

THE LAW OFFICES OF

**SCHINDEL, FARMAN, LIPSIUS,  
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## **Life and Disability Insurance Newsletter June 4, 2010**

Periodically we inform our clients of interesting developments relating to life insurance and disability insurance. Over the past two weeks a few decisions have been delivered which we believe are of interest to our clients.

We invite you to contribute any item of interest or court decision that you believe will benefit other clients. Please forward items to [Blevine@sfl-legal.com](mailto:Blevine@sfl-legal.com) for inclusion in future bulletins. Please indicate in the email whether you would like acknowledgment of the contribution.

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### **Does An Insurance Company When Rescinding a Policy Have the Right to Refuse to Refund the Premium and Deduct Commissions and Other Expenses**

In most states a precondition of policy rescission is refund of premium. In past years, the insurance industry, generally has refunded premium, or offered to refund premium when it has commenced a rescission action. In recent years many insurers have taken the position that as commissions and expenses frequently equaled or even exceeded the premium, the insurers were not obligated to refund premium. In a very recent decision a federal magistrate judge held that the insurer did not have to refund premium and could hold the premium until the court determined whether fraud had been committed in the application process, who committed the fraud, and the damages suffered by the insurer. A copy of the decision is attached.

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## **Is an Insured Entitled to Obtain from the Insurer, in Discovery, Similar Policies Issued by the Insurer?**

Over the past two years life insurers have commenced in excess of 500 actions to rescind policies based upon the absence of insurable interest and based upon false or exaggerated financial disclosures. In most jurisdictions, in order to rescind a policy an insurer must prove both false application and the materiality of the false information. Insureds, policy owners and premium financers have asserted that false financial information may not be material. In order to prove the absence of materiality, insureds, policy owners and premium financers have served discovery requests demanding the insurer provide copies of other similar applications. Insurers have resisted providing this information. In quite a number of instances we have successfully obtained such information and have been able to show that the insurers issued policies, even in the absence of any financial representation or have disregarded their underwriting guidelines. In a decision issued this week one federal judge found that the insurer did not have to produce other policies. The court stated:

The discovery sought by defendants here – namely, policy files and applications by 75 year olds for life insurance in the amount of \$5 million or more – is simply not relevant to the determination of materiality. As stated above, “[t]he question ... is not whether the company might have issued the policy even if the information had been furnished; the question in each case is whether the company has been induced to accept an application which it might otherwise have refused.” Mutual Ben. Life Ins. Co. v. JMR Electronics Corp., 848 F.2d 30, 32 (2d Cir. 1988).

Furthermore, “[t]his test does not require the insurer to show that it would not have issued any policy at all to the insured, but only that it would not have issued the policy in question.” Paul Revere Life Ins. Co. v. Hines, 1998 WL 809000 at \*3. Thus, even if it was true that John Hancock did issue other life insurance policies of \$5 million or more to persons ages 75 or older, that would not help determine whether John Hancock had been induced into issuing policy it might have refused or offered under different terms.

Simply obtaining the applications for such individuals will not help determine the materiality of net assets and other responses on the application. Even if such applications were relevant, obtaining the entire file will place a heavy burden and expense on plaintiff, which is not justified at this juncture, absent a showing that all other avenues of discovery have been exhausted and there is no alternative source of information.

A copy of the decision is attached.

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If you know of anyone who would benefit by receipt of this and similar updates please email [blevine@sfl-legal.com](mailto:blevine@sfl-legal.com) with that persons email address.

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