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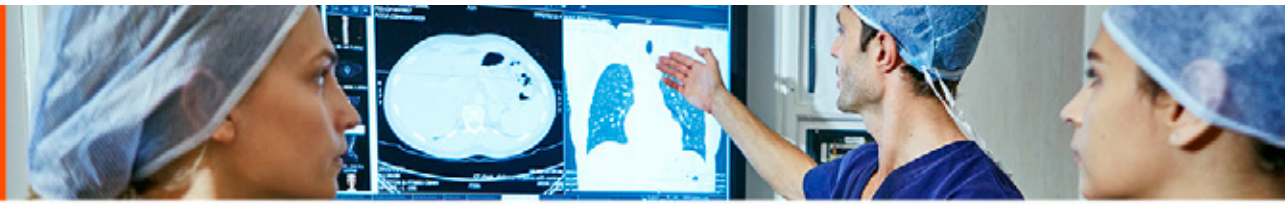

Life, Health and Disability News

The newsletter of the Life, Health and Disability Committee

10/13/2020

Volume 31, Issue 3

Committee Leadership

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In This Issue

Leadership Notes

From the Chair

By Byrne J. Decker

Greetings LHD Committee Members!

I hope you and your families are well and continue to stay safe during these challenging times. Since the onset of COVID-19 last year, we have all had to make numerous changes and adjustments. Change can be frustrating but also provides opportunities for growth and evolution.

There is no doubt that recent events have provided challenges for our Committee. But as usual, our dedicated members have risen to meet them. Undeterred by the cancelation of our annual April Seminar, Program Chair Sarah Delaney and her team are currently hard at work planning the April 2021 Seminar. Whether live in Washington, D.C., or virtual, rest assured that the Seminar will provide all of the educational and networking opportunities that you have come to expect.

We are having our first ever Committee "Zoom-In" (a virtual Fly-In) on September 18, 2020, which also features the always highly anticipated ERISA update by Mark Schmidtke. One advantage to the virtual platform is the lack of resources necessary to participate. We expect excellent turn out and hope that you all take the opportunity to participate and get more involved in the Committee.

Please also mark your calendars for the 2020 DRI Virtual Annual Meeting on October 21–23. Our Committee is teaming up with the Drug and Medical Device and Medical Liability and Health Care Law Committees to present a joint CLE session at the Meeting scheduled for Friday, October 23 at 3:00 P.M. Eastern. Our very own Lisa Bondurant will be speaking on a panel with Joseph Coughlin and Sonali Gunawardhana to discuss ""Artificial Intelligence, InsureTech, the Internet of Things and the Business of Insurance." We certainly hope you are able to tune in and take advantage of this timely presentation.

Yet another opportunity that we hope you take advantage of, is through our Committee publications, like the *LHD Newsletter*. All committee members are welcome and encouraged to contribute to our excellent platform of publications, whether it be this Newsletter, the *ERISA Report*, *The Voice*, *For The Defense*, or *In-House Defense Quarterly*. With perhaps a little more flexibility on your plates, now is the perfect time to get your name out there by publishing on a topic of interest to our Committee.

Although it seems like a very long time since we were able to gather together in person, it is more important than ever that we support each other and maintain our sense of community as a Committee. And the best way to do that is to get involved!

Stay well and be safe!

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From the Editor

By Moheeb H. Murray

As we transition from iced tea and lemonade of summer to the apple cider and various pumpkin-spiced concoctions of fall, I and my co-editor, Stephen Roach, are happy to bring you this edition of the *LHD Newsletter* (Non-ERISA). The articles cover a range of topics that we trust you'll find informative for your practice. We sincerely thank our authors for their hard work on their articles. If you have a question about one of the articles in the newsletter or would like to explore some aspect of an article more deeply, don't forget the LHDE Committee's Digest. It is a great way to engage with your fellow committee members and benefit from the group's collective experience.

As you read the newsletter, please give thought to topics you might like to write about in future editions and don't hesitate to let us know. We're always looking for contributors.

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Feature Articles

Wait for It: California State and Federal High Courts to Issue Long-Awaited Clarification Regarding California's Life Insurance Statutes

By Jodi K. Swick and Charan M. Higbee

In 2013, California enacted two related life insurance statutes. One statute mandated a minimum 60-day grace period for life insurance policies issued or delivered in the State. The second required the mailing of a lapse notice at least 30 days prior to the effective date of policy termination due to nonpayment of premium and specified that the applicant for an individual life insurance policy, and a policy owner annually, must be provided the right to designate at least one person, in addition to the applicant, to receive the notice of lapse or policy termination. *See* Cal. Ins. Code Sections 10113.71 and 10113.72 (hereinafter "the Statutes"). Of note, the Statutes expressly apply to policies "issued or delivered" in California. The Statutes do not include a reference to policies "renewed" after the effective dates.

Over seven years later, both the California Supreme Court and the Ninth Circuit Court of Appeals will address the question of whether the Statutes retroactively apply to life insurance policies issued before 2013. *See McHugh v. Protective Life Ins.,* 40 Cal.App.5th 1166 (2019), *Bentley v. United of Omaha Life Ins. Co.*, 371 F.Supp.3d 723 (C.D. Cal. 2019) and *Thomas v. State Farm Insurance Company,* 424 F.Supp.3d 1018 (S.D. Cal. 2019).

In the meantime, numerous putative class action lawsuits continue to be filed in California alleging life insurers violated the Statutes by not applying their mandates to pre-2013 policies that lapsed after enactment of the Statutes. Pandemic notwithstanding, in 2020, class action complaints raising this issue were filed in every federal district court of California.

