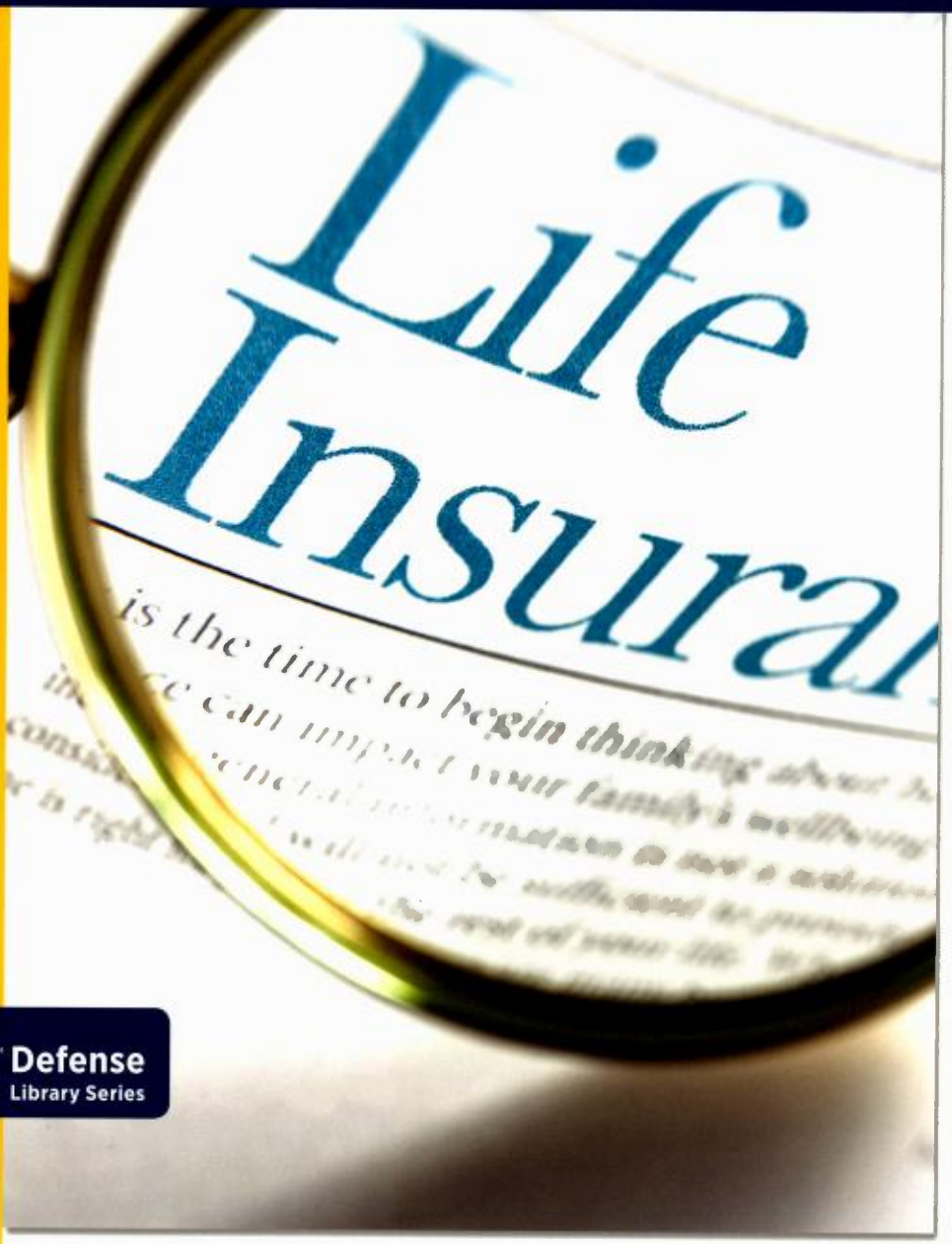
The Law of Life Insurance

Key Issues in Each State



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Wisconsin

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Formation of a Life Insurance Contract

Insurable Interest Requirement

Under Wisconsin law, the person to whom an insurance policy is issued must have an insurable interest in the policy's subject. *See* Wis. Stat. §631.07(1) ("No insurer may knowingly issue a policy to a person without an insurable interest in the subject of the insurance.").

A life insurance policy can only be issued "to a person other than the one whose life or health is at risk" if the subject of the policy has consented in writing. Wis. Stat. §631.07(2). However, there are numerous exceptions where the subject's consent is not required. Wis. Stat. §631.07(3). A person does not need consent to obtain life insurance on a dependent lacking legal capacity or on a family member "living with or dependent on the person," and a creditor does not need consent to obtain life insurance on a debtor "in an amount reasonably related to the amount of the debt." Wis. Stat. §§631.07(3)(a)1, 2, 3. Someone other than the insured may consent in certain contexts: a parent or guardian may consent to the issuance of a policy on a dependent child, a grandparent may consent to a policy on a grandchild, and a "court of general jurisdiction may give consent on ex parte application on the showing of any facts the court considers sufficient to justify such insurance." Wis. Stat. §631.07(3)(b).

If the policyholder lacks insurable interest or if consent has not been given, an insurance policy is not invalid. Wis. Stat. §631.07(4); *Martin v. Tower Ins. Co.*, 349 N.W.2d 90 (Wis. Ct. App. 1984). Rather, in that circumstance, a court may order that the proceeds "be paid to someone other than the person to whom the policy is designated to be payable, who is equitably entitled thereto." Wis. Stat. §631.07(4). A court may also "create a constructive trust in the proceeds or a part thereof, subject to terms and conditions of the policy other than those relating to insurable interest or consent." *Id.*

The Wisconsin Administrative Code states that a charitable organization may be the applicant, owner, or beneficiary of an insurance policy on the life of any individual and that the organization will be "deemed to have an insurable interest in the individual." Wis. Adm. Code INS §2.45 (Aug. 2015).

