Ohio

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What is the required procedure for seeking rescission? If there is no required procedure, what are the acceptable or customary procedures for rescission?

The procedural requirements for rescinding an insurance policy in Ohio will depend on whether the policy is void *ab initio* or merely voidable. The distinction is discussed in more detail below.

If a policy is void *ab initio*, there is no required procedure for rescinding the policy. Frequently, insurers notify their insureds that a policy is void *ab initio* through a letter and the rescission is either confirmed or denied through a declaratory judgment action. *See, e.g.*, *May v. State Farm Ins. Co.*, No. 90AP-1407, 1991 WL 81925, at *1 (Ohio Ct. App. May 14, 1991); *Nat'l Credit Union Admin. Bd. v. CUMIS Ins. Soc'y, Inc.*, No. 1:11 CV 1739, 2015 WL 1538822, at *4–5 (N.D. Ohio Apr. 7, 2015); *Unencumbered Assets, Trust v. Great Am. Ins. Co.*, 817 F. Supp. 2d 1014, 1021 (S.D. Ohio 2011).

If a policy may be cancelled (i.e. is merely voidable), Ohio Revised Code sections typically spell out the procedural requirements that must be met to effect cancellation, which vary depending on the type of insurance policy. As an example, if a policy for commercial property insurance, commercial fire insurance, or commercial casualty insurance has been in effect for more than ninety days:

> The notice of cancellation required by this section must be in writing, be mailed to the insured at the insured's last known address, and contain all of the following:
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> (1) The policy number;
>
> (2) The date of the notice;
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> (3) The effective date of the cancellation;
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> (4) An explanation of the reason for cancellation.
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> Such notice of cancellation also shall be mailed to the insured's agent.

Ohio Rev. Code §3937.25(C). *See also* Ohio Rev. Code §3937.32 (providing the requirements for cancelling an automobile insurance policy); Ohio Rev. Code §3937.29 (providing the requirements for cancelling a medical malpractice policy).

If the Ohio Revised Code does not provide cancellation procedures for a policy, or the policy is void *ab initio*, it may nevertheless be advisable for insurers to comply with a comparable Ohio Revised Code provision when informing their insureds that a policy is being cancelled or will be treated as void *ab initio*. *See May*, 1991 WL 81925, at *3 (failing to note that Ohio Revised Code §3937.25(C) did not apply even though the policy was void *ab initio* and not merely subject to cancellation).

What must an insurer prove to be entitled to rescind a policy?

Is it required that the insured have committed an intentional or fraudulent misrepresentation on the application? Or is it sufficient that there was a material misrepresentation, regardless of intent?

Is there a separate requisite showing of reliance by the insurer, or is reliance presumed if materiality is found?

With regard to life insurance, accident insurance, and other such policies, does your jurisdiction recognize that the policy becomes "incontestable" after a certain period of time? And must an insurer, in turn, prove fraud to rescind the policy?

Can an insurer rescind based on the insured's failure to volunteer material information that was not requested by the application? That is, does the insured have a duty to volunteer material information?

The proof required to rescind a policy depends, in part, on whether the policy is void *ab initio* or merely voidable. Generally speaking, whether a policy is void *ab initio* or merely voidable will depend on whether a misstatement of fact by the insured relates to a warranty or representation. "'A warranty is a statement, description or undertaking by the insured of a material fact either appearing on the face of the policy or in another instrument specifically incorporated in the policy.'" *O'Donnell v. Fin. Am. Life Ins. Co.*, 171 F. Supp. 3d 711, 722 (S.D. Ohio 2016) (quoting *Allstate Ins. Co. v. Boggs*, 27 Ohio St. 2d 216, 271 N.E.2d 855 (Ohio 1971)). "'A representation is a statement made prior to the issuance of the policy which tends to cause the insurer to assume the risk.'" *Id.* Misstatements of fact with respect to warranties void a policy *ab initio*, without any consideration of intent, materiality, etc. *James v. Safeco Inc. Co. of Ill.*, 195 Ohio App. 3d 265, 268, 2011-Ohio-4241, 959 N.E.2d 599, 601 (Ohio Ct. App. 2011) (citing *Allstate Ins. Co. v. Boggs*, 27 Ohio St. 2d 216, 271 N.E.2d 855 (1971)). Misstatements of fact with respect to representations, on the other hand, render a policy voidable only if (1) they are made fraudulently and (2) the misrepresented fact is material to the risk. *Id.*