The two notable cases facing California Supreme Court and Ninth Circuit review contain different facts and plaintiffs invoke different parts of the Statutes (one pointing to the failure to allow existing policy owners to designate a third party for notices and the other arguing the 60-day grace period should be enforced despite the subject policy's express 31-day grace period). Regardless, the cases overlap on the key legal issue of whether any or all of the Statutes' provisions have retroactive application. The parties' respective arguments invoke public policy concerns, constitutional considerations, and principles of statutory interpretation.

This article is a primer of the key holdings pending review in the Ninth Circuit and the California Supreme Court and previews the judicial guidance expected for life insurers that issued policies in California prior to 2013.

The Room Where It Happens: The Ninth Circuit Will Address the *Bentley* and *Thomas* Decisions

In February 2019, the United States District Court for the Central District Court of California addressed the Statutes' retroactive application in *Bentley, supra,* 371 F.Supp.3d 723. Judge Dolly M. Gee explicitly stated there was no retroactive application but held the Statutes apply prospectively to policies that continued in force after January 1, 2013 due to an ongoing premium payment.

Eric Bentley purchased a term life insurance policy in 2001 and his policy lapsed in 2014 for non-payment of premium. The beneficiary of Mr. Bentley's policy filed a class action lawsuit and asserted, as to each policy which was a subject of the class action, the insurer had failed to provide the policy owner with an opportunity to designate an additional person to receive notice of lapse or termination.

The certified class in *Bentley* was all beneficiaries who made a claim, or would have been eligible to make a claim, for benefits on policies renewed, issued or delivered in California that lapsed or were terminated for the non-payment of premium after January 1, 2013 *and* as to which one or more of the third-party notices described in the Statutes were not sent prior to lapse or termination.

On cross-motions for summary judgment, Judge Gee held the Statutes do not apply retroactively, but they apply prospectively from the effective date of the Statutes. Specifically, when a policy renews, it incorporates any changes in law that occurred prior to the renewal. *See* 371 F.Supp.3d at 731–32, citing to *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 927 (9th Cir. 2012)(an ERISA case discussing California law holding "[t]he law in effect at the time of renewal of a policy governs the policy even if that law is subsequently changed or repealed.") Judge Gee dubbed this California's "renewal principle."

The *Bentley* Court thereafter ruled the subject life insurance policies renewed "when a premium payment was made after the Effective Date [of the Statutes], regardless of whether the payment was an annual or a subannual premium payment." *Id.* at 735. Thus, where premiums were paid in 2013 or after, the life insurance policies were deemed subject to the Statutes under California's renewal principle.

Summary judgment was granted in favor of Mr. Bentley's beneficiary, the class representative, on her breach of contract claim because the insurer failed to provide Mr. Bentley with the opportunity to designate at least one person, other than himself, to receive the notice of lapse required by the Statutes and no death benefit had been paid to his beneficiary.

Shortly thereafter, the United States District Court for the Southern District of California (district judge Cynthia A. Bashant) largely followed the reasoning in *Bentley* and held the Statutes were applicable to two term life insurance policies issued in 2008 that lapsed in 2016 for non-payment of premiums. *See Thomas, supra,* 424 F.Supp.3d 1018. The insurer filed an appeal to the Ninth Circuit in February 2020 and its opening brief was filed on June 29, 2020. Amicus briefs were filed in July 2020 by the Chamber of Commerce of the United States of America and the American Council of Life Insurers.

In *Bentley,* cross-appeals were filed to the Ninth Circuit Court of Appeals in April 2020. On June 15, 2020, the insurer filed a motion to suspend appellate briefing pending the outcomes in *McHugh* (discussed below) and *Thomas.*

Minds at Work: The California Supreme Court Will Review the *McHugh* Case

Approximately seven months after the *Bentley* decision, a California Court of Appeal (Fourth District) also considered the retroactive application of the Statutes and ruled in favor of the insurance company, finding the Statutes did not govern policies issued before January 1, 2013.

In *McHugh, supra,* the subject individual term life insurance policy was issued in 2005, with a 31-day grace period provision, and lapsed for non-payment of a premium due on January 9, 2013. The policy beneficiary thereafter sued the insurer for breach of contract and breach of the implied covenant of good faith and fair dealing, arguing the insurer had failed to comply with the 60-day grace period mandated by the Statutes.

The California Court of Appeal, Justices O'Rourke, Aaron and Huffman, held the Statutes apply only to policies issued or delivered after January 1, 2013 and not to Mr. McHugh's policy. *See* 40 Cal.App.5th 1166, 1171. The *McHugh* court reached this decision based on information published by the California Department of Insurance; communications from Department of Insurance personnel to representatives of the insurance industry; the Statutes' legislative history; and well-established California law

that insurance policies are governed by the statutory and decisional law in force at the time the policy is issued.

In the *McHugh* opinion, there is no specific discussion of California's renewal principle as applicable to the facts of the case. However, the Court cited to communications from the California Department of Insurance confirming that "[a] statute . . . would have to say 'and renewed' in order to apply to renewals, because presumably those renewed policies were issued or delivered before the January 1, 2013 effective date" and the Statutes do "not require insurers to extend the grace period when policies that were issued prior to [January 1, 2013], are renewed." *See* 40 Cal. App.5th 1166, 1172.

The California Supreme Court granted a petition for review of the *McHugh* decision on January 29, 2020. *See* 456 P.3d 933. The opening brief was filed in May 2020 and the respondent's answering brief was due in July 2020.