Must the Insured Sign the Application?

Although there is no absolute rule that the insured sign the life insurance application, the person "whose life or health is at risk" must give "written consent to the issuance of the policy." Wis. Stat. §631.07(2). One way of doing so is by "knowingly signing the application for the insurance with knowledge of the nature of the document." *Id.* Consent can also be expressed "in any other reasonable way," *id.*, but Wisconsin law does not elaborate on what might qualify as an alternative reasonable way of consenting. Furthermore, there are numerous exceptions where consent is either unnecessary or can be given by someone other than the subject. *See* Wis. Stat. §631.07(3); *see also* "**Formation of a Life Insurance Contract, Insurable Interest Requirement**," *supra*.

Conditional Receipt/Temporary Insurance Application and Agreement ("TIAA")

The language of the insurance contract determines whether a life insurance policy is effective during a period of conditional or temporary agreement. In *Brown v. Equitable Life Ins. Co.*, 211 N.W.2d 431 (Wis. 1973), and *Fox v. Catholics Knights Ins. Soc'y*, 665 N.W.2d 181 (Wis. 2003), the Wisconsin Supreme

Court relied on contractual language to conclude that the failure to satisfy a condition precedent to coverage meant there was no interim insurance. But in *Judd v. AIG/Am. Gen. Life Ins. Co.*, No. 06-C-355-S, 2006 WL 3337360 (W.D. Wis. Nov. 16, 2006), the court construed the contract at issue to reach the opposite conclusion, finding that interim coverage *was* effective.

When the decedent in *Brown* applied for life insurance, he had a cancerous skin condition of which the agent was aware. He tendered his first month's premium and received a "satisfaction type" conditional receipt,[1] which stated that the premium payment "provides insurance only after all of" a series of conditions "are fully met"—including the insurer's satisfaction that the "persons to be insured are insurable under the Company's rules and practices." 211 N.W.2d at 434, n.1. However, shortly after his medical examination, the insured died from a heart condition unrelated to the cancer. *Id.* at 433. Applying a "strict contractual construction," the court concluded that "the language used in the conditional receipt"—which was "plain on its face"—required "the applicant to be determined insurable as a standard risk prior to the effecting of coverage." *Id.* at 434–35. Insurability was a condition precedent to coverage, and since the insurer concluded in good faith that the cancer made the decedent uninsurable, no contract of insurance arose in the first place. *Id.* at 434–36. As a result, recovery was not allowed under the insurance contract.

The Wisconsin Supreme Court relied on *Brown* to reach a similar result in *Fox*, where the prospective insured filled out an application for life insurance and paid the initial premium, but died in a car accident the very morning he was to have blood drawn for a required blood test. 665 N.W.2d 181, ¶2. The application included a section entitled "Receipt for Payment and Conditional Insurance Agreement," which noted that coverage would not begin until certain conditions were satisfied, including the completion of a blood test. *Id.* at ¶6. The insurer denied coverage because, without the mandatory blood test, the policy had never gone into effect. *Id.* at ¶10. The Wisconsin Supreme Court agreed, concluding that a medical examination "may be made a condition precedent to coverage" and finding that whether a condition "is a condition precedent to coverage depends on the language of the contract itself." *Id.* at ¶36.

The court quoted with approval Couch on Insurance's discussion of conditions precedent in the temporary insurance context:

> The effectiveness of a contract of temporary insurance may be made dependent upon the fulfillment of specifically named conditions, such as payment of the first full premium, approval or acceptance of the application by the insurer, *completion of a medical examination*, insurability, issuance or delivery of the policy, *or any combination of the above*. As with any such contractual qualifications, *the conditions must be met in order for a contract of temporary insurance to exist.*

Fox, 665 N.W.2d 181, ¶23 (quoting Couch on Insurance §13.10 (3d ed. 1999) (emphasis added by *Fox* court)). It also warned of the danger of "absurd results" with a contrary conclusion:

> Were we to decide that unconditional interim insurance arises where an applicant pays a premium with his application but dies before fulfilling conditions precedent to coverage, insurers would either have to charge high rates to cover the risk of providing interim insurance or stop providing it altogether. As we have noted, applicants would have no incentive to actually get the required medical examinations or fulfill other required conditions of coverage if even the uninsurable were guaranteed coverage for some period of time before the insurability determination.

Id. ¶41.

Fox has also been cited to reach the opposite outcome. In *Judd*, a Wisconsin federal court relied on the language of the insurance contract to conclude

[1] The Wisconsin Supreme Court described a "conditional receipt" as "a sales device instituted by the life insurance industry whereby a life insurance company would warrant immediate coverage upon payment of the initial life insurance premium at the time of application and the satisfaction of various conditions precedent to coverage." Brown, 211 N.W.2d at 433.

that a policy became effective during a temporary coverage period. *Judd*, 2006 WL 3337360. As in *Fox*, the prospective insured in *Judd* died in an accident after submitting his life insurance application and making his first premium payment, but before his medical examination. *Id.* at *1–3. The application contained a "Limited Temporary Life Insurance Agreement," which did *not* establish that the medical examination was a condition precedent to coverage under the temporary agreement. The insurer's denial of the claim for benefits was therefore found to breach the insurance contract. *Id.* at *10.

