

COMPLIANCE & LEGAL SECTIONS ANNUAL MEETING 2019

JULY 15-17

FORT LAUDERDALE MARRIOTT HARBOR BEACH RESORT & SPA

FORT LAUDERDALE, FL

ACLI
Financial Security... for Life.



Litigation Update: Recent Developments in Life Insurance Litigation

Justin Krypel, Securian Financial
Irma Solares, Carlton Fields, PA
Ashley Street, USAA

Contestability, Rescission & Suicide

- Americans purchased **\$3.1 trillion** of new life insurance coverage in 2017
- 142 million policies in force with a face amount of **\$11.9 trillion**
- **\$1.2 billion** in claims in 2017

ACLI Life Insurers Fact Book 2018

Material Misrepresentation

- Contestability Periods
- False statements or omissions
- Multi-factor test:
 - (1) misrepresentation and
 - (2) material to underwriting
- Two key areas where states differ:
 - “Intent to deceive” (or “knowing”) requirement
 - Relationship between the loss and the misrepresentation



Regulatory Provisions

- South Carolina Bulletin 2019-02
 - Prohibits “unilateral” rescission
 - Requires rescission to be accomplished through “proceedings to vacate a policy”
- New York Circular Letter 2017-01
 - Enacted to stem perceived shift of burden of proof to beneficiaries
 - Requires proof of misrepresentation before presumption of materiality is triggered

Rescission

Peterson v. USAA Life Ins. Co. (D. Colo. 2018)

- “Preferred Ultra” risk class
- Beneficiary executed HIPAA form
- Diagnosis and treatment for obstructive sleep apnea
- Materially affected risk classification
- Summary judgment for USAA
 - Different result if filed in New York?



Rescission After Reinstatement

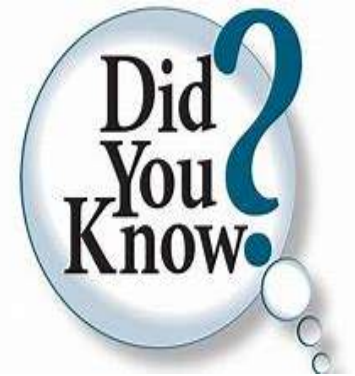
Banner Life Insurance Co. v. Holland (W.D.N.C. 2018)

- Policy reinstated after lapse for failure to pay premiums
- Insured commits suicide 4 months later
- Misrepresentations in reinstatement application
- Reinstatement triggers renewed contestability period



Some Interesting Facts About Americans

- 42 percent say they believe in ghosts
- 11 percent have never left their home state
- 1 in 8 have worked at McDonald's at some point
- 1 in 5 think the sun revolves around the Earth
- 500 to 1,000 die every year from autoerotic asphyxiation



Self-inflicted Injury Exclusion

Tran v. Minnesota Life Insurance Co. (7th Cir. 2019)

- Denial of AD&D coverage
 - “intentionally self-inflicted injury” exclusion
- Two Issues: (1) Injury; and (2) intentionally self-inflicted.

Self-inflicted Injury Exclusion

- Ruling: The Injury was “one continuous act.”
 - “there was no intervening cause or break in the chain of causation.”
 - Even the intended “partial strangulation” is an “injury.”
- Plaintiff’s intent was to engage in auto-erotic asphyxiation (i.e. to injure).
- Ruling below reversed. Judgment for insurer.
- Broader implications?

Suicide Exclusion

Arena v. RiverSource Life Insurance Co. (D.N.J. 2018)

- Suicide exclusion applied even if insured would not have committed suicide but for the effects of medication

Lann v. Metropolitan Life Insurance Co. (N.D. Ga. 2019)

- Insurer was justified in relying on medical examiner's report listing suicide as cause of death

Lapse Notification

Two types of scenarios:

- 1) Improper lapse notification
- 2) Failure to notify third party of a lapse



Rees v. Jackson National Life Insurance Co. (N.D. Ga. 2019)

- No breach of contract where insurance adhered to routine, customary procedures in mailing lapse notice

Peak v. Reliastar Life Insurance Co. (N.D. Ga. 2018)

- Notice sent prior to expiration of level premium period, although not required by policy, followed insurer's "routine and customary procedures"

Lapse Notice Insufficient

Halberstam v. Allianz Life Insurance Co. of N. America
(E.D.N.Y 2018)

- Lapse notice legally insufficient because it demanded more premium than was required at the time
- Notice failed to comply with N.Y. Ins. Law § 3211

STOLI Litigation

Sun Life Assurance Co. of Canada v. Wells Fargo Bank, N.A. (N.J. 2019)

- Certified questions from the U.S. Court of Appeals for the Third Circuit:
 - 1) Does a life insurance policy that is procured with the intent to benefit persons without an insurable interest in the life of the insured violate the public policy of New Jersey, and if so, is that policy void ab initio?
 - 2) If such a policy is void ab initio, is a later purchaser of the policy, who was not involved in the illegal conduct, entitled to a refund of any premium payments that they made on the policy?