Look Around: More Decisions Expected as Class Action Complaints Proceed

Since class action complaints proliferate throughout California, district and trial courts will continue to wrestle with the myriad of facts presented by each complaint implicating the Statutes. For example, subsequent to the *Bentley* decision, Judge Cormac J. Carney in the USDC for the Central District of California examined the retroactive application of the Statutes to a policy issued and delivered in Illinois in 1988 which lapsed in 2017. *See Elmore v. Hartford Life and Accident Insurance Company,* 2020 WL 1276106 (C.D. Cal. Jan. 6, 2020).

The *Elmore* Court granted summary judgment in favor of the insurer, agreeing that the Statutes do not apply retroactively and cited to the California Court of Appeal's decision in *McHugh.* Additionally, Judge Carney found the Statutes (even if they had retroactive application) did not apply to the subject policy which was issued and delivered in Illinois and "[t]hat Plaintiff may have moved to California at some point after purchasing the policy has no bearing on the original location of issuance and delivery." *Id.* at *4. Interestingly, the *Elmore* Court made no reference to the decision in *Bentley* and did not discuss California's renewal principle.

History Is Happening: Clarity Regarding Retroactive Application Awaits

Life insurers most likely will not obtain clarity regarding the Statutes' retroactive application until late 2021 or 2022. As such, insurance companies remain in limbo when administering California life insurance policies issued before 2013. For the insurers involved in pending litigation, conflicting rulings are almost inevitable, unless the actions are stayed pending resolution of *Thomas, Bentley* and *McHugh*, as each case presents different facts and slightly different legal issues.

Jodi K. Swick *is the founding partner of* **McDowell Hetherington***'s California office. Jodi's specialty is representing insurance company clients in complex, coverage, and bad faith disputes. She is known for her ability to take on tough cases and favorably resolve them. She has been victorious on dispositive motions and at trial as well as negotiated settlements on what clients viewed as "impossible to resolve" cases.*

Charan M. Higbee *is a senior attorney in* **McDowell Hetherington***'s California office. For more than twenty-five years, Charan has handled insurance matters in state and federal court during every phase of litigation. Charan's specialty is representing insurers in cases involving life, health and disability policies and group policies subject to ERISA.*

Social Media Evidence, Such as Facebook and Instagram, Are Fertile Areas for Discovery if Approached Properly

By Philip M. Howe

Discovery of social media content by Interrogatories, Requests for Production, and third party Subpoenas Duces Tecum are increasing in use as we employ social media so much more to communicate, express, record our lives and share with others. In 2018 we discussed a CA Supreme Court decision, *Facebook, Inc. v. Superior Court of San Francisco,* 417 P. 3d 725 (2018) in the *L H & D Newsletter*, Volume 29, Issue 3. That decision involved discovery of social media content by serving a Subpoena Duces Tecum on a third party, Facebook.

This article will examine several recent decisions in many other jurisdictions discussing discovery of social media content by the parties in civil litigation. Several of the decisions are "unpublished," but are available online, with memoranda and orders of the Court showing the actual resolution of social media discovery disputes in the very recent past, including several from 2020. This article will discuss some of the basic rules of discovery, such as the scope of discovery under F.R.C.P. No. 26 (b), under the N. Y. C.P.L.R. and decisions which deal with the issue in general. The article will also discuss some of the decisions where the discovery went well and some where it did not.

Discovery of Social Media In General

There is a thorough examination of the issue of the discovery of social media content in *Forman v. Henkin,* 30 N.Y. 3d 656, 93 N.E. 3d 882, 70 N.Y.S. 3d 157 (2018). In *Forman* the Plaintiff was injured in a fall from a horse owned by the Defendant. She claimed that she could no longer cook, travel, participate in sports, horseback ride, go to the movies, theatre or boating. She also claimed that she had difficulty composing on the computer. She had posted many photos of herself prior to the accident but had deactivated her Facebook account about six months after the accident. *Forman v. Henkin,* 30 N.Y. 3d at 659.

The Court in *Forman* ruled that under N.Y. CPLR 3101(a) there shall be full disclosure of all matter "material and necessary in the prosecution or defense of an action… The test is one of usefulness and reason… A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary.'" *Id.* at 661.)

The Defendant in *Forman* had sought an unlimited authorization to obtain Plaintiff's entire private Facebook account. *Id.* at 659. The Court noted that Facebook is a social networking website where people can share information about their personal lives. Users may set privacy levels to control with whom they share their information. The Court rejected the notion that the account holder's privacy settings govern the scope of social media disclosures. Even private materials may be subject to discovery if they are relevant. The threshold inquiry is not "whether the materials sought are private but whether they are reasonably calculated to contain relevant information." *Id.* at 664–66.

Plaintiff in *Forman* had testified at her deposition that she had posted many photographs on Facebook. The Court ruled that there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities or limitations. The request for these photographs was reasonably calculated to yield evidence relevant to Plaintiff's assertion that she could no longer engage in the activities she had enjoyed before the accident. *Id.* at 667.

The above *Facebook* decision in CA is dated May 24, 2018, three months after the above *Forman* decision in NY. *Facebook* was decided largely on the basis of the privacy settings the Facebook account holder had set. The NY Court in *Forman* rejected that premise.

There is an interesting discussion of the discovery of social media content in *Gondola v. USMD PPM,* 223 F. Supp. 3d 575 (N.D. TX 2016). In *Gondola* the Plaintiff alleged that her employer had discriminated against her based on her disability from an autoimmune disease. The Defendant employer served a Request for Production seeking, "Plaintiff's activity on social networking sites" including copies of her complete profile on Facebook, MySpace, LinkedIn and Twitter. *Id.* at 590.

The Court in *Gondola* ruled, "Generally, social networking site content is neither privileged nor protected by any right of privacy." Information on social media accounts like Facebook is discoverable. But, a party is no more entitled to unfettered access to an opponent's social networking

communications than it is to rummage through the desk drawers and closets in an opponent's home. The Court further ruled that Plaintiff's placing mental and physical conditions at issue is not sufficient to allow the Defendant to rummage through the Plaintiff's social media sites. *Id.* at 591.

