IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PAUL BROEGE, and THE ESTATE OF STEVEN J. BROEGE,
BY PHYLLIS A. BROEGE, PERSONAL REPRESENTATIVE,
Wisconsin Residents,

Plaintiffs,

v.

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,
an Indiana Corporation,

Defendant.

OPINION AND ORDER

11-cv-566-slc

This is a lawsuit over an unpaid half-million dollar life insurance policy. The parties have filed cross motions for summary judgment. For the reasons stated below, I am granting summary judgment to defendant.

Defendant Lincoln National Life Insurance Company sold the contested $500,000 policy to Garit E. Broege (Broege) in March 2009 and he died less than two years later. Lincoln then notified Broege's beneficiaries–his brothers Paul and Steven (plaintiffs)[1]–that it was rescinding the policy and denying coverage because it had learned that, contrary to Broege's denials in his application, Broege had been a smoker. In July 2011, plaintiffs filed a state court lawsuit against Lincoln, for breach of contract and bad faith, and asserting that Lincoln was barred under Wis. Stat. § 631.11(4)(b) from rescinding the policy because it had failed to notify plaintiffs of its intent to rescind within 60 days of obtaining information about Broege's smoking history. On August 10, 2011, defendant removed the case to this court, asserting federal diversity jurisdiction under 28 U.S.C. § 1332(a). Dkt. 1.

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[1] Steven Broege died on May 20, 2011. This suit is brought on behalf of his estate by his wife, Phyllis Broege, who is his personal representative.

Before the court are the parties' cross-motions for summary judgment. Plaintiffs initially argued only that Lincoln's notice of rescission was untimely, conceding that the post-death information received by Lincoln concerning Broege's smoking history had provided a legitimate basis for rescission. However, after Lincoln filed its own motion for summary judgment on the timeliness issue, plaintiffs altered their position, arguing for the first time that there is a genuine factual dispute whether Broege knew or ought to have known that he was making a false statement when he answered "no" to Lincoln's question about nicotine use. Plaintiffs contend that the propriety of Lincoln's conclusion that Broege had made a material misrepresentation of fact on his insurance application is called into doubt by information submitted by Lincoln in its summary judgment papers about its underwriting practices.

Plaintiffs cannot prevail. First, they have not adduced any facts from any source that would support a finding that Broege did not understand that the question whether he had "ever" used tobacco or products containing nicotine included past use. Plaintiffs' citation to Lincoln's underwriting practices on this issue is a canard.

Second, if an insurer needs to review medical records before deciding whether to rescind a policy, then Wis. Stat. § 631.11(4)(b), allows 60 extra days to do so. Because it is undisputed that Lincoln notified plaintiffs within this 120-day time period of its intent to rescind the policy, Lincoln is entitled to judgment as a matter of law.

FACTS

The facts are undisputed. On or about November 10, 2008, Garit Broege applied for a life insurance policy from Lincoln. Question No. 64 of Lincoln's application asked "Have you ever used tobacco or products containing nicotine?" The application instructed that if the answer to Question No. 64 was "yes," then the applicant was to identify the type of product, the dates the applicant first and last used it, and the amount and frequency of use. Broege answer "no" to Question 64. Broege gave the same answer to the same question on a Medical Supplement to the Application, which he signed on or about December 2, 2008.

In reliance on this information, on March 13, 2009, Lincoln issued Policy No. ME 7059019 to Broege on a preferred "non-tobacco" class rating. The policy provided Lincoln a two-year window during which it could challenge a claim or seek to avoid liability on the basis of statements made by Broege in his application. Broege died about 18½ months later, on October 1, 2010, during this contestability period.

Lincoln began a contestability investigation with assistance from Research Service Bureau, Inc. ("Research"). Through Research, Lincoln obtained the following information about Broege's smoking history (listed in date order when Lincoln learned it):

- November 16, 2010: An October 10, 2010 statement from Broege's wife, Barbara, indicating that Broege did not smoke or use tobacco products of any type;

- November 16,2010: A November 4, 2010 statement from Barbara Broege in response to a smoking questionnaire indicating that Broege had smoked one cigarette a day until he quit smoking in January 2009 (*i.e.* three months after he applied for life insurance);

- November 26, 2010: Medical records from Cancer Treatment Centers of America containing notes indicating that Broege had quit smoking in 1992;

- December 6, 2010: Medical records from Broege's primary care physician, Dr. Harry Ramsey, containing notes indicating that Broege had quit smoking in 1992;

- December 15, 2010: Medical Records from Mercy Hospital, indicating that Broege had been a smoker until about April 2010.

This evidence allowed for three possibilities: (1) Broege had never smoked at all; (2) Broege had smoked in the past but quit in 1992; or (3) Broege was a smoker who quit sometime after he applied for life insurance (either in January 2009 or April 2010).

