
ACLI
drive
ACLI Annual Conference 2019
October 13-15 | Sheraton Boston Hotel | Boston, MA

Developments and Forecast on Life Insurance Company Litigation UL, IUL, VLI and LTC

Moderator: James Jorden

Panelists: Ben Edwards

Christian Walker

Michael Gugig

Introduction and Overview

James Jorden

Partner, Drinker Biddle & Reath LLP

Ben Edwards

Vice President & Senior Counsel
Lincoln Financial Group

Opinions expressed during this presentation represent those of the presenter and may not represent those of Lincoln Financial Group.

Developments and Forecast on Life Insurance Company Litigation

- Life Insurance
  - STOLI
  - Indexed Universal Life
  - Producer Litigation
  - What's next?

STOLI

- *Sun Life v. Wells Fargo Bank* (Bergman) (Supreme Court of N.J., certified question from the Third Circuit, June 4, 2019)
  - Key Facts: Policy issued in 2007; $5 million face amount; insured passed away in 2014.
  - Held: A life insurance policy procured to benefit investors without an insurable interest in the life of the insured is VOID as against public policy.
  - Significance?

Indexed Universal Life

- *Walker v. Life Ins. Co. of the Southwest* (C.D. California)
  - July 31, 2018 (granting class certification)
    - Held: illustration-based UCL claims are amenable to class treatment, but the court limited the class to CA residents who received an illustration on or before the date of application.
  - October 22, 2018 (denying plaintiffs' motion for reconsideration of certification ruling)
  - 9th Circuit appeal pending
  - Takeaways:
    - Potential roadmap for framing IUL claims in individual and class contexts.
    - Class action somewhat unique when compared with IUL individual actions.

Indexed Universal Life (continued)

- *Nadig v. Kandus* (California Sup. Ct., filed July 1, 2019)
  - Recently-filed action framing IUL allegations in a different way
  - Individual action against a producer in California state court
  - Carrier not named as a defendant
  - Allegation of an allegedly unsuitable sale of an IUL policy as sole part of a “retirement-planning strategy”
  - To date, vast majority of IUL cases framed as individual actions where individual claims (ex: suitability) predominate over potential class issues

Producer Cases

- *Jammal v. American Family Ins. Co.* (Sixth Circuit, January 29, 2019; rehearing en banc denied March 25, 2019)
  - Putative ERISA class action by producers alleging that American Family misclassified them as independent contractors (not employees).
  - Sixth Circuit held that district court incorrectly applied the legal standards and found that the producers were independent contractors.
- *Drew v. Pacific Life* (Court of Appeals of Utah, July 18, 2019)
  - Court of Appeals of Utah reversed summary judgment for the insurer on vicarious liability claims.
  - Plaintiff insureds (retirees) alleged that they relied on an appointed producer who recommended purchasing a life insurance policy (funded by a reverse mortgage) and selling it on the secondary market.

What's Next???

- Standard of care/fiduciary/best interest claims
- Suitability claims
- Lapsed policy litigation
- Disputes between carriers and reinsurers (rates/claims)
- Hybrid products: Life claims, LTC claims
- Maturity litigation

Christian Walker

Vice President – Litigation

Athene USA

ANNUITY LITIGATION: Pricing / “Value”

- *Abbit v. ING* (9th Circuit May 2019)
  - Grant of summary judgment affirmed
  - Putative class action
  - Allegation that the FIA had a “true value” or “fair value” that was reduced through various pricing mechanisms
  - Insurer did not breach contract or act in bad faith when it set participation rates and caps within the bounds of the contract

ANNUITY LITIGATION: Pricing / "Value"

- *Ogles v. Security Benefit* (D. Kansas 2019)
  - Motion to dismiss granted
  - Based on McCarran-Ferguson preemption
  - Allege that the FIA's "true nature" was misrepresented, and thus the annuity purchased "was worth less than the premium" paid

- These two cases are consistent with recent cases where courts have been skeptical of attacks on annuity pricing / allegations that "value" of annuities has been reduced

ANNUITY LITIGATION: Class Certification

- *Thompson v. Allianz* (D. Minn. 2019)
  - Class certification denied
  - Putative nationwide class of deferred annuity purchasers
  - Breach of contract claims
  - Court found choice of law issues destroyed predominance – applying Minnesota law to putative class members was unconstitutional, and applying the variations in breach of contract laws was unmanageable

- This was a bright spot in class certification. There have been other classes certified this year.

