OPINION

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Misrepresentations in disability and life insurance applications and the new statute

By Philip M. Howe

By statute, the area of misrepresentation in the application for life and disability insurance is highly regulated.

The traditional concepts of the tort of deceit and fraud have, for over a century, been superseded by statutes such as G.L.c. 175, §186, revised, and §186A, as amended, which both were approved on Nov. 7, 2008, and became effective March 7.

The revised §186 provides:

"(a) No oral or written misrepresentation or warranty made in the negotiation of a policy of insurance by the insured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with the actual intent to deceive, or unless the matter misrepresented or made a warranty increased the risk of loss.

"(b) No oral or written misrepresentation or warranty as to the physical condition or health risks to the physical condition of the insured made in the negotiation of any policy of life or endowment insurance or annuity contract by the insured or on his behalf shall defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is material and is made with actual intent to deceive or increased the risk of loss. For the purposes of this paragraph, a misrepresentation or warranty shall be deemed material if knowledge or ignorance of it would otherwise have influenced the insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium."

Sub-section (a) above is essentially the old §186 and sub-section (b) is the new addition.

As a result, it seems that the decisions addressing §186 should not be impacted by sub-section (a) of the new §186.

Burden on insurer

One of the leading decisions to interpret the existing §186 is *Pahigian v. The Manufacturer's Life Insurance Company*, 349 Mass. 78, 206 N.E.2d 660, 1965 Mass. LEXIS 687 (1965).

In *Pahigian*, on page 85, the court ruled that, at the trial of an action on a life insurance policy, the burden is on the insurer to prove that misrepresentations by the insured "increased the risk of loss and entitled the insurer to avoid the policy."

The insured had concealed a history of Hodgkin's disease when he completed the application for life insurance. The evidence was that, in at least 75 percent of the cases, this disease is fatal. The court ruled that Hodgkin's disease as a matter of law increased the risk of loss. The court ruled that the insurer was entitled to avoid the policy.

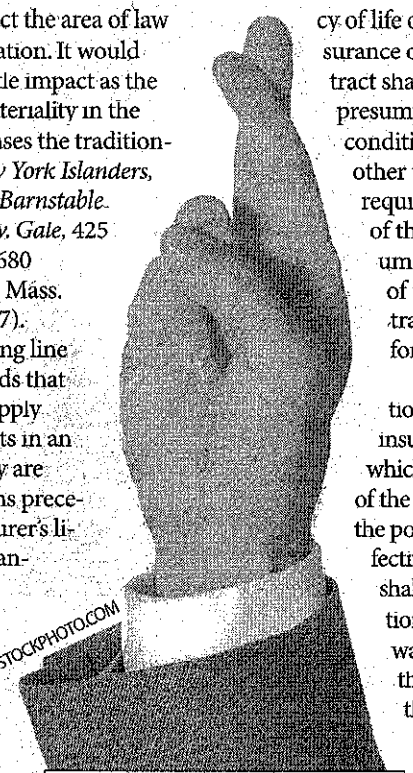
For a 1st Circuit discussion of a similar issue involving a disability policy, see *Boston Mutual Ins. Co. v. New York Islanders Hockey Club*, 165 F3d 93, 1999 U.S. App. LEXIS 21876 (1st Cir.1999).

The issue of intent to deceive is dealt with in *Rappe v. Metropolitan Life Ins. Co.*, 320 Mass. 376, 69 NE2d 584, 1946 Mass LEXIS 490 (1946), and *Doulames v. Prudential Ins. Co.*, 1 Mass. App. 871, 307 NE2d 17, 1974 Mass. App. LEXIS (1974).

Sub-section (b) of the new §186 targets life insurance and provides a definition of when a misrepresentation "shall be deemed material."

It remains to be seen if this definition will impact the area of law of misrepresentation. It would seem to have little impact as the standard for materiality in the statute paraphrases the traditional standard. *New York Islanders, supra at 97* and *Barnstable County Ins. Co. v. Gale*, 425 Mass. 126, 129; 680 N.E.2d 42; 1997 Mass. LEXIS 119 (1997).

However, a long line of decisions holds that §186 does not apply where statements in an insurance policy are made "conditions precedent" to the insurer's liability, and the answers to the questions on the application are critical to the insurer's intelligent decision to issue the policy. *Massachusetts Mutual Life Ins. Co. v. Sullivan*, 5 Mass. App. 816, 361 NE2d 1321, 1977 Mass. App. LEXIS 790 (1977).



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In *Massachusetts Mutual Ins. Co. v. Fraidowitz*, 443 F3d 128, 132, 2006 U.S. App. LEXIS 8199 (1st Cir. 2006), the court ruled that §186 "does not apply to conditions precedent." It went on to rule that if "an insured fails to satisfy a condition precedent, the coverage is void regardless of whether there was proof of an intent to deceive or an increased risk of loss."

Conditions precedent

The Legislature recently passed, and the commonwealth enacted, an amended version of §186A, which now provides:

"The delivery of any policy of life or endowment insurance or annuity contract shall create a presumption that any conditions precedent, other than a condition requiring prepayment of the initial premium, to the attaching of the policy or contract have been performed.

"In any court action based on a life insurance policy in which the good health of the insured at the time the policy becomes effective is at issue, there shall be a presumption that the insured was in good health if the insurer delivered the policy."

The amendment added the second sentence. It is unclear what the second sentence adds to the first sentence, which refers to "any conditions precedent." The second sentence in effect restates the first sentence, which provides that there shall be a presumption that all conditions precedent, classically good health at the delivery of the policy, have been performed.

Nevertheless, the Legislature has added the second sentence and that must be respected. However, it seems that it will have little or no impact on this area of the law.

The original §186A, enacted in 1949, shifted the burden from the insured or beneficiary to the insurer to rebut the presumption that the condition precedent has not been satisfied.

Curiously, §186A seems to be at odds with the 1957 Supreme Judicial Court holding in *Paratore v. John Hancock Mutual Life Ins. Co.*, 335 Mass. 632, 634; 141 N.E.2d 511; 1957 Mass. LEXIS 550 (1957), which ruled that "[t]he provisions of the policy above referred to, being conditions precedent, must be proved by the plaintiff." The plaintiff was the beneficiary of the subject life insurance policy.

This 1957 decision seems contrary to the 1949 statute, §186A, which provided that the delivery of the policy should create a presumption that any conditions precedent have been performed. The result of such a presumption would be to shift the burden to the insurer of proving that any conditions precedent had not been performed.

The Legislature has with §186A reversed the ruling in *Paratore, supra.*

What remains to be seen is the impact of the amended §186A on the rest of the body of law under §186. It seems that those decisions cited in *Fraidowitz, supra* would not be impacted in that §186 does not apply to conditions precedent.

But §186A clearly creates the presumption that conditions precedent have been satisfied upon delivery of the policy.

As a practical matter, one would expect that the insurer would not rely on the defense of failure of a condition precedent, such as that the insured was not in good health at the delivery of the policy, without having in hand solid documentary evidence that the insured was not in good health.

However, there is now no doubt that the burden of introducing evidence at trial, and the jury instructions on the burden of proof in an action involving a condition precedent, are burdens borne by the insurer, not the insured. MLW

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