CARLTON FIELDS

State Law Steers STOLI Cases, Drives Federal Court Outcomes

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We previously reported in detail on developments in the case law and legislation addressing stranger- originated life insurance (STOLI) policies. *See* "New Jersey Springs Into Action: New Bill to Ban STOLI Policies" and "New Jersey Enacts Anti-STOLI Law," *Expect Focus – Life, Annuity, and Retirement Solutions*. In two recent decisions, the Second and Eleventh Circuit Courts of Appeal chimed in on the validity of STOLI policies.

In *Lincoln National Life Insurance Co. v. Inzlicht-Sprei,* the Second Circuit rejected a claimant's argument that he was entitled to his mother's insurance policy proceeds. Under New York insurance law, a person may procure an insurance policy on his or her own life and transfer it to someone without an insurable interest in that life, even where the policy was obtained for just such a purpose. The insured's decision, however, must be on the insured's own initiative and be free from nefarious influence or coercion. The Second Circuit found that the claimant had failed to raise a genuine issue of material fact as to whether his mother had been induced to take out the policy by nefarious influence or coercion, especially in light of his statement that his mother had proposed the idea to purchase and sell an insurance policy on her life. The court thus affirmed the district court's decision that a later purchaser of the policy was entitled to its proceeds.

In *Estate of Malkin v. Wells Fargo Bank, N.A.,* the Eleventh Circuit considered whether a 2006 policy on Malkin's life was, under controlling Delaware law, a prohibited STOLI policy procured or effected without an insurable interest. The policy at issue was orchestrated by, funded by, and transferred among a group of entities that were in the business of non-recourse premium financing of life insurance policies and targeted healthy seniors with excess wealth who wanted to make money off of their "life insurance capacity." The court concluded that the circumstances under which the policy was issued showed it was not purchased for lawful insurance purposes. Malkin did not procure the policy and never paid any of the premiums; rather, the policy was obtained through a power of attorney, and paid for, by unrelated third-party entities. Malkin was simply an instrumentality used to procure a policy for which there was no insurable interest. The court, accordingly, affirmed the district court's determination that Malkin's policy was an illegal STOLI policy, void under Delaware law.

The Eleventh Circuit, however, declined to affirm the district court's ruling that Malkin's estate was entitled to the policy's proceeds of $4 million. Berkshire Hathaway received the proceeds when Malkin died in 2014 after acquiring the policy in 2013. Berkshire argued it was a bona fide purchaser under Delaware's version of the Uniform Commercial Code. The district court held that allowing UCC-based defenses would gut the purpose and effectiveness of the insurable interest provision of Delaware's insurance code, which takes no notice of the UCC and makes no exception for bona fide purchasers. Based on the lack of precedential authority on whether UCC- based defenses can be asserted in this context, the Eleventh Circuit certified the question to the Delaware Supreme Court along with the question whether an investor can recover the premiums it paid on a void policy. Stay tuned.

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