RELIANT Life Shares

Institutional Profitability Brought to the Individual Investor™

California Couple Sues Lincoln National

In January, a Rancho Mirage couple filed a class-action lawsuit against Lincoln National Life Insurance Company for failure to disclose the life settlement option. A U.S. District Court filing in Riverside County reveals allegations of fraud, elder abuse, and unfair and fraudulent business practices, and seeks punitive damages and injunctive relief on behalf of the class.

In a 21-page complaint, plaintiffs Larry and Joan Grill, and Steven Grill, the trustee for the Grill's estate, allege that Lincoln forbids its agents from talking to clients about life settlements. The lawsuit continues that "active concealment" of the settlement option is pervasive amongst life insurance carriers because surrendered and lapsed policies are key sources of profitability.

In 2007, the life settlement industry introduced legislation to address this issue. The NCOIL Life Settlement Model Act requires carriers to disclose the settlement option to individuals over age 60 who are considering policy surrender. Facing opposition from the life insurance industry, however, the pro-consumer initiative gained limited traction, with only seven states officially adopting the Act and signing it into law.

California was not one of those states. Although Senate Bill 98, the state's comprehensive life settlement legislation, is based largely on the NCOIL Act, the provision for carrier disclosure of life settlements was not included in the final statute adopted by California.

California Senate Bill 98 (SB 98)	Effective July 2010, SB 98 governs life settlement transactions, providing a strong regulatory framework for the life settlement industry in California
California Senate Bill 1837 (SB 1837)	Approved by Governor Gray Davis in September 2000, SB 1837 regulates the sale of viatical and life settlement investments, specifying that California-licensed life agents are exempt from broker-dealer licensing requirements for these securities

Lincoln mentions the California exclusion in its motion to dismiss, alleging that the lawsuit is "…an effort to impose upon insurers a life settlement disclosure obligation" that does not exist under California law. Lincoln further contends that its policy change form, which the Grills signed to reduce the face amount of their coverage from $7.2 million to $2 million, "explicitly asks about…the possible sale or assignment of this policy to a life settlement, viatical, or other secondary market provider."

Lincoln also argues that insurers are not fiduciaries under California law. In his article "What Are the Fiduciary Duties of Insurance Agents and Brokers?," Mher Asatryan, a Los Angeles-based attorney, points out that the California Supreme Court concurs with Lincoln's position. He notes that in *Vu v. Prudential Property & Casualty Company* (Vu v. Prudential Prop. & Casualty Ins. Co., 26 Cal. 4th 1142 (2001)), the court held that the "insurer-insured relationship…is not a true 'fiduciary relationship' in the same sense as the relationship between trustee and beneficiary, or attorney and client." In *Vu*, the court went on to explain that duties imposed on carriers are only fiduciary-like duties because of the unique nature of the insurance contract, not because the insurer is a fiduciary. As such, insurers are not de facto fiduciaries.

The question of fiduciary duty may not be so clear cut for insurance agents and brokers in California. Contrary to popular belief that agents owe clients a fiduciary duty, Asatryan maintains that California courts have treaded warily around the issue, hesitant to offer a definitive ruling.

The decision in *Kotlar v. Hartford Fire Insurance Company* (Kotlar v. Hartford Fire Ins. Co., 83 Cal. App. 4th 1116 (2000)) sheds some light on California's thought process. Here, the court made the distinction between insurance brokers and attorneys, noting that unlike lawyers, who do not represent both parties to a transaction, insurance brokers can be dual agents, representing the insurer and insured.

The court held in *Kotlar* that "the duty of a broker, by and large, is to use reasonable care, diligence, and judgment in procuring the insurance requested by the client," continuing that "...while an attorney must represent his or her clients zealously within the bounds of the law, a broker only needs to use reasonable care to represent his or her client."

Other California cases, however, have ruled that agents and brokers should be held to a higher standard. In *Eddy v. Sharp* (Eddy v. Sharp, 199 Cal. App. 3d 858 (1988)), a broker promised his client that the coverage he was securing would cover a particular loss. The broker failed to read the policy when it was issued, only to find out later that the policy actually excluded that loss. In rendering its verdict, the court stated that "…where the agency relationship exists there is not only a fiduciary duty but an obligation to use due care." Subsequent cases have cited this statement in an attempt to impose fiduciary duties on insurance brokers and agents.

Another strong dismissal of fiduciary duty was initially issued in *Workmen's Auto Insurance Company v. Guy Carpenter & Company, Inc.* (Workmen's Auto Insurance Company v. Guy Carpenter & Company, Inc., 194 Cal.App.4th 1468 (2011)). In this case, the California Court of Appeal (Second District) affirmed a previous finding that a reinsurance broker did not owe a fiduciary duty to its client, an insurer. Although the decision was initially heralded as a victory for insurance brokers and agents, the court subsequently vacated and unpublished its legal opinion. Again, California's reluctance to establish firm precedent left agents and brokers scrambling for guidance.

In the Grill case, the plaintiff's attorney asserts that Lincoln's agent did in fact have a fiduciary duty to review all potential options when the policy no longer became affordable. Although the success of the

case hinges largely on the establishment of an agent/principal relationship between Lincoln and its agent, Asatryan points out that in matters concerning insurance agents and brokers, California courts have become less and less dependent on traditional agency/principal law.

With respect to life settlement disclosure, an inherent conflict exists between insurance companies and their agents. An advisor's duty to exercise the reasonable care standard is hindered by carrier directives to conceal the life settlement option. Until this issue is resolved, lawsuits like the one filed in Riverside County may become more common.

The case is *Larry Grill et al v. Lincoln National Life Insurance Company*, 5:2014cv00051, U.S. District Court, California Central District (Riverside).