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On the Legal Relief of Insurance Fraud——Take the Right to Cancel the Insurance Law and the Right to Cancel the Civil Law as the Way

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Abstract: With the development of science and technology, insurance fraud is not uncommon, but my country's legal remedies for this are not clear. This article first explains the concept of insurance fraud and compares and analyzes the difference between the insurer's right of rescission and revocation, and summarizes the current application dilemmas of the two rights. Next, the author analyzes the preconditions for the insurer to exercise the right of termination according to the law to distinguish the two rights again, and then introduces the current thinking dimensions of scholars from the two mainstream viewpoints of "exclusion of application theory" and "selection application theory". At the same time Combining with extraterritorial regulations and summarizing the advanced experience that our country can learn from, the author finally puts forward suggestions on regulating the application of the insurer's right of cancellation and cancellation from the subjective aspects of the insurant and the insurer in anticipation of resolving the dilemma of the conflict of rights.

Keywords: Insurance Fraud; Right of Cancellation; Right of Revocation; Period of Exclusion

Introduction

With the gradual increase in the incidence of insurance fraud incidents, the insurance law's regulation of insurance fraud has become even more inadequate. There are constant disputes in theory and practice regarding the application of the relief insurer's right of rescission and revocation. This article aims to make recommendations from the perspective of regulating the application of the insurer's rescission and revocation rights, so as to better protect the insurer from fraud. Rights relief, while taking into account the interests of policyholders.

1. Overview of basic issues

1.1 The concept of insurance fraud

Insurance fraud is when the insurant deliberately fails to inform the relevant information truthfully when entering into an insurance contract, which makes the insurer fall into a misunderstanding and conclude an insurance contract. Specific notifications that are not truthful can be achieved by concealing the truth or fictional circumstances. In practice, policyholders can commit fraud by fabricating false medical records, concealing medical history, etc., thereby influencing the insurer's decision whether to underwrite or whether to increase the premium rate.

1.2 The difference between the insurer's right of rescission and the right of cancellation and the application dilemma

There are many differences between the right to cancel an insurance contract and the right to rescind. "the basic norms of the insurer's right to rescind the "Insurance Law" Article 16 Paragraph 2 and the basic norms of the "Civil Code" 148 Articles have differences in legislative intent, constituent elements, and legal effects. "[1] First, the insurer's right to terminate the contract and the right to cancel both belong to the right of formation, and both are restricted by the period of exclusion. If the corresponding rights have not been exercised after the expiration period, the rights will be eliminated, that is, the defrauded insurer will be urged to actively exercise their rights with an irrefutable clause. However, the length of the exclusion period is different. The period of exclusion in the Civil Code is 1 year or 5 years. The former is calculated after knowing or should know the reason for the cancellation, and the latter is calculated after the conclusion of the insurance contract. The "Insurance Law" stipulates that the exclusion period for the right to cancel the contract is 30 days or 2 years, and the calculation start date is the same as the right to cancel. It can be seen that the exercise period of the right to cancel the contract is much longer than the exercise period of the right to cancel, which is more beneficial for the insurer to request rights relief. Second, the constituent elements of the exercise of the right of cancellation and the right of revocation are not exactly the same. The constitutive element for the exercise of the right of revocation is that the policyholder commits fraud. Fraud contains two requirements. The first point requires that the policyholder must be deliberate subjectively, that is, he knows that his failure to tell the truth will affect the establishment of the insurance contract, but he hopes or lets the contract be so. Established; The second point requires that the insurer must fall into a "misunderstanding" due to the fact that the insured did not tell the truth, that is, the insurer is deceived without intention or gross negligence to cause a misunderstanding. The insured who exercises the right of cancellation can be subjectively deliberate or grossly negligent. Third, the two methods of exercise and the legal effects after exercise are different. The right of revocation needs to be exercised by the people's court or arbitration institution, and the right of revocation can be effective only by a unilateral notice. Moreover, the insurer does not need to refund the insurance premium after the contract is cancelled, and both parties need to restore the original state after the contract is cancelled.

In summary, when the insured cheats the insurer, the legal remedies that the insurer can choose include, but are not limited to, the exercise of the right of cancellation and the right of revocation, but the two may have the effect of competition or exclusion when they are exercised. However, my country's laws or judicial interpretations do not impose regulations on this at present, so academic circles and judicial practice have been arguing about this.

2. Prerequisites for the insurer to exercise the right of rescission

The insurer needs to inquire about important matters related to the conclusion of the insurance contract first. Only when the insurer has fully fulfilled his inquiry responsibility, the insured person will have the corresponding obligation of truthful notification. If the insurer does not inquire, then the insured does not have an obligation to answer this part truthfully, and the insurer will not have the right to rescind.

The issue of the insurer is a major matter related to insurance. At the same time, what the policyholder fails to tell the truth is also a major issue that can affect whether the insurer enters into an insurance contract or sets the terms in the contract.

The insurer did not waive in advance. According to the provisions of Judicial Interpretation II of the Insurance Law, if the insurer signs an insurance contract and collects insurance premiums when he should know that the insured has not truthfully informed it, it shall be deemed that the insurer has waived the right to rescind. That is to say, the insurer needs to check the insurance information carefully and accurately, and if he strays into the scam because he is negligent in underwriting, he will be responsible for the consequences.