Does the Insurer's Acceptance and Retention of a Premium Create a Life Insurance Policy?

The acceptance and retention of a premium by an insurer does not by itself create a life insurance policy under Wisconsin law. Rather, the existence of coverage is based on the language of the insurance contract. *See Brown v. Equitable Life Ins. Co.*, 211 N.W.2d 431 (Wis. 1973); *Fox v. Catholics Knights Ins. Soc'y*, 665 N.W.2d 181 (Wis. 2003); "**Formation of a Life Insurance Contract: Conditional Receipt/Temporary Insurance Application and Agreement ("TIAA")**," *supra*.

Good Health Requirement at Time of Delivery

Wisconsin law binds insurers to the determinations of their own medical examiners as to the health and insurability of a proposed insured:

> If under the rules of any insurer issuing life insurance, its medical examiner has authority to issue a certificate of health, or to declare the proposed insured acceptable for insurance, and so reports to the insurer or its agent, the insurer is estopped to set up in defense of an action on the policy issued thereon that the proposed insured was not in the condition of health required by the policy at the time of issue or delivery, or that there was a preexisting condition not noted in the certificate or report, unless the certificate or report was procured through the fraudulent misrepresentation or nondisclosure by the applicant or proposed insured.

Wis. Stat. §632.50. Under the Wisconsin Supreme Court's reading of the statute, estoppel "is activated unless an insurance company has enacted formal rules prohibiting its medical examiners from issuing certificates of health or declaring applicants fit for insurance." *Grosse v. Protective Life Ins. Co.*, 513 N.W.2d 592, 598 (Wis. 1994).

In *Grosse*, the insurer refused to pay life insurance proceeds based on the death of Michael Grosse because a "a material change" in his health—a diagnosis of lung cancer—occurred after he passed an independent medical examination but before he paid his first premium. *Id.* at 593. The court applied Section 632.50 to hold that Protective Life was estopped "from asserting as a defense Mr. Grosse's change of health between the time of his medical exam and payment of his premium." *Id.* at 596–98. It further rejected Protective Life's argument that its medical examiner lacked authority to declare Mr. Grosse acceptable for insurance because the company had never enacted a rule to that effect. *Id.* at 597–98.

Free Look Period After Policy Delivery

As a general matter, Wisconsin law does not mandate that life insurance policies include a "free look" period during which policyholders can return a policy and have their premium returned. However, when an existing life insurance policy is being replaced, the replacing insurer is required to:

> Provide to the policy or contract owner notice of the right to return the policy or contract within 30 days of the delivery of the contract and receive an unconditional full refund of all premiums or considerations paid on it, including any policy fees or charges or, in the case of a variable or market value adjustment policy or contract, a payment of the cash surrender value provided under the policy or contract plus the fees and other charges deducted from the gross premiums or considerations or imposed under the policy or contract.

Wis. Admin. Code §Ins. 2.07(6)4 (Aug. 2015).

Electronic Signature Requirements

Electronic transactions and records, including those between insurers and insureds, are governed by Chapter 137 of the Wisconsin Statutes. Wisconsin

law recognizes the validity of electronic signatures and records. Section 137.15 provides:

> (1) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
>
> (2) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
>
> (3) If a law requires a record to be in writing, an electronic record satisfies that requirement in that law.
>
> (4) If a law requires a signature, an electronic signature satisfies that requirement in that law.

Wis. Stat. §137.15.

To engage in electronic transactions, the insurer must have an agreement with the insured, who must be able to read, print, and retain the electronic records. Wis. Stat. §§137.13(2), 137.16; Wis. Ins. Bulletin 6-23-2004, at *3–4. However, notices regarding the "cancellation or termination of health insurance or benefits or life insurance benefits" (other than annuities) are expressly excluded from Chapter 137. Wis. Stat. §137.12(2r)(c).

Maintenance of a Life Insurance Policy

Grace Period

In Wisconsin, every life insurance policy must contain a provision entitling the policyholder to a grace period of "not less than 31 days for the payment of any premium due except the first." Wis. Stat. §632.44(2); §632.56(5). During the grace period, the policy continues in force. *Id.*

Lapse for Failure to Timely Pay Premiums

Wisconsin draws a distinction between cancellation of a policy, which requires a written notice of cancellation, and lapse, which does not.

Midterm cancellations are controlled by Wis. Stat. §631.36(2)(a), which permits a carrier to cancel a policy prior to the expiration of the policy term for failure to pay a premium when due. No cancellation is effective until at least ten days after the first class mailing or delivery of a written notice to the policyholder. Wis. Stat. §631.36(2)(b). The notice of cancellation must state with reasonable precision the facts on which the insurer's decision is based. Wis. Stat. §631.36(6).

For policies that permit cancellations by mail, Wisconsin courts have held that mailing takes place when there is evidence of office custom and practice and corroborating facts that infer that the custom was followed. *Olson v. Hardware Dealers Mut. Fire Ins. Co.*, 173 N.W.2d 599 (Wis. 1970). *See also Christnacht v. DILHR*, 228 N.W.2d 690, 692–93 (Wis. 1975) (evidence from which it may be inferred that an office mailing custom was complied with was sufficient to support a finding of mailing of a cancellation notice).

