



# WRNewswire

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**TOPIC: Agent Who Received Premium Notices for Life Policy and Failed to Forward Them Owed No Fiduciary Duty to Beneficiaries**

**CITE:** [\*UBS Financial Services Inc. v. Thompson\*](#), No. 0352 (Court of Special Appeals of Md, June 25, 2014).

**SUMMARY:** The appellate court reversed a jury award and remanded the case for a new trial in an action against UBS and Gordon Witherspoon by sisters Nancy Thompson and Barbara Clements. The sisters alleged that UBS and Witherspoon denied them the full value of a second-to-die life insurance policy purchased by their parents, Nancy and Albert Thompson (“insureds”). Witherspoon, the financial advisor to the insureds, was also their son-in-law (the husband of another sister).

**FACTS:** The insureds purchased a second-to-die life insurance policy from the Manufacturers Life Insurance Company (“Manulife”) on September 28, 1990. The owners (and beneficiaries) of the policy were listed as the insureds’ children. Premium payments were regularly made on the policy until 1996 when the premium was not paid. The premium was paid again in 1997, but was not paid from 1998 until Mr. Thompson’s death in 2005.

At the time of his death, the beneficiaries had an opportunity to look into the policy and realized that premiums had not been regularly made and that policy loans of about \$900,000 had been automatically taken by Manulife against the policy to keep the policy in force. Up to that point, the children were not aware that the premium payments had not been made because the policy statements were being sent only to the agent. Since the premium payments that were made had been paid from monies gifted by the insureds, the children simply assumed that their parents had continued to make the premium payments without their knowledge or involvement. Accordingly, the children argued throughout the trial that their “ownership” was “converted” by Witherspoon through his handling of the premium notices and his concealment of the fact that loans were being taken out against the value of the policy.

The appeals court found that life insurance was not the type of property that could generally be converted under state law. The court found that the agent could not be liable for a conversion claim unless he actually took possession of the policy itself. In this case, the insureds retained control of the actual policy at all times.

The court also struck down a claim for constructive fraud. For a claim of constructive fraud, a confidential relationship must exist. The court noted that in some relationships, such as the one between an attorney and a client and a trustee and a beneficiary, there is a presumption of confidentiality. However, it held that such a relationship did not exist here between the parent's financial advisor and the owner/beneficiary children. The confidential relationship, *if* one existed, was between the insureds and Witherspoon (who was their advisor). The familiar relationship between Witherspoon and his sisters-in-law was not enough by itself to create a confidential relationship. Instead, the court found that Witherspoon initiated a limited duty towards the sisters by taking it upon himself to receive the premium notices and coordinate payment of the premiums. These duties were found not to be fiduciary in nature. Instead, the court noted that a cause of action, if any, would be available under a theory of negligence.

The court noted that any liability of UBS would be predicated on its supervision of Witherspoon. In determining Witherspoon's liability, the trial record spent much time attempting to distinguish between the duties of an insurance agent and an insurance broker. But the appeals court found that Maryland law no longer distinguishes between the duties of an agent and a broker. Moreover, the court noted that even in states where there is a distinction between an "insurance broker" and an "insurance agent," the focus is on the agent's or broker's duty while obtaining the insurance, not after. Specifically, the appeals court found that "the circumstances indicate that the ultimate responsibility to pay the premiums on the life insurance policy rested on the parents and appellees, as owners of the policy."

In reaching its decision, the appeals court also made an interesting comparison of Witherspoon's position as an investment advisor selling life insurance to an attorney drafting a will. The court found "significant parallels" and stated that "while not a formal will, the parents' life insurance claim was essentially a vehicle for dividing their considerable estate amongst their children." Therefore, the court found that Witherspoon was "in a similar position as an attorney drafting a will." Therefore, using Maryland's law of "strict privity" for attorneys, the court determined that Witherspoon was under no duty to ensure that the sisters, as beneficiaries, received as much of the proceeds as possible.

**RELEVANCE:** This case is significant for a number of reasons. Even given the unusual facts of this case (the agent being related to the beneficiaries), the court confirmed that the agent had no duty to ensure that premium payments were made or that the overall performance of the policy was maximized.

By taking it upon himself to receive the policy statements, the agent seemed to be taking on a higher level of responsibility with regard to the policy. However, the court seemed to conclude that the agent's responsibility largely ended after the policy was issued. Responsibility for payment of premiums and management of the policy was found to be with

the owners and insureds (who effectively retained control over the policy even though not legal owners).

The discussion on privity and the comparison of a life insurance agent to an attorney drafting a will is also one that could have considerable relevance. This is especially true in those states where the doctrine of strict privity has been significantly eroded and attorneys are found to have considerable responsibilities to the beneficiaries of the estate plans that they prepare.

***WRNewswire #14.07.14* was written by Randy Zipse of [Highland Capital Brokerage](#).**

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