3. Extraterritorial regulations and experience reference

My country's regulations on the period of exclusion of the insurer's right to discharge are actually borrowed from my country's Taiwan's "Insurance Law", but China's Taiwan also borrows from the relevant provisions of the British and American insurance laws. Compared with extraterritorial regulations, civil law countries have a longer exclusion period. "If the remedy path of the right of revocation is not opened, it will undoubtedly condone the emergence of a large number of

insurance frauds if the insurer's revocation of the right to eliminate the circumstances that have passed during the reprimand period provides relief."^[2] The "German Insurance Contract Law" stipulates that if the insured fails to tell the truth intentionally or fraudulently, the exclusion period is 10 years. The "Japan Insurance Law" uniformly stipulates a five-year exclusion period for certain types of insurance, such as life insurance. At the same time, the most worthy reference for our country is that the "German Insurance Contract Law" sets up an exception in the setting of the exclusion period, that is, the exclusion period is no longer an absolutely irrefutable clause, which also greatly adapts to the rapid pace of the insurance industry. Development is conducive to protecting the interests of the insurer. The exception applicable to the German law during the exclusion period is "the occurrence of an insured event during the exclusion period". The California Insurance Law of the United States regards the insured's survival as a restrictive provision for the application of non-defense clauses. Because when there is no insured incident during the exclusion period, it means that the insured's fraudulent behavior did not make the fairness of the contract between the two parties too much different. At this time, it is necessary to take into account the interests of the insurer and the insurer to apply the exclusion to the insurer. period.

4. Regulating the applicable methods of the insurer's right of rescission and cancellation

4.1 Apply according to the subjective aspects of the insured

4.1.1 The policyholder is deliberately subjective

According to the legal provisions of the rescission right and the rescission right, when the insured is deliberate, he meets the constituent elements of the rescission right and the rescission right at the same time, which means that both may be applicable. Because when the insured is deliberate, this subjective attitude is extremely bad and seriously disrupts the order of the insurance market, so relevant laws restrict this.

4.1.2 The policyholder is subjectively due to gross negligence

According to relevant laws and regulations, only the right of rescission allows policyholders to fail to inform truthfully due to gross negligence. Perhaps the legislators considered that the policyholders should pay special attention to such major matters, so the gross negligence at this time is more subjective. Therefore, at this time, the two rights are in a state of "exclusion of application", and the right of cancellation is applied to the right of cancellation. After judging the subjective state of the insured, combined with the subjective state of the insurer, the rights that the insurer should exercise can be obtained.

4.2 Apply according to the subjective aspects of the insurer

4.2.1 Subjective intention or gross negligence of the insurer

Because the judicial interpretation of the Insurance Law mentioned above stipulates that if the insurer fails to fulfill the obligation of insurance underwriting, it shall be regarded as a waiver of the right to rescind. That is, if the insurer does not fulfill the strict review and underwriting obligation intentionally or grossly negligently, the insured takes advantage of the loopholes, and the insurer shall bear the unfavorable legal consequences. The deliberate or gross negligence here means that the insurer has enough for the item the review ability of the company is negligent in review. Similarly for the right of revocation, if the insurer did not discover the insured's scam due to deliberate or gross negligence, and the fraud could be avoided as long as he paid attention to it, it means that the insured's behavior was not sufficient to make the insurer fall into a misunderstanding. In other words, the insurer did not fall into a misunderstanding but gave up his own interests, so the insured's behavior cannot be regarded as fraud. In summary, when the insurer intentionally or grossly negligent neither the

right of revocation nor the right of rescission can be applied.

4.2.2 The insurer is subjectively due to general negligence

Because of the rapid development of modern technology and the increasingly sophisticated methods of fraud and fraud, insurers need to face increasingly diverse and novel fraud methods. However, due to the limited scale and capital of the insurer, the insurer may not have sufficient high-tech and professional capabilities for this. Under review, the insurer can only detect fraud when opening the claims settlement process, but the two-year exclusion period of the right of cancellation is often exceeded, so it is extremely unfair to the insurer at this time. Although the "Insurance Law" focuses on protecting the interests of the insured or the insured, "the law is not difficult for others," and the review difficulties caused by the insured should not be passed on to the insurer to bear the adverse consequences of review. Therefore, the time limit should be relaxed at this time. The best way is to allow the insurer to apply the right of revocation. The five-year period will no longer allow the insurer to shirk its responsibilities.

To sum up, when the insured intentionally fails to tell the truth while the insurer is subjectively negligent, the right of revocation and the right of rescission can be "selected and applied" because it fully complies with the constituent requirements for the exercise of the two rights. At this time, it has been judged that the insurer is out of general negligence. If the insured event occurs within the 2-year exclusion period of the right of cancellation, the provisions of the right of cancellation apply; if it occurs after 2 years but within 5 years, the right of cancellation applies. The main consideration is that the insurer can review the fraudulent behavior of the insured after the insured incident occurs. In order to avoid the long-term instability of the insurance contract, the validity of the contract is terminated in time. Practice is rather chaotic. Because the right of revocation protects the insurer for a longer period of time than the right of revocation, in practice the insurer will choose to exercise the right of revocation. However, there are also insurers who can detect fraud by the insurer within two years, so they actively exercise the right of revocation and There is no need to refund insurance premiums.

Conclusion

By analyzing the legal constitutional elements of the right to cancel the insurance law and the right to cancel the civil code, it can be found that there are differences in the provisions of the two. In terms of the differences between the two, the application of one of the rights can be excluded, but when the legal constitutional elements of the two are fully met. At that time, there is indeed a state of competition between the two rights. There is no specific regulation on how to choose the application in my country. Therefore, we can only combine the specific practical difficulties and balance the interests of both parties to the insurance contract to uniformly improve the application method. In this article, the author puts forward personal immature application suggestions based on foreign experience, hoping to contribute to the solution of the current insurer's application of conflicts of rights.

References

- [1] Wu Yiwen. Legal Regulation Path of Insurance Fraud[J]. Legal Review, 2019, 37(5): 59-71.
- [2] Ren Yishun. On the right of insurer's contract cancellation under the background of insurance fraud: a clue from a two-tier court decision in an insurance fraud case[J]. Insurance Research, 2015(3): 80-91.