In addition, the written notice must be unambiguous and unequivocal. *Benefit Trust Life Ins. Co. v. Office of Comm'r of Ins.*, 419 N.W.2d 265, 269 (Wis. Ct. App. 1987) (insurer's second letter was effective notice of cancellation because it unequivocally cancelled the policy and provided a date and time when the cancellation would be effective). A notice that merely threatens to cancel is not sufficient. *Id.* The purpose underlying the notice requirement is to give the delinquent insured opportunity to secure other insurance prior to the cancellation of the present policy. *Id.* at 269–70, citing *Seeburger v. Citizens Mut. Fire Ins. Co.*, 64 N.W.2d 879, 883 (Wis. 1954).

A policy that contains an automatic lapse provision, however, does not require written notice before it may be terminated. *Peterson v. Truck Ins. Exch.*, 223 N.W.2d 579, 585 (Wis. 1974). In *Peterson*, an insurer terminated a policy for nonpayment of a premium. *Id.* at 580. The policy period was one calendar month and contained a special endorsement that provided an automatic lapse in the event the insured failed to pay the next month's premium. *Id.* at 582. The policy was subject to renewal for successive one-month terms as long as the advance premium was paid prior to the end of the month. *Id.* The Wisconsin Supreme Court held that where a policy provides for an automatic lapse for failure to pay premiums on time, no notice under §631.36(2) is required. *Id.* at 585. The *Peterson* court distinguished cancellation and termination: "'Cancellation' refers to termination of a policy prior to the end of the policy period, and 'termination' refers to expiration of a policy by lapse of the policy period.'" *Id.* at 584.

Finally, Wisconsin law requires life insurance policies to include strict and detailed nonforfeiture provisions that apply when a policyholder defaults on premium payments. *See* Wis. Stat. §632.43. These provisions require that the insurer provide certain paid-up benefits to defaulting policyholders, as more fully described in the nonforfeiture law.

Changes in the Beneficiary

Substantial Compliance Rule

Under Wisconsin Statute §632.48(1)(b), a policyholder may change a policy beneficiary without consent or knowledge of the previously designated beneficiary as long as the designation of beneficiary is not explicitly irrevocable. A carrier discharges its obligation to pay benefits under its policy if it pays a properly designated beneficiary "unless it has actual notice of either an assignment or a change in beneficiary designation." Wis. Stats. §632.48(2). A carrier has actual notice if the prescribed formalities are complied with or if the change in beneficiary has been requested in the form prescribed by the insurer and delivered to an insurer or its agent. *Id.*

Rather than applying a substantial compliance test, Wisconsin law looks to the intention of the person making the beneficiary change. "[A]ny act that unequivocally indicates an intention to make the change is sufficient to effect it." Wis. Stat. §632.48(1)(b). The attempted beneficiary change does not need to be memorialized in writing. *Empire Gen. Life Ins. Co. v. Silverman*, 399 N.W.2d 910, 916 (Wis. 1987).

However, subject to Wisconsin Statute §853.17, "[a]ny provision in a will which purports to name a different beneficiary of a life insurance or annuity contract than the beneficiary properly designated in accordance with the contract with the issuing company, or its bylaws, is ineffective to change the contract beneficiary unless the contract or the company's bylaws authorizes such a change by will."

Finally, insurers may prescribe formalities and procedures with which policyholders must comply to change policy beneficiaries, if those formalities and procedures are designed only for the protection of the insurer. Wis. Stat. §632.48(2).

Revocation of Death Benefits by Divorce or Annulment

Wisconsin law provides that a divorce, annulment, or similar event ordinarily removes the former spouse or a relative of the former spouse as a beneficiary of a life insurance policy:

> (3) Revocation upon divorce. Except as provided in subs. (5) and (6), a divorce, annulment or similar event does all of the following:
>
> (a) Revokes any revocable disposition of property made by the decedent to the former spouse or a relative of the former spouse in a governing instrument.
>
> (b) Revokes any disposition created by law to the former spouse or a relative of the former spouse....

Wis. Stat. §854.15(3). Provisions of a life insurance policy revoked by this Section "are given effect as if the former spouse and relatives of the former spouse disclaimed the revoked provisions...." Wis. Stat. §854.15(4).

This Section does not apply, however, if any of the following conditions apply:

1. The express terms of a governing instrument provide otherwise.
2. The express terms of a court order provide otherwise.
3. The express terms of a contract relating to the division of the decedent's and former spouse's property made between the decedent and the former spouse before or after the marriage or the divorce, annulment or similar event provide otherwise.
4. The divorce, annulment or similar event is nullified.
5. The decedent and the former spouse have remarried or entered into a new domestic partnership before the death of the decedent.

Wis. Stat. §854.15(5)(am). Moreover, a former spouse may use extrinsic evidence to prove the deceased's intent with regard to a transfer. Wis. Stat. §854.15(5)(bm).

In legal proceedings, there is a presumption that divorce or annulment revokes the former spouse's beneficiary interest in his or her ex-spouse's life insurance policy. *Dahm v. City of Milwaukee*, 707 N.W.2d 922 (Wis. Ct. App. 2005) (decedent's first wife failed to produce specific facts to rebut presumption that her designation as beneficiary of decedent's pension benefits was revoked by their divorce).

Payment of Life Claims

Interpleader

Wisconsin Statute §803.07 provides:

> Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross claim or counterclaim. The provisions of this section supplement and do not in any way limit the joinder of parties permitted in [Wisconsin Statute] s. 803.04.

Attorneys representing carriers in Wisconsin often plead that they want attorneys' fees and costs, but there is no authority in the statute for such an award.