STOLI Litigation (cont'd)

Third Circuit:

- 1st question: STOLI policies are against public policy and void ab initio
- 2nd question: Premium refund “depends” on circumstances
 - Balancing of equitable factors
- Incontestability provision does not bar challenge to policies that are contrary to public policy

STOLI Litigation (cont'd)

Estate of Malkin v. Wells Fargo Bank, N.A.
(S.D. Fla. 2019)

- Life insurance policy deemed STOLI policy
 - Insured's husband was beneficiary,
 - But investors provided funds to procure the policy
- Decedent's estate – not STOLI investors – entitled to death benefits



DOL Fiduciary Rule

Legal challenges to the Fiduciary Rule:

Chamber of Commerce of the United States of America v. Hugler (N.D. Tex. 2017)

- district court upheld the fiduciary rule
 - DOL lawfully exercised its administrative authority
 - Neither the Rule nor the DOL's rulemaking violate the Administrative Procedure Act
- Summary judgment for defendants

DOL Fiduciary Rule – What’s next?

Appeal to the Fifth Circuit:

Chamber of Commerce of the United States of America v. United States Department of Labor (5th Cir. 2018)

- Reversed the District Court
- DOL’s expansion of the term “fiduciary” conflicts with plain language of ERISA:
 - “Where the text and structure of a statute unambiguously foreclose an agency’s statutory interpretation, the intent of Congress is clear, and ‘that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’” (Citations omitted)
- What’s next?

New York Reg. 187

- Expanded N.Y.'s suitability rule
- Applies best interest standard of conduct
- Legal challenges (cases consolidated):
 - *Independent Insurance v. New York State Department of Financial Services* (Supreme Court, Albany County, NY 2018)
 - *National Ass'n of Insurance and Financial Advisors-New York State, Inc. v. New York State Department of Financial Services* (Supreme Court, New York County, NY 2018)
- Motion to dismiss pending

U.S. Supreme Court Decision

Sveen v. Melin (2018)

- Minnesota legislation providing for automatic revocation of spouse beneficiary upon divorce
 - Insured designated his then wife as beneficiary before enactment of statute
 - Eighth Circuit ruled that retroactive application of the statute violated beneficiary's rights under the Contracts Clause of the U.S. Constitution
- U.S. Supreme Court reversed; statute applied retroactively



Annuity Litigation

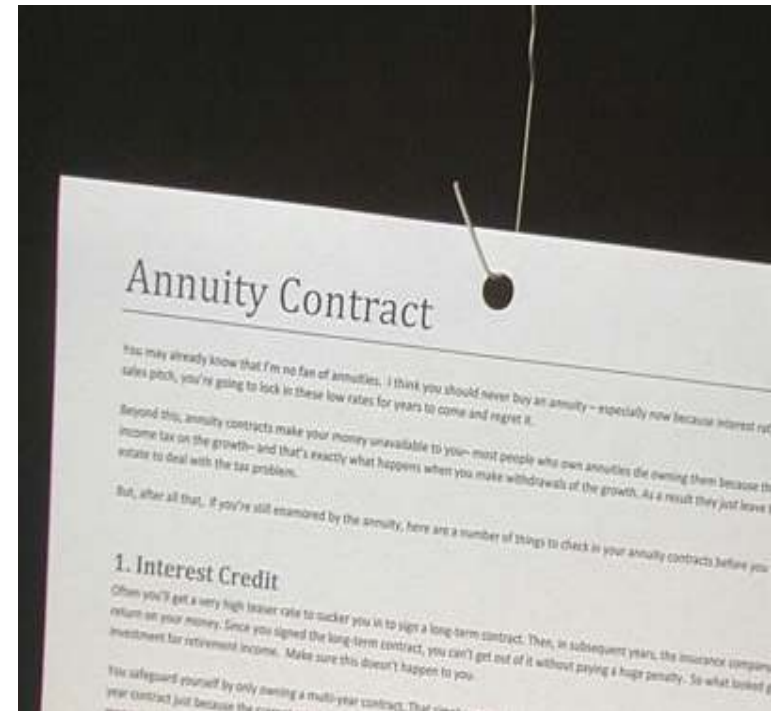
Thompson v. Allianz Life Insurance Co. of N. America (D. Minn. 2019)

- Plaintiff sought certification of nationwide class action based on Minnesota contract law
- Alleged reduction of deferred annuity payouts resulting from application of an “expense recovery adjustment” to the annuitization value
- Motion to certify class denied because Minnesota law cannot be constitutionally applied to all class members claims
 - Court must make individualized choice of law analysis as to each class plaintiff’s claims could not apply to breach of contract claims in states other than Minnesota
 - Because plaintiff relief on what she claims was an ambiguity in the annuity contracts, variances in the laws regarding extrinsic evidence and statutes of limitations certification improper because common issues do not predominate over individual issues

Annuity Litigation (cont'd)

O'Brien v. Transamerica Premier Life Insurance Co.
(11th Cir. 2018)

- “Return of Premium Death Benefit Rider” only applies where annuitant dies before annuitizing the contract
- At time of death, annuitant has received annuity payments for 14 years
- Contract must be read as a whole and Court must employ a “reasonable reading” of the contract



Emerging Litigation Risks

Biometrics in insurance



Attacks on independent contractor relationship

Investment portfolio litigation



ADA website litigation

Thank you!