The Court in *Gondola* ordered the parties to craft a more limited scope of Request for Production to include the social networking on the claims and defenses in this action, discussion of employment termination, job searches and effects of the termination on the Plaintiff. *Id.* at 591.

Scope of Discovery Under FRCP No. 26

In *Locke v. Swift Transportation,* Case No. 5:18-CV-00119-TBR-LLK (W.D. KY 2019) the Plaintiff suffered injuries in an accident and the Defendants contend that the Plaintiff's post-accident postings and photographs are relevant to the claims for injury and damages. The Court wrote that the scope of discovery in a federal action is governed by F.R.C.P. No. 26 (b)(1). The standard is relevance to any party's claim or defense. The information need not be admissible in evidence to be discoverable. *Id.* at 2.

The Court in *Locke* went on to rule that social networking content is subject to discovery under F.R.C.P. No. 34 and is treated as any other type of information would be in the discovery process. *Id.* at 4. The Court cited to *Gordon v. T.G.R. Logistics,* 321 F.R.D. 401, 405 (D. WY 2017) involving personal injury from an automobile accident. The *Gordon* Court denied Defendant's request for access to the Plaintiff's entire Facebook history. It required the Plaintiff to produce only information relevant to the Plaintiff's emotional state, the accident and its aftermath, any other physical injuries and her levels of activity prior to the accident. *Id.* at 6.

In *Holdridge v. Estee Lauder Companies,* Civil Action No. 19-37-SDD-RLB (MD LA, 2019) the Plaintiff had filed an action for employment discrimination alleging an acute stress disorder, anxiety and depression. She claimed that she was subject to sexual discrimination and harassment. *Id.* at 1. One of Defendant's Interrogatories sought Plaintiff's social media sites for the past five years such as Facebook, Twitter and LinkedIn. The Court ruled that the Interrogatory merely sought the identification of sources of potentially relevant electronically stored information. The Court ruled that the identification of social media sites, email addresses, cell phone numbers and computers on which relevant information may be located does not violate Plaintiff's privacy rights. *Id.* at 5.

This suggests what could well be a very productive approach to discovery. Do not ask for the actual social media content from the opposing party. Seek the identification of their social media sites, email addresses and cell phone numbers. Then discover the content through carefully prepared and focused third party subpoenas duces tecum served on the providers such as Facebook.

The next case involves the highly controversial and tragic death of Michael Brown in Ferguson, MO on August 9, 2014. Mr. Brown's father, Michael Brown, Sr. commenced an action against the City of Ferguson entitled *Michael Brown, Sr., et al. v. The City of Fergusson et al.,* No. 4:15CV00831 ERW (ED MO, 2017). The City had sought discovery of the decedent's social media content. The Court had previously ordered production of all social media content of the Plaintiff and the decedent for five years preceding August 9, 2014. The Plaintiff sought clarification from the Court on whether this order called only for all public information or if it also included private information on social media.

The Court in *Brown* ruled that Plaintiffs must produce all social media content which has "any relevance to this case, including private messages sent through Facebook messenger." *Id.* at 3. The Court relied on the often cited *E.E.O.C. v. Simply Storage Mgmt.,* 270, F.R.D. 430, 434. (S.D. Ind. 2010) In *Simply Storage* the Court wrote that it is "reasonable to expect [for] severe emotional or mental injury to manifest itself in some [social media] content…" *Id.* The Court's final ruling was that passwords for social media accounts need not be disclosed.

See *McGowan v. Southern Methodist University,* Civil Action No. 3:18-CV-141-N (ND TX, 2020) for a discussion of the limit in Rule 26 (b)(1) that discovery be "proportional to the needs of the case." The Defendant in this employment action had sought Plaintiff's social media activity including her employment history. The Court ruled against Defendant's unlimited access to Plaintiff's social media accounts but required Plaintiff to produce posts regarding Plaintiff's physical activities, emotional state and limited employment history. *Id.* at 4–5.

Where Social Media Discovery Went Well

In *Rodriguez-Ruiz v. Microsoft*, Civil No. 18-1806 (PG) (D. PR, March 5, 2020) the plaintiff had filed an action for wrongful termination and damages for pain and suffering and economic harm. The Defendant's Interrogatories and Requests for Production sought Plaintiff's Facebook and other social media profiles. The Court relied on the U.S. Supreme Court for the principle that F.R.C.P. Rule 26 is to be "construed broadly to encompass any matter which

bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may b be in the case." *Oppenheimer Fun, Inc. v. Sanders,* 437 U.S. 340, 351 (1978). *Id*. at 3.

The Court in *Rodriguez-Ruiz* ruled that a Plaintiff's Facebook profile is discoverable in an employment litigation. *Id*. at 7. The Court went on to rule that social media content that is reflective of a person's emotional state is relevant and discoverable when it has been placed at issue. For example, posts regarding Plaintiff's social activities may be relevant to Plaintiff's claims of emotional distress and loss of enjoyment of life. *Id*. at 9. As a result, the Court ordered the Plaintiff to produce any and all "content, posts or comments referencing Plaintiff's emotions, feelings, mental status, or mood ...including any photographs which may have accompanied such posts or comments." *Id*. at 9.