Slayer Statute

Wisconsin's slayer statute, Wis. Stat. §854.14, provides that the unlawful and intentional killing of the decedent revokes a provision in a governing instrument that, by reason of the decedent's death, transfers or appoints property to the killer, and also revokes every statutory right or benefit to which the killer may have been entitled by reason of the decedent's death. Wis. Stat. §854.14(2). A life insurance beneficiary designation form "is a provision in a governing instrument that appoints property to... the accused killer." *Hartford Life & Accident Ins. Co. v. Sabol*, No. 09-CV-45, 2010 WL 519725, at *2 (E.D. Wis. Feb. 9, 2010) (applying Wisconsin law). "Thus, [Wisconsin's slayer] statute prohibits [the life insurance company] from paying the insurance benefits to [the killer] after a determination is made that he unlawfully and intentionally killed [the decedent]." *Id.* (citing Wis. Stat. §854.14(5)). Wisconsin's slayer statute does not define the terms "intentional" or "unlawful."

The provisions of the life insurance policy that would be revoked by this statute "are given effect as if the killer disclaimed all revoked provisions... [and] the killer's share of the decedent's intestate estate, if any, passes as if the killer had disclaimed his or her intestate share under [Wisconsin Statute §] 854.13." Wis. Stat. §854.14(3).

Wisconsin law specifically addresses additional effects on life insurance if the policyholder's death is caused by the decedent's spouse:

> (b) *Life insurance.*
>
> 1. Except as provided in sub. (6), if a noninsured spouse unlawfully and intentionally kills an insured spouse, the surviving spouse's ownership interest in a policy that designates the decedent spouse as the owner and insured, or in the proceeds of such a policy, is limited to a dollar amount equal to one-half of the marital property interest in the interpolated terminal reserve and in the unused portion of the term premium of the policy on the date of death of the decedent spouse. All other rights of the surviving spouse in the ownership interest or proceeds of the policy, other than the marital property interest described in this subsection, terminate at the decedent spouse's death.
> 2. Notwithstanding s. 766.61(7) and except as provided in sub. (6), if an insured spouse unlawfully and intentionally kills a noninsured spouse, the ownership interest at death of the decedent spouse in any policy with a marital property component that designates the surviving spouse as the owner and insured is a fractional interest equal to one-half

> of the portion of the policy that was marital property immediately before the death of the decedent spouse.

Wis. Stat. §854.14(3m)(b).

Wisconsin's slayer statute provides that an unlawful and intentional killing may be established by a final judgment or juvenile adjudication establishing criminal accountability for the unlawful and intentional killing of the decedent. In the absence of such a judgment and upon the petition of an interested person, a court may determine whether, based on the preponderance of the evidence, the killing of the decedent was unlawful and intentional for purposes of this Section. Wis. Stat. §854.14(5)(a)–(c).

Wisconsin's slayer statute does not apply if the court finds that, under the factual situation created by the killing, the decedent's wishes would best be carried out by means of another disposition of property or the decedent provided in his or her will, by specific reference to the slayer statute, that the statute does not apply. Wis. Stat. §854.14(6).

Interest on Life Insurance Proceeds

Wisconsin Statute §628.46(1) requires an insurer to promptly pay every insurance claim and states that a claim is overdue if not paid within 30 days after the insurer is furnished written notice of a covered loss and the amount of the loss. Under the statute, "[a]ny payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer." Wis. Stat. §628.46(1). "All overdue payments shall bear simple interest at the rate of 12 percent per year." *Id.*

"Reasonable proof" of non-responsibility to pay interest on a claim is equated with whether the coverage issue was fairly debatable and is a question of fact; if fairly debatable, then the insurer has the required proof of non-responsibility. *Dilger v. Metro. Prop. & Cas. Ins. Co.*, 868 N.W.2d 177 (Wis. Ct. App. 2015), *review denied*, 870 N.W.2d 839 (Wis. 2015).

This statute unambiguously applies to claims submitted under all types of insurance coverage in Wisconsin. *Kontowicz v. Am. Standard Ins. Co.*, 714 N.W.2d 105, ¶27 (Wis. 2006), *clarified by, reconsideration denied by* 718 N.W.2d 111 (Wis. 2006). Wisconsin Statute Section 628.46(1), which requires prompt payment of insurance claims and a 12 percent interest charge on overdue payments, is considered "an additional provision of the insurance contract incorporated into it by operation of law." *Poling v. Wis. Physicians Serv.*, 357 N.W.2d 293, 298 (Wis. Ct. App. 1984). Imposing interest on overdue payment of insurance claims is not intended to penalize insurers, but to compensate claimants for the value of the use of their money. *Kontowicz*, 714 N.W.2d 105, ¶47. Wisconsin's post-judgment interest statute provides that interest on a judgment accrues at 1 percent plus the prime interest rate in effect on January 1 and July 1 of each year, as reported in Federal Reserve statistical release H. Wis. Stat. §814.04(4). Pre-judgment interest is awarded at 5 percent and will typically be appropriate in situations where damages were determinable prior to judgment. Wis. Stat. §138.04; *see Poling*, 357 N.W.2d at 298. This, of course, assumes there are no other previously agreed-upon contract rates.

