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Recent Trends and Defense Strategies in Agent Sales Practice Suits

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Allegations of misconduct by agents and brokers are a consistent feature of lawsuits aimed at insurance companies. Several recent court decisions illustrate the types of claims insurers have faced and which defense strategies are proving successful.

The claims generally fall into two archetypes: misrepresentations by the insurance agent during the sale of the policy, and fraud by the insurance agent after the sale of the policy. In one recently filed putative class action, for example, the plaintiff claimed that agents were trained and incentivized to trick consumers into replacing whole life policies with universal life policies and that, in doing so, agents misrepresented the terms or benefits of the universal life policies. In another case, the plaintiff sued an agent and insurer, alleging that the agent (who was also the decedent's brother) improperly designated himself as the beneficiary of the decedent's policy or unduly influenced the decedent to make the change.

Chief among these lawsuits are claims for breach of contract, breach of implied covenant of good faith and fair dealing, violations of state insurance statutes, deceptive and unfair trade practices, unjust enrichment, negligent misrepresentation, and fraud.

- Insurers and agents have successfully fended off some of these claims by arguing that insurance transactions are exempt from state deceptive business practices statutes. In *Grammer v. Ferlin*, for example, the court dismissed claims against individual agents, concluding that the conduct and transactions alleged — namely, improperly reducing an insured's coverage when converting her group policy to a personal one and selling her an additional, unnecessary life policy for their own financial benefit — were regulated by the state insurance code and exempt from Georgia's Fair Business Practices Act.

- Insurers have also obtained dismissal of such claims due to the insurer's lack of knowledge of the agent's activities or because the actions were outside the scope of the agent's employment. In *Fairchild v. Fairchild*, the court dismissed all claims against an insurer because there were no allegations that the insurer authorized, knew of, or had reason to know of the agent's alleged misconduct. Further, the court found that an alleged improper change of beneficiary and alleged self-dealing were not actions taken within the scope of the sales agent's employment.

- Insurers have also often prevailed in summary judgment of fraud claims where the alleged agent misrepresentations were expressly contradicted by the policy and policy exclusions. In *Carter v. Companion Life Insurance Co.*, the court dismissed the insured's misrepresentation claims based on the agent's alleged inaccuarate statements about the coverage of a health insurance policy where the agent's statements were directly contradicted by the policy's language and exclusions.

- Insurers have had success with statute of limitations and statute of repose arguments. For example, in *Tucker v. Transamerica Life Insurance Co.*, the court dismissed a fraud claim based on the agent's alleged misrepresentations that the plaintiff's long-term care insurance policy would pay for any changes or modifications to her house, because the alleged statements were made 20 years earlier when the policy was purchased.

- And insurers have won summary judgment on fraud claims where, as in *Derrick v. Lincoln National Life Insurance Co.*, the plaintiff could not show that the agent's statements at the time of purchase were a false representation, rather than a prediction of what was a probable future performance or outcome.

While litigation against insurers usually involves actions relating to agent conduct, as these recent decisions illustrate, insurers can employ numerous strategies that can result in favorable decisions early in the litigation and thus minimize potential costs and exposure.

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