Where Social Media Discovery Did Not Go Well

In *Bruner et al. v. City of Phoenix*, No. CV-18-00664-PHX-DJH (WD AZ, February 4, 2020), the Court found that the Plaintiffs had deleted at least one Facebook post which the City alleges was harmful to Plaintiffs' case alleging racial and sexual harassment. *Id*. at 4. The Court further found that the Plaintiffs had deleted at least one relevant Facebook post and that two of the Plaintiffs had deactivated their Facebook accounts with the intention of preventing the City from discovering relevant information. *Id*. at 8–9. As a result, the Court pursuant to its authority under F.R.C.P. Nos. 24, 26 and 37 dismissed the racial harassment claims and struck from the Complaint all allegations of racial harassment. *Id*. at 10.

Lastly, in another highly controversial case involving the Charlottesville protest of a Ku Klux Klan and neo-Nazi gathering resulting in the death of one of the protesters, the Court ordered the Defendant James Fields, who drove the car killing the protester, to sign an SCA Consent form to permit the Plaintiffs to acquire any requested social media accounts. *Sines et al. v. Kessler et al.*, Civil Action No. 3:17-cv-00072 (WD VA, June 11, 2020) *Id*. at 18. The Stored Communications Act, 18 U.S.C. Section 2702 ("SCA") provides for a consent form by which the account holder may authorize the social media provider to provide information to others, here the Plaintiffs.

Conclusion

Wise practice seems to be to serve Interrogatories to identify all social media accounts and an accompanying Request for Production requesting the execution of an attached SCA authorization as discussed in *Sines*. Then use the signed Authorization to obtain directly from the social media provider all social media content consistent with F.R.C.P. 26 and the applicable decisions. Further, in all actions there should be a request at the earliest possible stage that the opposing party preserve all social media content.

Phil Howe *of* **Philip Howe Law** *in Boston is a civil litigator with lengthy experience in defending complex medical and financial issues in the areas of life, disability, health, automobile, homeowners, property and casualty insurance including claims of bad faith. He has additional experience in condominium, construction, medical malpractice, personal injury and real estate litigation. He has tried cases in CA and MA, state and federal courts. Phil has also managed litigation nationwide as house counsel for an insurer which issued individual and group life, health and disability insurance. He is a member of the DRI Life, Health and Disability Committee, has published in their Newsletter and has for many years presented at the Eastern Claims and International Claims Associations among others. He is in private practice in Boston.*

2020 Life and Disability Decisions from New York and the Second Circuit

By Eileen Buholtz

Annuity contract – insurer was entitled to summary judgment regarding third-party authority to access to policy-holder's account.

***Riccio v. Genworth Financial*, 184 A.D.3d 590, 124 N.Y.S.3d 370, 2020 N.Y. Slip Op. 03135 (1st Dep't June 2020).**

Held:

a) Defendant life insurance company did not breach its annuity contract with its customer (plaintiff Mother) for permitting Mother's daughter to become a third party on the account.

b) Defendant life insurance company did not breach its duty to Mother by permitting Daughter to make substantial withdrawals from the annuity account.

No breach of annuity contract: Defendant life insurance company (Insurer) who issued the annuity contract proved that it strictly complied with the terms of the annuity contract and precisely followed its internal procedures in permitting Daughter to access Mother's annuity account. Insurer provided in its motion papers:

- the annuity contract;
- the auto-interest-withdrawal-request form signed by plaintiff which authorized Insurer to make monthly payments of $1,100 to plaintiff;
- a withdrawal authorization form signed by Mother granting Daughter telephone withdrawal authorization privileges in any amount and which initiated a fixed withdrawal of $10,000;
- recordings of 21 phone calls that Mother made to defendant's customer service department;
- excerpts from plaintiff's deposition testimony; and
- calculations showing that the surrender charges Insurer deducted for the withdrawals complied with the formula in the contract.

The telephone conversations revealed that plaintiff and daughter were on the phone together on several occasions and discussed cashing withdrawal checks. Plaintiff's signature appeared as endorsements on all of the checks. Plaintiff testified she was present with her daughter at the check-cashing location when the daughter cashed each check.

No breach of duty to Mother: As soon as co-defendant bank advised Insurer that Mother's son was alleging that Daughter was committing elder abuse, Insurer froze Daughter's access to the account.

Class action – in a putative class action, plaintiff's motion to add a second plaintiff to assert unrelated class claims against defendant Life Insurer was denied because the request did not meet the criteria for permissive joinder under Fed. R. Civ. P. 20. Also, Life Insurer's motion to transfer this case to Pennsylvania where two other cases involved the same issue (cost of insurance) were pending against other affiliates of Life Insurer was properly denied.

Vida Longevity Fund, LP v Lincoln Life & Annuity Co. of New York, **19CV6004 (ALC) (DF), 2020 WL 4194729 (S.D.N.Y. July 21, 2020).**

Named Plaintiff in a putative class action against Life Insurer alleged that Life Insurer had overcharged on its monthly cost-of-insurance (COI) charges. Named Plaintiff moved to add a second named plaintiff to assert new class claims on behalf of a different putative class against Life Insurer for unrelated relief (specifically, Life Insurer's failure to refund premiums paid after the death of its insureds).

Plaintiff's motion to add second named plaintiff who alleged unrelated claims: Plaintiff's motion was denied because it did not meet the criteria for permissive joinder under Fed. R. Civ. P. 20 because the claims did not arise out of the same transaction or occurrence, there were no common questions of law or fact, and the possibility of some overlap between members of the two putative classes was not enough by itself to warrant the amendment to include the proposed claim.

Life Insurer's motion to transfer: Life Insurer's motion to transfer the case to Pennsylvania where two other cases

were pending against two of defendant's affiliates for the same type of claim was denied because although Life Insurer expressly consented to jurisdiction in Pennsylvania, Life Insurer failed to show that the interests of justice favored transfer. More specifically, the locus of operative facts was New York; Named Plaintiff chose New York for his venue; New York law applied to the contract; there was no overlap of plaintiffs; and discovery was already being coordinated with the Pennsylvania cases.