Contested Life Insurance Claims

Contestability Period

Under Wisconsin law, no individual life insurance policy may be contested after it has been in force for two years from the date of issuance, except for nonpayment of premiums or certain misstatements of age. Wis. Stat. §632.46(1). Similarly, except for nonpayment of premiums or certain misstatements of age, no group life insurance policy may be contested after it has been in force for two years and no coverage for an individual insured under such a policy may be contested on the basis of misstatements made by the insured after coverage has been in force on the life of the insured for two years. Wis. Stat. §632.46(2). When replacing coverage, if the replacing and existing insurer are the same or subsidiaries or affiliates under common ownership or control, credit must be provided for the period of time that has elapsed under the replaced policy's or contract's incontestability period. Wis. Admin. Code §Ins. 2.07(6)(b) (Aug. 2015) (if a financed purchase, the credit may be limited to the amount the face amount of the existing policy is reduced by the use of existing policy values to fund the new policy or contract).

If the age or sex of the person whose life is insured is misstated in the policy application, and the error is not adjusted during the person's lifetime, the amount payable under the policy is equal to the death benefit the premium paid would have purchased if the age and sex had been stated correctly. Wis. Stat. §632.46(3)(a). If an insured whose age was misstated was beyond the maximum age limit designated by the insurer at the time the insurance was applied for, the insurer must refund at least the amount of the premiums collected under the policy. Wis. Stat. §632.46(3)(b).

The foregoing notwithstanding, disability coverages and additional accident benefits included in a life insurance policy may be contested at any time on the ground of fraudulent misrepresentation. Wis. Stat. §632.46(4). Certain group and blanket insurers are also entirely exempt from the statutory incontestability provision. *See* Wis. Stat. §600.01(1)(b)(3) and (4).

Can a Claim Still Be Contested After Expiration of the Contestability Period?

Incontestability clauses are in the nature of statutes of repose. *Peterson v. Equitable Life Assurance Soc'y of the United States*, 57 F. Supp. 2d 692, 699 (W.D. Wis. 1999) (applying incontestability provisions under Wis. Stat. §§632.46 and 632.76 to bar insurer from contesting its liability for claim under individual and group disability policies), citing *Columbian Nat'l Life Ins. Co. v. Wallerstein*, 91 F.2d 351, 352 (7th Cir. 1937).

Suicide

A modified guaranteed life insurance policy may include an exclusion for suicide within two years after the date the policy takes effect, except that, if the policy includes an increased death benefit as a result of the policyholder's application after the date the policy takes effect, the exclusion applies only to the amount of increased benefits. Wis. Admin. Code §Ins. 2.13(7)(d)1 (Aug. 2015); *see also* Wis. Admin. Code §Ins. 2.13(2)(f) (Aug. 2015) (defining "modified guaranteed life insurance policy"). Credit life insurance offered to debtors may not contain suicide exclusions other than for suicide within one year of the effective date of coverage. Wis. Admin. Code §Ins. 3.25(14)(e)2.a. and 3 (May 2014).

STOLI/BOLI/COLI and Stranger Owned Annuity Contracts

Generally, no Wisconsin insurer may knowingly issue a policy to a person without an insurable interest in the subject of the insurance. Wis. Stat. §631.07(1). An individual life insurance policy may be issued to a person other than the one whose life is at risk, however, if the latter has given written consent to the policy's issuance by knowingly signing the insurance application or other reasonable means. Wis. Stat. §631.07(2). "An insurance policy is not invalid merely because the policyholder lacks an insurable interest or because consent has not been given," but a court may order the proceeds to be paid to someone other than the designated beneficiary or payee. Wis. Stat. §632.07(4); *see also U.S. Bank Nat'l Assoc. v. Sun Life Assurance of Canada*, 2015 WL 3645700 (W.D. Wis. June 10, 2015) (life insurance policy was not void and insurer could not withhold payment of benefits to subsequent owner on grounds that policy may be an "illegal wagering contract").

Stranger-originated life insurance (STOLI) is prohibited as a fraudulent life settlement act. Wis. Stat. §632.69(1)(g)7, (15); *c.f. U.S. Bank*, 2015 WL 3645700, at *5 (Wis. Stat. §632.69 did not apply retroactively and, thus, did not bear on policy at issue). A person who commits a fraudulent life settlement act is subject to civil statutory penalties, including but not limited to forfeiture of twice of the amount of any profit gained from the violation. Wis. Stat. §§601.64(3), 632.69(19). If the person intentionally commits such an act, he or she may be found guilty of a Class I felony. Wis. Stat. §§601.64(4), 632.69(19). Wisconsin statutes further provide a private right of action for any person damaged by the fraudulent life settlement act. Wis. Stat. §632.69(18).

Material Misrepresentations in the Application

Applicable State Statute

Section 631.11(1)(a) of the Wisconsin Statutes states that:

> No statement, representation or warranty made by a person other than the insurer or an agent of the insurer in the negotiation for an insurance contract affects the insurer's obligations under the policy unless it is stated in any of the following:
>
> 1. The policy.
> 2. A written application signed by the person, provided that a copy of the written application is made a part of the policy by attachment or endorsement.
> 3. A written communication provided by the insurer to the insured within 60 days after the effective date of the policy.

Similarly, no statement, representation, or warranty made by or on behalf of a group life insurance certificate holder affects the insurer's obligations unless it is stated in the certificate, or in a written document signed by the certificate holder. Wis. Stat. §631.11(4m)(b). An insurer cannot rely on a misrepresentation in a policy, certificate, or application unless a copy is provided, or instructions to inspect are provided, to the policyholder or certificate holder as described in Wis. Stat. §631.11(4m).