Under Ohio law, there is no separate requirement to show reliance by the insurer in order effect rescission. Any misstatement of fact with respect to a warranty renders a policy void *ab initio. James*, 195 Ohio App. 3d at 268, 2011-Ohio-4241, 959 N.E.2d at 601 (citations omitted). As discussed more fully below, reliance is merely a component of the materiality prong of the *Boggs* test with respect to misrepresentations.

With regard to long-term care insurance policies,[1] the standards for rescission, which vary depending on how long the policy has been in effect, are specifically set forth in Ohio Revised Code section 3923.441. It provides as follows:

> (A) Except as otherwise provided in division (C) of this section and notwithstanding **division (B) of section 3923.04 of the Revised Code**, no insurer shall rescind a long-term care insurance policy or certificate or deny an otherwise valid claim based upon a misrepresentation by the applicant without adhering to one of the following:
>
> (1) For a policy or certificate that has been in force for less than six months, an insurer may rescind a long-term care insurance policy or certificate or deny an otherwise valid long-term care insurance claim if the insurer can demonstrate that the insured misrepresented facts that were material to the insurer's offer of coverage to the insured.
>
> (2) For a policy or certificate that has been in force for at least six months but less than two years, an insurer may rescind a long-term care insurance policy or certificate or deny an otherwise valid long-term care insurance claim if the insurer can demonstrate that the insured misrepresented facts that were both material to the insurer's offer of coverage to the insured and that pertain to the condition for which the insured sought benefits.
>
> (3) After a policy or certificate has been in force for at least two years, an insurer may rescind a long-term care insurance policy or certificate or deny an otherwise valid long-term care insurance claim if the insurer can demonstrate that the insured knowingly and intentionally misrepresented relevant facts relating to the insured's health in the insured's application for the policy.

[1] The term "long-term care insurance" "means any insurance policy or rider advertised, marketed, offered, or designed to provide coverage for not less than one year for each covered person on an expense incurred, indemnity, prepaid, or other basis, for one or more necessary or medically necessary diagnostic, preventive, therapeutic, rehabilitative, maintenance, or personal care services, provided in a setting other than an acute care unit of a hospital." Ohio Rev. Code §3923.41(A).

Although there is no case law directly on point, *Boggs* suggests an insurer cannot rescind a policy if an insured just fails to volunteer information. As stated above, a misstatement of fact with respect to a representation is only grounds for rescission if the misrepresentation was (1) made fraudulently and (2) material to the risk. *James*, 195 Ohio App. at 268, 2011-Ohio-4241, 959 N.E.2d at 601 (Ohio Ct. App. 2011) (citations omitted). Under Ohio law, "[f]raud … includes 'deliberate omissions *when a response is required by law* or when the non-moving party *has volunteered information that would be misleading* without the omitted material.'" *Info-Hold, Inc. v. Sound Merchandising, Inc.*, 538 F.3d 448, 456 (6th Cir. 2008) (emphasis added) (quoting *Jordan v. Paccar, Inc.*, 97 F.3d 1452 (6th Cir. 1996)). Merely failing to *volunteer* information, consequently, cannot satisfy the first prong of the *Boggs* test.

If your jurisdiction requires a showing that misrepresentations be material, what constitutes materiality? Does there need to be some sort of causal nexus between the misrepresentation and ultimate loss?