ANNUITY LITIGATION: Suitability

- *Robertson v. MetLife* (2d Cir. 2019)
  - Affirmed motion to dismiss without leave to amend
  - Allegations were that a variable annuity was not suitable
  - Second Circuit called this a “sad case”
  - But affirmed the district court because plaintiff could not plausibly allege loss causation, as the reason why the annuity was allegedly unsuitable was not the cause of plaintiff’s damages

ANNUITY LITIGATION: Vicarious Liability

- *Drew v. Pacific Life* (Ct. App. Utah 2019)
  - Appellate court reversed grant of summary judgment for insurer and directed the trial court to grant, in part, summary judgment for insured
  - Agents sold annuities and high-value life policies; told the insureds they could sell the policies on the secondary market
  - Court found that the producers were agents of Pac Life and were acting within the scope of their authority when they made misrepresentations to the insureds
  - This despite the fact that the producers lied to the insurer regarding the ultimate intentions with the policies

Michael S. Gugig

VP, State Government Affairs &
Associate General Counsel
Transamerica Life Insurance Company

ACLI drive

Long-Term Care Insurance Litigation

- Overview:
  - Number of lawsuits continues to rise each year, with 80 or so lawsuits to have been filed in 2019.
  - Issues stemming from premium rate increases, claims issues, provider eligibility issues, and fraud, among others
  - With increasing number of claims for benefits comes (i) more claims-related decisions (and potential room for error); (ii) unique scenarios; (iii) policy interpretation issues; (iv) fraud concerns; and (v) rate increase/insolvency concern.

Provider Eligibility Issues

- *Rain* – District of Massachusetts – pending class action
  - Unlike other class actions the industry has seen, *Rain* involves a provider eligibility dispute surrounding care received at an assisted living residence.
  - Lead plaintiff alleges that policy provides for custodial care benefits, regardless of where that care is provided.
  - The policy at issue expressly limits coverage to care provided in a Licensed Nursing Home, but "Licensed Nursing Home" is not defined in the policy.

Rain continued

- The issues raised in *Rain* are concerning for companies with older policy language
- General trend towards “aging in place”
- Evolving and new types of facilities pop up around the country
- *Rain* is significant because claims-based lawsuits are typically one-off situations (smaller amounts at issue, less “visible”). By converting this claim into a putative nationwide class action, exposure is far greater.

Fraud Issues

- Fraud has been rampant in the LTCi industry for years, and there are numerous red flags for companies looking to combat fraudsters.
- *Dallal* – Central Dist. California – in 2018, an insurer prevailed in a jury trial against its insured for fraud based on the insured's fraudulent claim submissions. This is the first decision of its kind for an insurer in this context.
- Court has not yet ruled on whether or not the insurer can void the policy as of the date of fraud.

Lapse and Reinstatement Issues

- Unique line of product in that, as policyholders age, there is a greater risk for age-related error, including lapse.
- Some lapses intentional, but many are not due to potential cognitive deficits. Sometimes policies are intentionally cancelled by the insured who may or may not know what he/she is doing.
- *Waskul* (E.D. Mich., July 2018) – the legal issue here was whether or not an insurer was required to provide an affirmative cancellation of a policy by the insured to the insured's third-party designee.

Rate Increase Issues

- Rate increases remain at the forefront of litigation in this space.
- *DiRito* – following two rate increases – both approved – Plaintiff filed suit alleging that the insurer defrauded him because the policy at issue contained a “guaranteed renewable” provision.
- Plaintiff relied on public information discussing pricing difficulties with LTCi that was published right around the time the policy at issue was purchased.

Rate Increase Issues Continued

- *Newman* – the first time the "filed rate doctrine" did not automatically result in a win on a motion to dismiss.
  - While the insurer's MTD was initially granted, the 7th Circuit found that the policy contained ambiguous language regarding the term "class."
  - In addition, the 7th Circuit entered a judgment on Plaintiff's breach of contract claim, effectively precluding the insurer from raising affirmative defenses.
  - Petition for rehearing successful in that it required remand to address ambiguities in policy.
  - Currently being mediated.

Questions / Conclusion