Class action – plaintiff's motion for class certification raised potential issues of claim-splitting that no one had addressed.

In re AXA Equit. Life Ins. Co. COI Litig., **16-CV-740 (JMF), 2020 WL 3961960 (S.D.N.Y. July 13, 2020).**

The named plaintiffs in this putative class action alleged breaches of life insurance policies and misrepresentation in connection therewith. They moved to certify (a) a nationwide class and (b) several subclasses one of which was itself nationwide and the remainder of which were tied to causes of action arising under New York or California law and were limited to residents of those two states. No claims were asserted for state-law claims on behalf of residents of other states, and none of the parties addressed this gap. The court, concerned that class plaintiffs in other states would be foreclosed from asserting their claims under their own state law, requested further briefing on the issue of claim splitting and whether or how it affects plaintiffs' motion for class certification. The court gave both sides two weeks to provide their responses acknowledging that the time frame was short but stating that COVID-19 had already caused enough of a delay.

Interpleader – the competing beneficiaries under the subject life insurance policy were not collaterally estopped by a surrogate court's determination that decedent was competent when he signed his will, which was one day after he changed the beneficiary on his life insurance. Nor was there any reason for abstention of the interpleader action in deference to the probate proceeding.

Aetna Life Ins. Co. v Rosen, **19-CV-6259 (JPO), 2020 WL 3972025 (S.D.N.Y. July 14, 2020) (Oetken, J.).**

Three weeks before his death, decedent changed the beneficiary on his group life insurance policy from his mother to his significant other. The next day, decedent executed his will. The state-court surrogate judge, in admitting decedent's will into probate, ruled that decedent was of sound mind at the time he executed the will. Decedent's significant other moved to dismiss Life Insurer's subject interpleader action on the grounds of issue preclusion (to wit, the surrogate's finding of competency a day after decedent changed his beneficiary) and the abstention doctrine (to wit, the federal court should defer to the state surrogate court).

There was no issue preclusion (res judicata): Decedent's significant other argued that the surrogate judge's decision that decedent was competent on day 2 when decedent executed his will was *res judicata* that decedent was competent on day 1 when he changed the beneficiary on his life insurance policy. Held: the surrogate did not decide an "identical issue." The surrogate's finding of competence on the day that the will was executed was a different issue from the question of decedent's competence on the preceding day.

Abstention doctrine: Similarly, the abstention doctrine did not apply. Abstention requires "parallel" lawsuits in state and federal court meaning that "substantially the same parties are contemporaneously litigating substantially the same issue" and that there is a "substantial likelihood that the state litigation will dispose of all claims presented in the federal case." Since the issues in the two cases were different, there was no reason for the federal court to defer to the state court.

Choice of law, STOLI, and rescission – A bench trial after 10 years of litigation in front of a federal magistrate judge in the Eastern District of New York yielded a decision that (a) New York law applied to the subject $10M policy; (b) the policy was not void ab initio as an illegal STOLI policy based on New York law at the time the policy was issued; (c) Life Insurer was entitled to rescind the policy because of material misrepresentations made by the insured and the Writing Agent that the premiums weren't going to be financed and that no other life insurance policies had been applied for or were in place; (d) Life Insurer was entitled to retain all premiums; and (e) Life Insurer was entitled to recover from the Writing Agent the commissions Life Insurer had paid and Life Insurer's attorneys' fees incurred in defendant plaintiff's breach-of-contract suit.

Dukes Bridge, LLC v Sec. Life of Denver Ins. Co., **10-CV-5491-SJB, 2020 WL 1908557 (E.D.N.Y. Apr. 17, 2020) (determining liability issues);** *Dukes Bridge, LLC v Sec. Life of Denver Ins. Co.*, **10-CV-5491-SJB, 2020 WL 4070094 (E.D.N.Y. July 20, 2020) (determining fraud damages). NB: Elizabeth Doolin and Julie Wall with others at their firm represented Life Insurer.**

Ten years of litigation in this diversity-jurisdiction suit in the Eastern District of New York climaxed in a stipulated

bench trial in front of Magistrate Judge Sanket J. Bulsara at which live testimony from two witnesses was presented and deposition transcripts from multiple other witnesses were submitted. In a seventy-page decision, the magistrate judge granted Life Insurer a judgment declaring (a) New York law applied to this $10M life insurance policy; (b) the policy was not void *ab initio* as an illegal STOLI policy based on New York law at the time the policy was issued; (c) Life Insurer was entitled to rescind the policy because of material misrepresentations made by the insured and the Writing Agent about no financing of the premiums and no other life insurance policies having been applied for or were in place at the time the insured applied for this policy; (d) Life Insurer was entitled to retain the premiums paid on the policy; and (e) Life Insurer was entitled to a judgment on its fraud claim against the Writing Agent for the commissions it had paid, for attorneys' fees it had incurred in defending plaintiff's claims, and for pre- and post-judgment interest on those sums.

The application was made in 2007 and the policy was issued in 2008. During this time, New York permitted STOLI (stranger-owner life insurance) policies.

Trial Issues and Trial Rulings

1. Choice of law governing the policy: The insured originally applied for a New Jersey policy. The application bore the insured's signature, but it did not indicate the location where he signed it. Halfway through the underwriting process, the insured applied for New York policy instead of the New Jersey policy, but ultimately withdrew the New York application and reopened the New Jersey application. The court pointedly noted that the Writing Agent's commission under the New Jersey policy was substantially higher than it would have been under the New York policy.

Life Insurer delivered the policy to the Writing Agent at the Writing Agent's New York address with instructions to provide the insured with a copy.