Prima Facie Case of Misrepresentation

Wisconsin law addresses misrepresentation in the procurement of life insurance as follows:

> No misrepresentation, and no breach of an affirmative warranty, that is made by a person other than the insurer or an agent of the insurer in the negotiation for or procurement of an insurance contract constitutes grounds for rescission of, or affects the insurer's obligations under, the policy unless, if a misrepresentation, the person knew or should have known that the representation was false, and unless any of the following applies:
>
> 1. The insurer relies on the misrepresentation or affirmative warranty and the misrepresentation or affirmative warranty is either material or made with intent to deceive.
> 2. The fact misrepresented or falsely warranted contributes to the loss.

Wis. Stat. §631.11(1)(b). *See also Pum v. Wis. Physicians Serv. Ins. Corp.*, 727 N.W.2d 346 (Wis. Ct. App. 2007).

Impact of "to the Best of My Knowledge and Belief" Language in Application

Wisconsin cases addressing policy provisions like "to the best of my knowledge and belief" hold that such language requires that an applicant's answers "accurately reflect his condition and history as he knows it to be." *Greenwood v. Knights of Columbus*, 319 N.W.2d 179, (Wis. Ct. App. 1982) (unpublished), citing *Nolden v. Mutual Benefit Life Ins. Co.*, 259 N.W.2d 75 (Wis. 1977). An insurer asking limited questions about an applicant's health assumes "more than ordinary" risks in issuing coverage. *Id.*

Materiality

Pursuant to Wis. Stat. §631.11(3), no failure of a condition prior to a loss and no breach of a promissory warranty constitutes grounds for rescission of, or affects an insurer's obligations under, an insurance policy unless it exists at the time of the loss and either increases the risk at the time of the loss or contributes to the loss. This provision, however, does not apply to failure to tender payment of premium.

Under Wisconsin law, an insurer must show materiality to avoid coverage due to misrepresentation. *Northwestern Nat'l Ins. Co. v. Nemetz*, 400 N.W.2d 33, 40 (Wis. Ct. App. 1986), citing *Nolden v. Mutual Benefit Life Ins. Co.*, 259 N.W.2d 75 (Wis. 1977). A material fact is a fact that is significant or essential to the issue or matter at hand. *Pum v. Wis. Physicians Serv. Ins. Corp.*, 727 N.W.2d 346 (Wis. Ct. App. 2007), citing *Black's Law Dictionary* (8th Ed. 2004).

Causal Connection

A misrepresentation by an insurance applicant is not effective to avoid coverage unless the insurer relied upon it in issuing the coverage. *Northwestern Nat'l Ins. Co. v. Nemetz*, 400 N.W.2d 33, 40 (Wis. Ct. App. 1986). The burden of proof on an insurance company seeking to rescind an insurance contract is the middle burden, that is, there must be clear and convincing evidence supporting every element of the claim. *Pum v. Wis. Physicians Serv. Ins. Corp.*, 727 N.W.2d 346 (Wis. Ct. App. 2007).

In Wisconsin, as in other states, the condition misrepresented does not have to contribute to the

insured's death for the insurer to avoid liability under the policy. *See Baumgart v. Modern Woodmen of Am.*, 55 N.W. 713, 714 (1893).

Impact of Agent's Knowledge and False Responses

Generally, an agent's knowledge of any facts material to the risk or which breach a condition of the policy is imputed to the insurer. Wis. Stat. §631.09(1). Similarly, a failure by a policyholder or insured to perform an act to perfect his or her rights under the policy, or to do so in the prescribed time and manner, does not affect the insurer's obligations if the failure was caused by an act or omission of an agent of the insurer with apparent authority. Wis. Stat. §632.09(2), *but see* Wis. Stat. §632.09(4) (subsections (1) and (2) do not apply if the policyholder or insured colluded with the agent or otherwise knew the agent was acting beyond the scope of authority). Notice given to the agent is notice to the insurer. Wis. Stat. §632.09(3). An agent does not include a person who is merely a policyholder of a group life insurance policy. Wis. Stat. §632.09(5).

Wisconsin law makes a distinction between an insurer or agent's knowledge of false responses when the policy was issued, and an insurer or agent's knowledge acquired after policy issuance. With regard to the first category, no misrepresentation or breach of warranty made by a policyholder, and no failure of a condition, constitutes grounds for rescission of, or affects an insurer's obligations under, an insurance policy if at the time the policy is issued the insurer has either constructive or actual knowledge of the facts. Wis. Stat. §631.11(4)(a); *see Greenwood v. Knights of Columbus*, 319 N.W.2d 179 (1982) (unpublished table decision) (life insurance applicant's disclosure to agent of prior experience with high blood pressure, restricted diet, medications, and examinations by out-of-state doctor requires imputation of knowledge to insurer).

As to after-acquired knowledge, if the insurer acquires knowledge of facts to constitute grounds for rescission of the policy, or a general defense to all claims under the policy, the insurer may not rescind the policy and the defense is not available unless the insurer notifies the insured within sixty days after acquiring such knowledge of its intention to either rescind the policy or defend against a claim if one should arise, or within 120 days if the insurer determines that it is necessary to secure additional medical information. Wis. Stat. §631.11(4)(b).

Defenses

Statutes of Limitation/Contractual Limitations Period

In Wisconsin, no insurance policy may limit the time for bringing an action on the policy to a time less than that authorized by the statutes. Wis. Stat. §631.83(3)(a). An action for breach of contract on a life insurance policy is subject to the six-year statute of limitations set forth in Wis. Stat. §893.43. *See Oaks v. Settlers Life Ins. Co.*, 791 N.W.2d 405 (Wis. Ct. App. 2010) (unpublished).

