



# WRNewswire

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The *WRNewswire* is created exclusively for AALU Members by insurance experts led by Steve Leimberg, Lawrence Brody and Linas Sudzius. *WRNewswire* #15.01.05 was written by Randy Zipse of The Prudential Insurance Company of America, Newark, NJ. The *WRNewswire* provides timely reports and commentary on tax and legal developments important to AALU members, clients and advisors, delivered to your inbox as they happen.

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**TOPIC: Producer Ordered to Return Commissions on Policies Rescinded in STOLI Settlement**

**CITE:** [\*PHL Variable Insurance Company v. Kevin Burke\*](#); No. 3:13-cv-1270 SRU (U.S. D.C. CT Nov. 14, 2014).

**SUMMARY:** Phoenix had alleged that Burke, a former Phoenix general agent, breached his Brokerage General Agent Agreement by failing to return commissions he received on several life insurance policies after those policies were rescinded by mutual agreement of the owner and the insurer. Burke admitted that he had received commissions and that he had kept them. However, based on a hyper-technical reading of his agent's agreement, he asserted that he was not required to return the commissions. Moreover, Burke counterclaimed for breach of contract, alleging that Phoenix unlawfully withheld additional commissions owed to him. The Federal District Court of Connecticut granted Phoenix's summary judgment motion and denied Burke's motion for summary judgment claiming breach of contract.

**RELEVANCE:** STOLI cases can lead to adverse results for the carrier, for the insured and for the STOLI investors. This case is a reminder that STOLI activity can create problems for agents, too. In this case, Burke's STOLI activity presumably led to his contract being terminated, and he was forced to pay back his compensation when the STOLI policy was rescinded.

**FACTS:** Burke was a licensed agent of Phoenix from April 2007 until his termination in May 2008. Burke's relationship with Phoenix was governed by the agent's agreement which he executed on April 1, 2007. Under the terms of the agreement, Burke was required to return commissions

if Phoenix cancel[led] or rescind[ed] a policy or contract for any reason or if the policy or contract owner exercise[d] any right to cancel a policy or contract, and, as a result, Phoenix refund[ed] or return[ed] any amount of any payment made on such policy or contract ....

Phoenix paid Burke more than \$1.7 million in commissions on the three life insurance policies at issue in this litigation. Subsequent to the policies' issuance, the policy owners filed suit against Phoenix in California seeking damages against Phoenix for "targeting" elderly individuals and convincing them to purchase multi-million dollar life insurance policies by falsely representing that the policies could be freely transferred or assigned and then refusing to recognize assignments or other transfers of ownership. Phoenix responded by alleging that the policies were obtained through fraudulent misrepresentations made by the policy owners. Phoenix and the policy owners reached a settlement and executed a settlement agreement under which the policies were rescinded *ab initio* (i.e. from inception).

Under the settlement agreement, Phoenix was required to pay the policy owners an amount of money that represented "a full return of the Premiums less a negotiated amount." Phoenix asserts that the amount it owed the policy owners under the settlement was approximately 57.77% of the premiums paid on the policies.

After the settlement, Phoenix demanded that Burke pay back approximately \$1 million in commissions he received on the policies. The amount Phoenix ordered Burke to repay was directly proportional to the amount of the premiums it paid back to the policy owners under the settlement—i.e., 57.77% of the total compensation Burke received on the policies.

Burke did not pay back *any* of the commissions he already had received so Phoenix subsequently withheld compensation from Burke that it otherwise would have owed him. As a result, Phoenix claimed that Burke owed a balance of \$379,193.16 in charged-back commissions on the policies.

In this case, the parties did not dispute that they had entered into a valid, binding settlement agreement. The agreement required Burke to return commissions in the event that "Phoenix cancell[ed] or rescind[ed] a policy or contract *for any reason* " or "the policy or contract owner exercise[d] *any right to cancel a policy or contract*, and, as a result, Phoenix refund[ed] or return[ed] any amount of any payment made on such policy or contract."

Despite the undisputed facts, Burke argued that he did not breach his agent's agreement because the settlement did not trigger the provision requiring him to repay commissions if a policy were cancelled or rescinded. Burke's entire defense seems to be that the plan language of the agreement, when read literally, requires a commission repayment *only* if either (a) Phoenix unilaterally cancels or rescinds the policy or (b) the policyholder unilaterally cancels or rescinds the policy. Burke claimed, specifically, the agent's agreement does not require charge-back when the cancellation or rescission is *mutually* negotiated, as in this instance.

**RESULT:** The agent asserted that California law governed the interpretation of the settlement. However, the federal court found that even if California law (and not Connecticut law as argued by Phoenix) did apply, the settlement declaring the policies rescinded, *ab initio*, has the effect of rendering them completely without legal effect.

Moreover, in granting Phoenix's request for summary judgment and rejecting Burke's request, the court found that Burke breached the agent's agreement by refusing to pay back \$1 million of the \$1.7 million in commissions that he received on the policies after

the policies were rescinded. Therefore, the court found that the insurer was entitled to withhold other compensation from Burke. In addition to the compensation offsets taken by Phoenix, Burke was ordered to make Phoenix whole by paying back the difference between \$1 million and the amount that Phoenix had withheld.

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