In Ohio, a misstatement of fact with respect to a representation must be material for a policy to be voidable. *James v. Safeco Inc. Co. of Ill.*, 195 Ohio App. 3d 265, 268, 2011-Ohio-4241, 959 N.E.2d 599, 601 (Ohio Ct. App. 2011) (citing *Allstate Ins. Co. v. Boggs*, 27 Ohio St. 2d 216, 271 N.E.2d 855 (1971)). The question of materiality "'relates to the consideration as to whether the company would not have issued such policy, but for the representation as made upon the application.'" *May v. State Farm Ins. Co.*, No. 90AP-1407, 1991 WL 81925, at *3 (Ohio Ct. App. May 14, 1991) (quoting *Martin v. Atlanta Life Ins. Co.*, No. 75AP-163, 1975 WL 181648 (Ohio Ct. App. Aug. 7, 1975)). As such, there need not be a causal connection between the misrepresentation and any claims for which the insured sought/may seek coverage for the policy to be voidable. *Id. See also N.Y. Life Ins. Co. v. Wittman*, 813 F. Supp. 1287, 1299 (N.D. Ohio 1993) ("Accordingly, this court holds that the test for the materiality is not dependent upon the claim made by the insured, but is … determined by analyzing the effect of the falsification upon the underwriting decision.") It is, however, somewhat unclear whether an insurer must show it would not have issued the policy *but for* the misrepresentation of fact to prove materiality. While that appears to be the court's holding in *May*, the trial court in *Wittman* held that "[t]he materiality requirement asks only if the misrepresentation significantly affected acceptance of the policy. *A significant effect can surely be something less than outright rejection*." 813 F. Supp. at 1299–1300 (emphasis added).

What types of proof can or must an insurer rely on to seek rescission?

Ohio law does not set out any specific types of proof an insurer can or must rely on in seeking rescission. Typically, written misstatements of fact will serve as the basis for rescission. Indeed, misstatements of fact with respect to warranties are, by definition, incorporated into the policy. Ohio law, however, has not addressed whether oral misrepresentations by an insured could serve as the basis to rescind a policy. *But see Ozbay v. Progressive Ins.*, 6th Dist. Wood No. WD-02-007, 2003-Ohio-575, ¶¶68–71 (2003) (finding a question of fact existed with respect to whether written misstatements in a policy application were fraudulent in light of a purported conversation between the insurance agent and insured regarding the responses).

In justifying its decision to rescind a policy, an insurer may rely on affidavits from its underwriter(s) to prove misrepresentations were material. *See, e.g.*, *Crnic v. Am. Republic Ins. Co.*, 8th Dist. No. 89021, 2007-Ohio-5439, ¶¶21–22 (2007) (upholding the trial court's decision to grant summary judgment in favor of the insured because the underwriter's affidavit showed that "if American Republic had been aware of the true state of Crnic's health, the specific policy would not have been issued"). The focus, however, remains on whether the misrepresentation was material to *the insurer. May v. State Farm Ins. Co.*, No. 90AP-1407, 1991 WL 81925, at *3 (Ohio Ct. App. May 14, 1991); *N.Y. Life Ins. Co. v. Wittman*, 813 F. Supp. 1287, 1299 (N.D. Ohio 1993) ("Thus, we must determine whether the defendant's prevarication materially affected the acceptance of the risk by the insurer.").

The Ohio Revised Code does place restrictions on the use of false statements in policy applications in certain situations. As an example, Ohio Revised

Code section 3923.14, which governs health and accident insurance, provides that

> [t]he falsity of any statement in the application for any policy of sickness and accident insurance shall not bar the right to recovery thereunder, or be used in evidence at any trial to recover upon such policy, unless it is clearly proved that such false statement is willfully false, that it was fraudulently made, that it materially affects either the acceptance of the risk or the hazard assumed by the insurer, that it induced the insurer to issue the policy, and that but for such false statement the policy would not have been issued.

Does an actionable misrepresentation in a policy application render the policy voidable or void *ab initio*?

Misstatements of fact with respect to warranties render a policy void *ab initio* whereas misstatements of fact with respect to representations render a policy voidable. *O'Donnell v. Fin. Am. Life Ins. Co.*, 171 F. Supp. 3d 711, 722 (S.D. Ohio 2016) (citing *Allstate Ins. Co. v. Boggs*, 27 Ohio St. 2d 216, 271 N.E.2d 855 (Ohio 1971)). As discussed above, "'[a] warranty is a statement, description or undertaking by the insured of a material fact either appearing on the face of the policy or in another instrument specifically incorporated in the policy." *Id.* "'A representation is a statement made prior to the issuance of the policy which tends to cause the insurer to assume the risk.'" *Id.* "'The *insurer's decision to incorporate the statement in or to omit it from the policy generally controls whether the statement is a warranty or a representation*.'" Further, "the Ohio Supreme Court has held that an insurance policy must clearly and unambiguously state that a misstatement by the insured will render the policy void ab initio in order for the statement to be considered a warranty." *Id.* (emphasis added).