The New Jersey policy was issued after the following required documents were supplied:

a) he insured signed an amendment to the application representing that he had signed the amendment in New Jersey (although at trial no one could recall that the insured had done so there) and

b) the Writing Agent and the insured's daughter as trustee signed an out-of-state verification stating that although the insured's residence was New York, all communications pertaining to the policy including the signing of the application took place in New Jersey, that the policy would be delivered in New Jersey, and that New Jersey law would apply. The integration clause of the policy excluded this form from being part of the policy.

The court concluded that although the policy impliedly chose New Jersey law as the law governing this policy, the delivery of the policy in New York required the application of New York law to the policy, its interpretation, and its enforcement.

2. The insured's financial condition: The application represented that the insured's annual income was $1.3M; his net worth was $20M; his liabilities were zero; the purpose of the insurance was "estate liquidity"; and the insured was financially able to pay the premiums. The only investigation that Life Insurer conducted of the insured's financial condition was a single inspection report from an ostensible third party who, unbeknownst to Life Insurer's underwriter on this policy, was reputedly involved in the STOLI scheme. Because of questions whether Life Insurer's underwriter followed Life Insurer's guidelines on investigating an applicant's finances, the court deferred on ruling whether these misrepresentations were material.

3. Other life insurance: On the original application, the insured left blank the question "do you currently have life insurance in force or applied for." The intercompany database search that Life Insurer's underwriter obtained during the underwriting process suggested that the insured had applied for life insurance with two other insurers, but the Writing Agent assured Life Insurer's underwriter stated that the applications were made through a previous agent. When the underwriter pressed further, the Writing Agent stated that there were several current applications but those were only to get quotes and that the insured was going to accept only Life Insurer's policy. The insured signed an amendment stating that that the insured was declining the other quotes for life insurance that he had obtained and that he was accepting only the subject policy. This statement was false; the insured had concurrently applied for seven other policies for an additional $60M in coverage (applications which the Writing Agent had either effected or at least knew about) and three of the polices were in place when the underwriter asked. The court found that these misrepresentations were material and justified rescission.

4. Financing the premiums: With the application the Writing Agent submitted an "agent's report" in which he answered NO to the following questions:

- Does the owner intend to change ownership of the policy after its issuance (*i.e.*, to a trust, viatical or life settlement company or other person)?
- Will any portion of the premiums for this policy be financed?
- Will there be a rebate of any kind to the proposed insured or owner?

In fact, the Writing Agent sought and obtained non-recourse financing for the premiums due under the policy.

The insured's application represented to Life Insurer that owner of the policy was a trust created under New York law (hereinafter "Family Trust") of which the insured's daughter was trustee. But part of the premium financing arrangement involved the creation of a Delaware trust for the benefit of the lending entities ("Lenders' Trust") to hold the lenders' rights to the policy, which the Family Trust assigned to the Lenders' Trust. None of these transactions were disclosed to Life Insurer. The trustee of the Lenders' Trust was an out-of-state attorney for one of the lending entities.

The premium for the first year was $872,300. Payments of that premium were made via circuitous transfers to hide the source of the funds. The court found the misrepresentations that denied premium financing were material and justified rescission.

5. Payment of premiums; payment of commissions: The first year's premium was paid via circuitous transfers to various accounts that hid the origin of the money from Life Insurer. After the first-year premium was paid, Life Insurer paid the General Agent and the Writing Agent the commissions due them respectively, and those agents paid various referral fees, commission payments, and kick-backs (the court's term) to other entities involved in obtaining the policy and in financing the premium payments.

6. Insured's death; Family Trust's claim for proceeds: The insured died within the two-year contestability period. The insured's daughter as trustee of the Family Trust filed a claim with Life Insurer representing that she was still the one and only trustee of the Family Trust and owned the policy.

7. Lifer insurer's post-death investigation: During Life Insurer's post-death investigation of the insured, it asked the insured's attorney for a multitude of proofs of the insured's financial condition and it obtained multiple reports about the insured from open-source records. Life Insurer had requested none of this information during the underwriting process. The information obtained post-death confirmed that the insured's estate had only modest assets and income. The Insured died intestate and his estate was administered as a "small estate" under New York's statute for estates under $30,000. The insured owned no real estate. The insured's 2007 income tax return reflected $26,000 in income. His attorney who had represented him for 15 years stated that he had no reason to believe that the insured ever received $1.3 million dollars in annual unearned income. None of the insured's children inherited anything from the insured.

8. Lenders' Trust's claim for proceeds: The Life Insurer's refusal to pay the proceeds to the Family Trust started a chain reaction in which the estate could not pay the proceeds to an intermediary entity that had borrowed the money for the premium, which in turn could not pay its lender. The intermediary entity that had borrowed the funds defaulted on its obligation to its lender and ultimately dissolved.

Through a series of complex transactions involving many entities, plaintiff (a Delaware LLC created by the financing entities after the intermediary entity's default) obtained all rights under the premium financing agreement via a foreclosure sale and via an ostensible assignment from the Family Trust. Plaintiff then notified Life Insurer that as assignee of the financing agreement, plaintiff was the only one entitled to the policy proceeds and was making a claim therefor. It was thus that Life Insurer learned of the finance scheme.

The court notes that plaintiff's chain of title to its claim for the policy proceeds had problems with the timing of signatures on the assignment from the Family Trust to the Lenders' Trust. The signors signed before they had authority to do so. When the issue was discovered, the insured's daughter as trustee of the Family Trust and the out-of-state attorney as trustee of the Lenders' Trust executed new versions of the assignment documents which they back-dated to appear as having been made when they actually had authority to sign the assignment.