When confronted with conflicting evidencing during a contestability investigation, Lincoln's customary practice is to give greatest weight to the statements of an insured's spouse, unless the insured's medical records are clearly contradictory. Accordingly, Lincoln determined that it would give the greatest weight to Barbara Broege's statement that her husband had smoked 1 cigarette a day until January 2009, since this statement was not clearly contradicted by the medical evidence and was consistent with the records from Mercy Hospital.

On February 3, 2011, Lincoln notified plaintiffs that it was rescinding the policy based on the information obtained during its investigation, which contradicted Broege's negative answer to Question 64 on the Application for Life Insurance. According to Lincoln, if it had known this information at the time Broege had applied for life insurance, then it would not have issued the policy for which Broege had applied.

If Broege actually had quit smoking in 1992, as was indicated in the medical records from Cancer Treatment Centers of America and Dr. Ramsey, then Lincoln still would have issued him the "non-tobacco" policy and would not have rescinded it.

OPINION

I. Summary Judgment Standard

Summary judgment is proper where there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions and affidavits, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "'A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party.'" *Sides v. City of Champaign*, 496 F.3d 820, 826 (7th Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005)). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780 (7th Cir. 2007). Even so, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

II. Basis for Rescission

In Wisconsin, an insurer is entitled to rescind a policy if: 1) a misrepresentation is made in an insurance application; 2) the person making the misrepresentation knew or should have known that the representation was false; 3) the insurer relied on the misrepresentation; and 4) the misrepresentation was material or made with intent to deceive. Wis. Stat. § 631.11(1)(b). Plaintiffs initially conceded that Broege's statements about his smoking history were false and had provided Lincoln with a basis to rescind the policy; at this juncture, however, plaintiffs contend that there are genuinely disputed facts on this question.

First, plaintiffs argue that the conflicting evidence regarding Broege's smoking history precludes the court from determining as a matter of law whether Broege knew or should have known that he was making a false statement when he answered "no" to the question whether he had ever used products containing nicotine. This argument borders on the preposterous. Question No. 64 was not ambiguous: it asked Broege if he had *ever* used nicotine products. The common understanding and definition of the word "ever" in this context is "at any time" or "in any way; at all."[2] By answering "no," Broege was saying "not ever" or "never."

Further, even if there were any justifiable doubt whether this particular question was asking about past nicotine product use in addition to present use–and there is no justifiable doubt–then any such doubt would have been erased by the instruction immediately following the question, which directed Broege to provide the dates that any such use began *and ended*. Obviously, use that has ended would be past use, not current use.

With the exception of Barbara Broege's October 20, 2010 statement–which plaintiffs do not pretend to have been correct–all the evidence obtained by Lincoln establishes that Broege had been a smoker at some point in his life. Tellingly, plaintiffs, who are Broege's close relatives and presumably would have some knowledge of his smoking history, have not submitted affidavits denying that Broege ever was a smoker, nor do they suggest that other evidence exists that calls this fact into question. On this record, no reasonable trier could find that Broege did not know or could not have known that he was making a false statement when he answered "no" to Question No. 64.

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[2] *See, e.g.,* www.thefreedictionary.com/ever.

Barbara Broege's first statement, in which she denied that her husband smoked or used tobacco products, is insufficient to create a material dispute of fact. As plaintiffs admit in the course of their argument regarding timeliness, "Lincoln could well have concluded under its policies that [Barbara Broege's second] statement serve[d] to correct her earlier statement dated October 20, 2010." Plt.'s Reply Br., dkt. 30, at 13 (arguing that Broege's second statement constituted "sufficient facts" to rescind and required Lincoln to provide notice of rescission within 60 days of that statement). Indeed, as Lincoln points out, Barbara Broege has not testified that her first statement was accurate and has not disavowed her second statement; to the contrary, she has attached her second statement to her declaration in this lawsuit, thereby vouching for its accuracy. And as already noted, plaintiffs do not suggest that they have any other evidence suggesting that Broege never smoked, or even suggesting that he had stopped smoking in 1992, nor do they ask for more time to obtain such evidence. On this record, the only reasonable conclusion that can be drawn is that Broege knew or ought to have known that he was making a false statement on his insurance application.

Plaintiffs also appear to argue that Broege's false statement was not material. In this context, a statement is "material" if it had "a significant bearing upon an insurer's decision to insure the risks the policy is to cover." Wis. JI-Civil 3100. Plaintiffs rest their materiality argument on the underwriter's statement that if, in fact, Broege had stopped smoking in 1992, then Broege would not have been disqualified from Lincoln's "preferred Non-Tobacco" rating. However, plaintiffs do not dispute and cannot dispute that other evidence obtained by Lincoln indicated that Broege had *not* stopped smoking in 1992 but rather had smoked at least one cigarette a day until after he had applied for life insurance. Nor have plaintiffs adduced evidence

to put genuinely into dispute that: (1) Lincoln's customary practice when receiving inconsistent information regarding an insured's tobacco use is to give the greatest weight to the spouse's statement unless the medical records are clearly contradictory; and (2) Lincoln followed that practice in this case when it relied on Barbara Broege's statement that her husband had been a smoker until January 2009 as a basis for rescission.

