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TOPIC: STOLI – Fraud Case Not Barred by Statute of Limitations

CITES: [Pruco v. Denise Bindow Koslowsky, R. Bindow Plans & Concepts, Ltd., Wells Fargo Bank, N.A.](#), No. 14-03976 (U.S.D.C. Dist. NJ 7/31/2015); [Kramer v. Lockwood Pension Servs., Inc.](#), 653 F.Supp.2d 354, 378-80 (S.D.N.Y.2009).

SUMMARY: This court denied the motion of defendants Denise Bindow Koslowsky and R. Bindow Plans & Concepts, Ltd. (the “Bindow defendants”) to dismiss claims of fraud, conspiracy, breach of contract, negligent misrepresentation, and violations of the New Jersey Fraud Prevention Action asserted against them by plaintiff Pruco. The court also refused to agree with the defendants that the policy at issue in this case should not be found void *ab initio* and rescinded.

Specifically, Pruco charged that the Bindow defendants engaged in a scheme whereby a policy was obtained with the intention and understanding that the policy would be sold to investors lacking an insurable interest in the insured’s life. The defendants unsuccessfully argued that (1) each claim should be barred by the applicable statute of limitations, and (2) Pruco did not, and will not, suffer any damages as a result of the Bindow defendants’ alleged conduct.

RELEVANCE: There are two main take-aways from this case: First, insurers may have longer than perpetrators of fraud, conspiracy, breach of contract, and misrepresentation think they have to uncover misconduct. Second, courts may be willing to allow insurers to recover damages in the form of commissions, costs, and expenses associated with issuing and maintaining a STOLI policy and may not be willing to buy the argument that commissions insurers pay to brokers are “simply an expected part of the transaction” and “not a damage.”

Every STOLI case has made it clear that life insurers need to do a much better job underwriting and investigating an applicant’s statements at the time of and within the two year period following the issuance of coverage. Obviously, the proverbial ounce of protection will save insurers a great deal of not only money spent on legal fees but also the most valuable asset it has, the time and work ability of its valued employees.

FACTS: Pruco alleged in its complaint that around May, 2007, the Bindow defendants solicited Ms. Espinal to procure from Pruco a stranger-originated life insurance (“STOLI”) policy. At this time, Koslowsky was an independent, nonexclusive producer appointed to sell products for Pruco. Bindow Plans was a broker general agency that acted as an intermediary between independent insurance producers, such as Koslowsky, and insurance carriers.

As part of the alleged scheme, Ms. Espinal purchased a \$4,000,000 policy from Pruco through Bindow Plans and Koslowsky. Pruco alleged that the beneficial interest in this policy was always intended to be sold to a third-party investor in the secondary market. As such, Ms. Espinal, her estate, and her named beneficiary was not intended to receive the death benefit from the policy upon her death. Instead, she would receive monetary compensation from the sale of her policy on the secondary market based upon a percentage of the policy’s face amount. Allegedly, the defendants benefited by receiving commissions from Pruco for securing a policy that would not have been issued but for their allegedly fraudulent scheme.

The complaint alleged that to secure this policy, the defendants made numerous fraudulent and material misrepresentations in connection with the policy application. For example, in the application, Koslowsky allegedly represented to Pruco that the purpose for the policy was “capital preservation” and “estate liquidation,” and the amount of the policy was determined using an “estate analysis.” The complaint also alleged Koslowsky falsely represented that Ms. Espinal’s “current income or savings account” would be the source of payment of premiums. Pruco alleged Koslowsky falsely represented Ms. Espinal had an earned annual income of \$200,000, an unearned annual income of \$200,000, and a net worth of \$4,935,600. In reliance upon these allegedly false representations, Pruco issued a \$4,000,000 policy on Ms. Espinal’s life on December 10, 2007.

Michael Bindow was indicted in New York on February 15, 2012. The charges were conspiracy to commit mail fraud and wire fraud. The indictment alleged he and co-defendants submitted and placed fraudulent STOLI policies with a number of carriers and received significant monetary compensation in exchange. His trial began on September 17, 2013, and Mr. Espinal, the insured’s son, testified that

- (1) his mother’s only source of income was \$720 a month from social security benefits;
- (2) between 2007 and 2013, she did not own any significant assets and held only approximately \$700 in her bank account; and
- (3) statements that she had an annual earned income of \$200,000 and a net worth of \$4,935,600 were false.