Typically, policy language will control whether a misstatement of fact in a policy application is incorporated into a policy and renders the policy void *ab initio*. In *Medical Protective Co. v. Fragatos*, the court found the phrase "[i]t is understood and agreed that the statements made in the insurance application are incorporated into, and shall form part of, this policy" expressly incorporated application answers into the policy, which rendered the policy void *ab initio*. 190 Ohio App. 3d 114, 121–22, 2010-Ohio-4487, 940 N.E.2d 1011, 1017 (Ohio Ct. App. 2010). Conversely, the court in *American Family Insurance Co. v. Johnson* found application answers could not render the policy void *ab initio*. In reaching its decision, the court considered the following policy provisions:

> "We will provide the insurance described in this policy in return for your premium payment and compliance with all policy terms. We will provide this insurance to you in reliance on the statements you have given us in your application of insurance."
>
> "You warrant the statements in your application to be true and this policy is conditioned upon the truth of your statements. We may void this policy if the statements you have given us are false and we have relied on them."

8th Dist. Cuyahoga No. 93022, 2010-Ohio-1855, ¶16. Given the language, the court determined that any misstatements in the application were not expressly incorporated into the policy and, consequently, could not render the policy void *ab initio*. *Id.*, at ¶17. *See also Nat'l Credit Union Admin. Bd. v. CUMIS Ins. Soc'y, Inc.*, No. 1:11 CV 1739, 2015 WL 1538822, at *15 (N.D. Ohio Apr. 7, 2015) (finding the policy did not expressly incorporate application answers into the policy).

Upon a showing of the requisite elements of rescission, is rescission effective as to innocent insureds and third-parties?

It appears Ohio law has not expressly addressed whether insurance coverage may be available to innocent insureds and third-parties following rescission. In *Unencumbered Assets, Trust v. Great American Insurance Co.*, the trial court simply applied the policy language to determine whether rescission was effective as to innocent insureds. In that case, an insured made misstatements of fact with respect to warranties that rendered the policy void *ab initio*. 817 F. Supp. 2d 1014, 1029–30 (S.D. Ohio 2011). In considering whether the insured's actions rendered the policy void with respect to "innocent insureds," the court held that "[u]nder the terms of the severability clause, [the insured's] misrepresentations are imputed to the other insureds for purposes of determining the validity of the policy." *Id.* at 1030.

Are there any statutory or regulatory time limits on seeking rescission of a policy? If so, does the statutory or regulatory language override or supersede express policy language allowing for rescission beyond the time limitation?

In Ohio, if a policy is merely voidable, "an insurer cannot rescind [the] policy after becoming liable on it, unless the putative misrepresentation is written into the policy itself." *Fifth Third Mortg. v. Chicago Title Ins. Co.*, 692 F.3d 507, 513 (6th Cir. 2012) (citing *Allstate Ins. Co. v. Boggs*, 27 Ohio St. 2d 216, 271 N.E.2d 855 (Ohio 1971)). This rule applies even if the policy provides coverage for future losses stemming from past events. *Id.* In *Fifth Third*, the bank sought coverage under its title insurance policy after its borrower defaulted on a mortgage and the bank discovered (1) the borrower did not have title to the mortgaged property and (2) other creditors had superior liens on the property. *Id.* at 509–10. While Chicago Title argued "Fifth Third's failure to disclose its underwriting practices would amount to a misrepresentation of a material fact on which Chicago Title relied[,]" the court held that, even if that was true, Chicago Title could not escape its liability under policy because it had "already incurred a liability under the terms of the policy." *Id.* at 513.

As discussed above, the requirements for cancelling a long-term care insurance policy under Ohio Revised Code section 3923.441 vary depending on how long the policy has been in effect. It does not appear that Ohio courts or the legislature have identified other situations where an insurance policy may become non-rescindable.

What is the requirement for an insurer to be considered to have waived its right to rescind the policy, and what other equitable defenses are available to insureds?