Notably, plaintiffs have not attempted to show that Lincoln's practice is not reasonable or that its underwriter did not honestly conclude, based on this practice, that Barbara Broege's statement was the most reliable evidence concerning Broege's cigarette use. Absent such evidence, there are no facts that would allow a jury to find that Broege's false statement about his smoking history did not have a significant bearing on Lincoln's decision to issue him a "preferred, non-Tobacco" policy.

III. The Timing of Lincoln's Rescission Notice

The next question is whether Lincoln complied with its statutory deadline for notifying plaintiffs that it was rescinding Broege's policy. Wis. Stat. § 631.11(4)(b) provides:

> *Knowledge acquired after policy issued.* If after issuance of an insurance policy an insurer acquires knowledge of sufficient facts to constitute grounds for rescission of the policy under this section 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 60 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.

The legislature might have added 60 days to the insurer's notice deadline when medical information was necessary because it recognized that securing such information could require

insurers to make requests to and receive responses from third-party care providers outside the control of the insurer or the insured; perhaps the legislature felt that in many cases, it would be the insured who would benefit from a more thorough review rather than a too-quick rescission decision based on hastily-gathered medical records. In any event, the statute clearly doubles the allotted time when the insurer decides that it needs to obtain additional medical information before deciding whether to rescind.

It is undisputed that Lincoln notified plaintiffs of its decision on February 3, 2011. Plaintiffs contend that this notification was untimely because it was provided more than 60 days after Lincoln acquired knowledge of "sufficient facts" to constitute grounds for rescission.[3] According to plaintiffs, Lincoln had sufficient facts to rescind the policy as early as November 16, 2010, when it received Barbara Broege's November 4, 2010 statement, and not later than November 26, 2010, when it received the medical records from the Cancer Treatment Centers, which confirmed that Broege had misrepresented his smoking history on his insurance application. If plaintiffs are correct, then Lincoln's rescission notification was untimely.

Lincoln contends otherwise, arguing that it had 120 days–not 60–from November 16, 2010 within which to rescind the policy,[4] because on that date it received *two* statements from Barbara Broege—one indicating that her husband *had* been a smoker and the other indicating that he had *not*–-which created an inconsistency that precluded Lincoln from determining conclusively whether a basis for rescission existed. In order to resolve this inconsistency, Lincoln says it had to review Broege's medical records, which put the statute's 120-day deadline into play.

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[3] January 15, 2011 is 60 days after November 16, 2010.

[4] March 16, 2011 is 120 days after November 16, 2010.

Lincoln is correct. As the statute makes clear, once Lincoln determined that it needed additional medical information, Lincoln had 120 days in which to complete its investigation and notify plaintiffs. There is no support for plaintiffs' assertion that permitting Lincoln to use the 120-day limit would allow an insurer to "forever extend the notification time line merely by acquiring duplicitous, irrelevant medical information." Plt.'s Br. in Supp., dkt. 17, at 12. As Lincoln points out, an insurer cannot "forever" extend the deadline: under the statute, the clock begins to run when the insurer acquires "knowledge of sufficient facts to constitute grounds for rescission of the policy." When these grounds for possible rescission necessitate medical record review, the time on the clock is increased to 120 days total, but the clock is not rewound. In other words, the clock only starts once; whether it runs out in 60 days or 120 days depends on whether the insurer sees the need to gather additional medical information.[5]

Plaintiffs also argue that it is unfair to give the insurer "total control" as to whether the 60- or 120-day deadline applies. However, the statute evinces the Legislature's willingness to grant this discretion to insurers and to tolerate an extra 60 days of investigation in order to allow insurers to review medical records more thoroughly. Frankly, the difference between a two-month deadline and a four-month deadline when deciding whether to make a half-million dollar payout on a policy that had been in effect for about a year and a half does not raise the court's equitable hackles.

Finally there is no support for plaintiffs' contention that the medical records obtained by Lincoln in this case were either duplicitous or irrelevant, or more importantly, that Lincoln

[5] Lincoln's arguments suggest that it may be interpreting the statutory deadlines more loosely than the court, but there is no need to address this possible discrepancy because Lincoln sent its rescission notice within the 120 day deadline that the court has found allowable under the statute.

knew they would be such when they ordered them. Contrary to plaintiffs' contention, the medical records obtained by Lincoln all contained information relevant to Broege's smoking history and were not duplicitous. In sum, Lincoln's rescission decision was timely.

ORDER

IT IS ORDERED that:

1. Plaintiffs' motion for summary judgment is DENIED.

2. Defendant's motion for summary judgment is GRANTED.

3. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 9th day of April, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge