

Five Steps to Heading Off a Potential Lawsuit

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Everyone has heard the saying that “an ounce of prevention is worth a pound of cure.” For insurers, marketing organizations and agencies, that “ounce of prevention” includes establishing compliance procedures to ensure the propriety of their policy sales and to avoid litigation. Periodic internal audits are among the tools used to make sure these compliance procedures are successful. More recently, these efforts also have included having outside counsel review current sales practices to help identify and avoid problems — or at least minimize them. Embracing an ounce-of-prevention approach, and budgeting legal department funds for such reviews, is an effective practice that can minimize legal exposure for insurers and agents alike. **An Ounce of Prevention...** Class action filings involving the insurance industry have steadily increased over the past several years, currently making up 7 percent of all class actions handled last year, according to the [2016 Carlton Fields Class Action Survey](#). In the past 10 years, many of the class action suits filed against the insurance industry have focused on alleged “common” agent or insurer actions. This is a way of maximizing the possibility of having a lawsuit certified as a class action. In addition to class action filings, lawsuits brought on an individual basis against the insurance industry also have continued unabated in recent years. A sales practices review conducted by knowledgeable outside counsel can identify and address problems and prevent both class action and individual lawsuits before they are filed. For example, a review might identify problematic sales materials or uncover improper communications, such as faxes sent in violation of the Telephone Consumer Protection Act (a basis for recent litigation against insurance producers and issuers). By conducting this review, the salesperson, agency, marketing organization and insurance company could save hundreds of thousands, if not millions, of dollars. A sales practices review is a form of compliance audit that can be accomplished in multiple ways, depending on the specific concerns and sensitivities of the distributor or company. Typically, a review involves analyzing an agency’s or marketing organization’s sales materials and compliance processes, and then preparing a report identifying areas of concern. A typical review usually involves five fundamental steps. [1] Defining the engagement. At the outset, outside counsel would meet with the insurer or marketing organization. The purpose of this initial meeting is to identify particular topics and practices to review, and to identify applicable privileges (such as the

attorney-client privilege, the attorney work-product doctrine and other protections) and ensure that protocols are in place to preserve them. Key areas of analysis might include Department of Labor fiduciary rule issues such as disclosures regarding compensation and potential conflicts of interest; privacy and cybersecurity; compliance with the Do Not Call Registry and the TCPA; suitability; advertising; potential unfair trade practices; sales to seniors; exchanges and replacements; complaint monitoring and resolution; unauthorized practice of law; tax advice and financial planning; and Financial Industry Regulatory Authority issues, if applicable. [2] Background work. In this preliminary phase, outside counsel will discuss relevant operations and sales practices with the insurer and the marketing organization. Counsel also would review the distributors' publicly available information such as any publicly available filings with their state or federal regulator and materials on their website. [3] Desk review of information. Outside counsel will analyze information obtained from the distributor to develop targeted questions for the on-site review and to understand any potential areas of concern. Depending on the volume of material, counsel may focus on certain areas or identify "representative" items. [4] On-site review. After review of written materials, outside counsel will visit the organization and conduct interviews of key staff to gain a complete understanding of their operations. [5] Assessment. Finally, outside counsel will communicate their findings and recommendations. The cost of undertaking such a review varies depending on the size of the organization and the volume of materials. But the financial outlay involved is modest compared with the cost of defending even one lawsuit or arbitration proceeding. In-house counsel at marketing organizations and insurers should consider the money spent upfront as an ounce of prevention. If the engagement avoids even one instance of litigation, it is all but certain to pay for itself and achieve considerable savings for all potential defendants. **...Is Worth a Pound of Cure** Regardless of who may be named as a defendant in a sales practices-related lawsuit, the benefits of undertaking sales practices reviews outweigh the risk of not doing so for all involved parties. The insurer benefits by avoiding significant litigation, reputational risk and a strained relationship with its distributors or agents. The individual producers, marketing organizations and insurance agencies benefit as well. Even when they are not named in the lawsuit itself, identifying and addressing compliance issues before a lawsuit is filed mitigates friction between insurers and producers, and helps avoid commission chargebacks on challenged sales. For all these reasons, insurers and marketing organizations/general agencies should strongly consider partnering to conduct reviews of their sales practices. Ensuring that rigorous procedures for insurance sales are both established and followed provides competitive advantages. In addition, it reduces legal and regulatory exposure for marketers/distributors as well as issuers of insurance products.

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