9. Plaintiff's complaint and Life Insurer's counterclaims: Plaintiff sued Life Insurer for breach of contract and for a judgment declaring the policy was a valid contract. Life Insurer countersued for (a) a judgment that declared that the policy was either void ab initio because it was an illegal STOLI scheme or that the policy should be rescinded because of fraud, material misrepresentation, and lack of insurable interest in the application process; (b) an award of attorneys' fees; and (c) an order declaring Life Insurer was entitled to keep the premiums as a offset to its costs and expenses incurred in issuing the policy. Life Insurer

also added as counter-defendants various entities involved in the scheme to obtain the policy and the financing, which included the insured's daughter as trustee of the Family Trust. Plaintiff argued that Life Insurer's failure to investigate the insured's financial status barred Life Insurer's counterclaims for voiding or rescinding the policy.

10. Magistrate judge's conclusions of law: The magistrate judge held after the bench trial as follows:

- **Choice of law**. New York law applied to plaintiff's breach-of-contract claims and to the interpretation and enforcement of the policy for these reasons:
  - — Notwithstanding several previous conflicting rulings in this case on choice of law, including two that applied New Jersey law and one that applied New York law, those rulings involved parties no longer in the suit and judges who were no longer assigned to the case. Moreover, the remaining parties conceded at the pre-trial conference that the choice of law issue was still open.
  - — Because the policy referred to New Jersey law and to particular statutes in various parts of the policy, the parties impliedly intended that New Jersey law should apply. But Life Insurer delivered the policy in New York by mailing the policy to the Writing Agent at his New York address, and that delivery invoked New York Ins. Law §3103(b). Section 3103(b) reforms all policies delivered in New York to conform with New York law.
  - — N.Y. Insurance Law §3103(b) is a statement of substantive law rather than a conflict-of-law principle, and therefore must be followed in this diversity-jurisdiction action because it is the law of the forum state. In addition, §3103(b) is a conformity law, not a conflict-of-law provision, and it is a statutory edict which overrides the parties' contractual choice.
- **Insurable interest**. The policy was legal under New York law at the time this policy was issued, because under N.Y. Insurance Law §3205(b), an insured could obtain a life insurance policy on his own life and, via a noncoercive arrangement with investors, could immediately transfer it to another person who lacked an insurable interest in the insured's life. Here, there was every indication that the insured voluntarily and knowingly obtained the policy and entered into the financing arrangements. NB: New Jersey law did not permit this type of policy, which was why Life Insurer was advocating for New Jersey law.
- **Rescission**. Life Insurer was entitled to rescind the policy because of false material representations made by the insured and the Writing Agent, to wit, (1) the Writing Agent's statement that the premiums would not be financed, which was imputed to the insured, and (2) the insured's and the Writing Agent's statements that there was no other insurance applied for or in force. In fact, the insured had applied for and accepted seven additional policies for an additional $60 million in coverage. Three of those policies were in place when these representations were made. These misrepresentations were material because Life Insurer would not have issued the policy had it known the truth. The court rejected plaintiff's arguments that Life Insurer should have been subjected to a heightened burden as a sophisticated party and that Life Insurer needed to prove fraud. Because the claim to rescind was made during the contestable period, Life Insurer was not required to prove that the insurer's reliance be objectively reasonable. To rescind a policy during the contestability period, the insurer need only show by reference to its policies that it would not have issued the policy if it knew the truth. An insurer is not required to verify or investigate information provided by an insured. Regarding the insured's misrepresentation about his finances, the magistrate found a "thorny factual issue" as to whether Life Insurer followed its own underwriting guidelines, which if true, would call into question whether the misrepresentations about the insured's finances were material.
- **Life Insurer's counterclaims that sounded in tort**: Life Insurer asserted tort claims against the Writing Agent, the daughter-trustee of the Family Trust, and plaintiff, plus a statutory claim against plaintiff for violating the New Jersey Insurance Fraud Prevention Act. The law to be applied can be different for tort claims than for contract claims. The court noted that there was no difference under New York's and New Jersey's law to the claims for fraud and civil conspiracy, so the magistrate applied New York law, ruling that Life Insurer presented clear and convincing evidence of the Writing Agent's fraud, but not of any fraud by the daughter-trustee or plaintiff. Regarding the statutory claim under New Jersey law, which sounded in tort, Life Insurer had no claim under the New Jersey statute because although the policy originated in New Jersey, the injury occurred in New York.
- **Retaining the premiums**: Equitable considerations permit Life Insurer to retain the premiums paid for the policy. Although in rescission claims, equity typically requires that the parties be returned to their pre-con-

tract status quo, which requires the insurer to return premium payments plus interest to the policy owner. But here, plaintiff was not part of the chain of payment of the premium. Moreover, plaintiff was assigned only the contractual right to receive the policy proceeds under an enforceable contract; plaintiff was not assigned the equitable right to the return of any premiums after rescission of the policy. Most importantly, the Writing Agent's fraud tainted any interest plaintiff had in a return of the premium payments because most of the premium was used to pay the Writing Agent's commissions.

- **Damages for the Writing Agent's fraud**: The court requested additional briefing on the damages owed to Life Insurer for the Writing Agent's fraud. In a follow-up decision, *Dukes Bridge, LLC v Sec. Life of Denver Ins. Co.*, 10-CV-5491-SJB, 2020 WL 4070094 (E.D.N.Y. July 20, 2020), the magistrate ruled that Writing Agent owed Life Insurer
  - the total amount of commissions that Life Insurer had paid without regard to Writing Agent's having shared those commissions with others,
  - the portion of Life Insurer's attorneys' fees attributable to defending plaintiff's claims, and
  - pre- and post-judgment interest on those damages.

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