48.18.090 (2009)	No. *See* Karpenski v. Am. Gen. Life Companies, LLC, 916 F. Supp.2d 1188 (W.D. Wash. 2012); St. Paul Mercury Ins. Co. v. Salovich, 41 Wash. App. 652, 705 P.2d 812 (Wash. Ct. App. 1985).	No.
West Virginia	W. VA. CODE § 33-6-7 (1997)	No. *See* Massachusetts Mut. Life Ins. Co. v. Thompson, 194 W. Va. 473, 460 S.E.2d 719 (W. Va. 1995), Cordial v. Ernst & Young, 199 W. Va. 119, 483 S.E.2d 248 (W. Va. 1996).	No.
Wisconsin	WIS. STAT. § 631.11 (West 1995)	No. *See* Pum v. Wisconsin Physicians Serv. Ins. Corp., 2007 WI App 10, 298 Wis.2d 497 (Wis. Ct. App. 2007); Tempelis v. Aetna Casualty & Surety Co., 164 Wis.2d 17, 473 N.W.2d 549 (Wis. Ct. App. 1991).	No.
Wyoming	WYO. STAT. § 26-15-109 (West 1977)	No.	No.

		See White v. Cont'l Gen. Ins. Co., 831 F. Supp. 1545 (D. Wyo. 1993)	