Does an insurer need to have actual knowledge that the insured has made a misrepresentation, or will constructive knowledge be sufficient?

Will an insurer be estopped from rescinding the policy if it waits too long to do so after acquiring actual or constructive knowledge of the misrepresentation?

When is an insurer required to investigate application answers? If an insurer is so required, does the duty extend only to "easily ascertainable" fraud, or does it go further?

If the insured intentionally made the misrepresentation or otherwise acted in bad faith, can there be any waiver by the insurer at all?

To prove an insurer waived its right to rescind a policy, the insured must show the insurer knowingly and voluntarily relinquished that right. *El-Ha'Kim v. Am. Gen. Life & Acc. Co.*, Case No. 97 CA 6, 1999 WL 669508, at *6 (Ohio Ct. App. Aug. 20, 1999) (citations omitted). An insurer may waive its right to rescind a policy if it accepts a premium and has "knowledge of … facts which would entitle it to treat the policy as no longer in force." *English v. Nat'l Cas. Co.*, 138 Ohio St. 166, 171, 34 N.E.2d 31, 34 (1941).

As demonstrated by the court's decision in *El-Ha'Kim*, an insurer's mere suspicions of fraud are insufficient to invoke waiver. In that case, the insured argued its insurer waived its right to rescind the policy because the insurer continued to accept premiums even after the insurer initiated an investigation into the insured's application responses regarding pre-existing medical conditions. The court found that because the insurer did not have direct evidence of the insured's pre-existing conditions until it completed its investigation (at which time it rescinded the policy and returned the insured's premiums), the insurer had not waived its right to rescind the policy. 1999 WL 669508, at *6–7. *See also May v. May v. State Farm Ins. Co.*, No. 90AP-1407, 1991 WL 81925, *2 (Ohio Ct. App. May 14, 1991) (rejecting plaintiff's argument that the insurer should have been aware plaintiff was making misrepresentations in his policy application because he had been previously insured by a high-risk insurance company and the insurer also provided high-risk insurance). *But see Unencumbered Assets, Trust v. Great Am. Ins. Co.*, 817 F. Supp. 2d 1014, 1031 (S.D. Ohio 2011) (finding there was a triable issue as to

whether Great American waived its right to rescind the policy based on its decision to accept payments for tail coverage because Great American may have known the insured submitted false financial statements in its insurance proposal form).

As discussed above, Ohio law also prohibits an insurer from rescinding a policy if it has already become liable on it, unless the policy is void *ab initio*. *See Fifth Third Mortg. v. Chicago Title Ins. Co.*, 692 F.3d 507, 513 (6th Cir. 2012) (citing *Allstate Ins. Co. v. Boggs*, 27 Ohio St. 2d 216, 271 N.E.2d 855 (Ohio 1971)).

There are no other statutory or common law time limits for rescinding a policy.

Under what circumstances must an insurer refund the premiums to the insured when rescinding a policy, and when must the refund be dispensed? Does the insurer have to refund the premiums even in situations where the insured procured the policy through willful fraud?

The rescission of a policy entitles an insured to the return of the premium, as if the premium had never been paid and the policy had never been issued. *See Nat'l Credit Union Admin. Bd. v. CUMIS Ins. Soc'y, Inc.*, No. 1:11 CV 1739, 2015 WL 1538822, at *10, n. 16 (N.D. Ohio Apr. 7, 2015) ("If a policy is declared void *ab initio*, it is considered to never have been executed and, therefore, an insurer has no obligation under the policy."). But, "a refund of an unearned premium following the cancellation of an insurance policy is neither a condition precedent nor a condition subsequent to an effective termination unless so stated in the policy." *Canter v. Christopher*, 80 Ohio App. 3d 465, 469, 609 N.E.2d 609, 612 (Ohio Ct. App. 1992) (citing *Gibbons v. Kelly*, 156 Ohio St. 163, 101 N.E.2d 497 (Ohio 1951)). *But see* Ohio Rev. Code §3937.33 (The statute provides that, with regard to automobile insurance policies, "prior to the effective date of cancellation, the insurer shall refund to the insured any premium and other sums which may be due the insured.").

Are there any other notable cases or issues regarding an insurer's right and ability to rescind?

No.

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