Wisconsin Stat. §813.22(2) also provides guidance as to the timing for a beneficiary to bring a claim for life insurance proceeds when the insured is absent and presumed to be deceased. It states that:

> When any [life insurance] policy, charter or bylaws... contains a provision requiring a beneficiary to bring suit on a claim of death within one year or other period after the death of the insured, and the fact of the absence of the insured is relied upon by the beneficiary as evidence of the death, the action may be begun, notwithstanding such provision in the policy or charter or bylaws, at any time within the statutory period of limitation for actions on contracts in writing dating from the date of the giving of written notice of such absence to the insurer, which notice shall be given within one year from the date when the beneficiary last heard of the absent insured.

The statute further requires that, "[i]f such notice is not given then the statutory period runs from the time when the absent person was last heard of by the beneficiary." Wis. Stats. §§813.22 to 813.34 (statutes applicable to life insurance actions based on death in which absence is relied upon as evidence of death).

Duty to Read Policy

In Wisconsin, the failure to read a policy generally precludes an action to rescind the policy (although

there are exceptions to this rule), but does not preclude an action for reformation. Under Wisconsin law, as a general matter, the owner of a life insurance policy who accepts the policy and fails to read it cannot rescind that policy based on a failure to read or examine its contents. *Bradach v. New York Life Ins. Co.*, 51 N.W.2d 13, 16 (Wis. 1952) (collecting cases). In *Bradach*, the Wisconsin Supreme Court concluded that the plaintiff-insured had a duty to examine the policy and his failure to do so precluded his ability to seek relief from the insurer. *Id.* at 16–17. The Wisconsin Supreme Court has also held that even in cases where insurer fraud is alleged, an insured is precluded from rescinding a life insurance policy when he or she fails to read it and fails to make an objection to the policy within a reasonable time after receiving the document and having a full and fair opportunity to read it. *Bostwick v. Mut. Life Ins. Co. of New York*, 89 N.W. 538 (Wis. 1902). There is authority, however, that the failure to read a life insurance policy will not prevent an insured from repudiating the policy if the policies are particularly complex. *See Berg v. Transamerica Ins. Co.*, 474 N.W.2d 528 (Wis. Ct. App. 1991) (unpublished).

Reformation, however, may still be an available remedy to an insured who fails to read his or her policy. *See Jeske v. Gen. Accident Fire & Life Assurance Corp.*, 83 N.W.2d 167, 179–80 (Wis. 1957). In *Jeske*, the Wisconsin Supreme Court held that an insured who failed to read and understand the terms of his policy was not barred from pursuing an action for reformation due to mutual mistake. The parties in *Jeske* had intended that the policy at issue would provide for property damage coverage in accordance with the plaintiff's contract with a municipal entity but, in fact, the policy did not provide such coverage. The court ruled that reformation was appropriate under the circumstances despite the insured's failure to read and understand the policy due to the parties' mutual mistake. *Id.*

Waiver/Estoppel

"Waiver" is defined as voluntary and intentional relinquishment of a known right. *Hanz Trucking, Inc. v. Harris Bros. Co.*, 138 N.W.2d 238, 244 (Wis. 1965) (citing *Nolop v. Spettel*, 64 N.W.2d 859, 862 (Wis. 1954); *Swedish American Nat'l Bank v. Koebernick*, 117 N.W. 1020, 1023 (Wis. 1908).

In Wisconsin, estoppel "cannot be invoked by the insured to create a primary liability of the insurer for which all elements of a binding contract are necessary." *Stueck v. Le Duc*, 205 N.W.2d 139, 144 (Wis. 1973). The Wisconsin Supreme Court has described the operation of estoppel with respect to insurance coverage as follows:

> Estoppel can block, but it cannot create. It is a barricade that can stop a litigant from proceeding down a roadway that, except for estoppel, would be open to him. It is not a bulldozer that can create a roadway where none in fact exists or ever did. Estoppel may prevent an insurer from enforcing certain policy provisions against its insured. However, even where the relationship of insurer and insured exists, estoppel cannot be used to enlarge the coverage of an insurance policy, for then the effect would be to create... a new contract providing coverage for which no premium has been paid.

Id. (quoting *Madgett v. Monroe County Mut. Tornado Ins. Co.*, 176 N.W.2d 314, 315 (Wis. 1970)).

Under Wisconsin law, the elements of estoppel are (1) action or nonaction which induces (2) reasonable reliance by another (3) to his detriment. *Bank of Sun Prairie v. Opstein*, 273 N.W.2d 279, 284 (Wis. 1979) (citing *In re Estate of Alexander*, 248 N.W.2d 475, 483 (Wis. 1977); *Kohlenberg v. American Plumbing Supply Co.*, 263 N.W.2d 496, 501 (Wis. 1978)). Estoppel must be proved by clear and convincing evidence—not conjecture or speculation. *Opstein*, 273 N.W.2d at 284.

Wisconsin law also specifically addresses when life insurers are estopped from defending a claim for benefits on the ground that the policyholder was not in the condition of health required by the policy:

> If under the rules of any insurer issuing life insurance, its medical examiner has authority to issue a certificate of health, or to declare the proposed insured acceptable for insurance, and so reports to the insurer or its agent, the insurer is estopped to set up in defense of an action on the policy issued thereon that the proposed insured was not in the condition of

health required by the policy at the time of issue or delivery, or that there was a preexisting condition not noted in the certificate or report, unless the certificate or report was procured through the fraudulent misrepresentation or nondisclosure by the applicant or proposed insured.

Wis. Stat. §632.50.

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