In addition, he testified that

- (1) Mr. Bindow and others solicited Ms. Espinal to participate in the procurement of a multi-million dollar STOLI policy;
- (2) Ms. Espinal would not incur any out of pocket costs and would not be responsible for paying the premiums on this policy;
- (3) Mr. Bindow sent Ms. Espinal several applications for her signature which she signed and returned;

(4) neither Mr. nor Ms. Espinal filled out the portions of the applications relating to Ms. Espinal's finances; and

(5) Ms. Espinal signed several applications with the hope and expectation that she would receive compensation for the sale of each policy.

Based on this testimony as well as other evidence, Michael Bindow was convicted on all counts on October 7, 2013.

Pruco alleged that prior to Mr. Espinal's testimony and Michael Bindow's conviction, it had been unaware of the intentions of the defendants with respect to the procurement of the STOLI policy and the allegedly fraudulent misrepresentations made in regards to Ms. Espinal's income and net worth. Pruco also alleged the defendants "concealed their fraudulent conduct." Pruco alleged it commenced this action by filing the complaint on June, 20, 2014 upon becoming aware of these alleged facts.

The Bindow defendants moved to dismiss the claims against them. Its two main arguments were that (1) each claim should be time-barred by the applicable statute of limitations, and (2) Pruco did not, and will not, suffer any damages as a result of the Bindow defendants' alleged conduct.

Pruco asserted New Jersey state law claims against the defendants for fraud, conspiracy, breach of contract, and negligent misrepresentation. These claims are all subject to six-year statute of limitations. But under the discovery rule, a statute of limitations does not begin to accrue until the earlier of the two dates on which a plaintiff knew or should have known of the facts giving rise to the cause of action. Specifically, "a cause of action will be held not to accrue until (1) the injured party discovers, or (2) by an exercise of reasonable diligence and intelligence should have discovered, that he may have a basis for an actionable claim."

In New Jersey, in the case of each of these charges, the period of limitation begins to run only from the discovery of the fraud or the time when, by reasonable diligence, it could have been discovered. So the court held the discovery rule is generally available to rebut a statute of limitations affirmative defense for all of the claims asserted against the Bindow defendants.

Looking only to the dates stated in the complaint, Pruco alleged that prior to Mr. Espinal's testimony on September 24, 2013 and Michael Bindow's conviction on October 7, 2013, it had been unaware of the fraudulent misrepresentations made in Ms. Espinal's application and that the defendants "concealed their fraudulent conduct." So Pruco filed the complaint less than nine (9) months later on June 20, 2014—well in advance of the six (6) year statute of limitations for the claims.

The Bindow defendants argued that the complaint should be dismissed because Pruco did not show damages, a required element of negligent misrepresentation. But Pruco alleged damages in the form of (1) commissions paid to the Bindow defendants for their roles in procuring Ms. Espinal's policy, (2) administrative costs and expenses associated with the issuance and maintenance of the policy, and (3) attorneys' fees Pruco incurred as a result of the Bindow defendants' conduct.

But the court found Pruco adequately pled damages and denied defendants' motion to dismiss. The defendants' theory asserted that Pruco received \$1,044,146.00 in premium payments, paid only \$242,461.12 in commissions, and therefore had "net" earnings of \$801,684.98. Therefore, it did not

suffer any damages. The defendants also argued that the commissions insurers pay to brokers are “simply an expected part of the transaction” and “not a damage.”

The court here first looked at the Kramer case where that court found that the plaintiff did not sufficiently plead damages because the plaintiff’s “only injury ... resulted from the defendant insured’s alleged noncompliance with New York Insurance Law.” But it noted that shortly after *Kramer*, another court in the Wolk case denied a motion to dismiss the plaintiff’s common law fraud claim stemming from an alleged STOLI scheme where the plaintiff pled damages by alleging that it had “incurred substantial damages ... including ... costs and expenses associated with the issuance of the policy.” There, the court held that the plaintiff adequately pled fraud, including damages, and denied defendant’s motion to dismiss that claim and pointed out that at least one New Jersey court held that the damages element of a fraud claim in an alleged STOLI scheme is sufficiently pled when it alleges “damages consisting of not just the future damages it will incur ... but also ‘substantial damages as a result of Defendants’ wrongful conduct, including ... costs and expenses associated with the issuance of the Policies.’” Here, Pruco alleged damages resulting from defendants’ conduct in the form of commissions, costs, and expenses associated with issuing and maintaining the STOLI policy.

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