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**TOPIC: Civil Action Pertaining to Insurance Agent Negligence, Breach of Fiduciary Duty, Negligent Misrepresentation, and Fraudulent Inducement**

**CITATION:** [Stickney v. United Insurance Group Agency](#), 2015 WL 7180927, No. 3:2013cv00235 (U.S.D.C. S.D. Ohio 2015).

**SUMMARY:** This civil action came before the Ohio Federal District Court on the policyholder’s motion *in limine* (a motion made at the beginning of a trial requesting that the judge rule that certain evidence may not be introduced) as to potential damages.

Plaintiff Stickney was the owner and beneficiary of a second-to-die policy on the joint lives of his parents. He felt the premiums were too high and looked for less expensive coverage. Defendant insurance agents provided Stickney with a number of options but because of the substandard health of his parents the policy originally considered could not be obtained and the insurer offered a rated policy instead.

Despite the less desirable underwriting decision and its consequent higher premiums, the more expensive replacement policy was issued. Initial premiums were paid through a Section 1035 exchange of an existing policy, which had been issued at a better underwriting class than the new policy.

**RELEVANCE:** This case should serve as a reminder to agents that it is important to understand and respect the client’s purpose for purchasing a policy—or to carefully communicate and document the reason for deviating from it. Here, Stickney seems to have made it clear—multiple times throughout the process—that his purpose for considering a new policy was to reduce his out of pocket cost. Yet the opposite seems to have occurred—the new policy required a larger annual outlay than the policy that was replaced.

This case also demonstrates that insurance illustrations can be complicated and a court may not assume that a consumer fully understands everything in an illustration. While the court here did not specifically find that the defendant insurance professionals were “agents” in the legal sense, it was obvious that the court imposed a significant duty of care on the actions of the insurance professionals.

**FACTS:** On July 22, 2013, Van Stickney brought this civil action against United Insurance Group Agency, Inc. (“UIG”) and United of Omaha Life Insurance Company (“Omaha”), alleging six claims: (1) negligence; (2) breach of fiduciary duty; (3) negligent misrepresentation; (4) fraudulent inducement; (5) reformation of contract; and (6) breach of contract.

On January 20, 2015, plaintiff settled his claims against Omaha. Therefore, the reformation and breach of contract claims, which were asserted against Omaha only, were dismissed. The remaining four claims are now pending solely against UIG.

In 2005, Stickney purchased a \$750,000 last-to-die flexible premium life insurance policy from Pacific Life Insurance Company (the “Pac Life policy”) which had an annual premium of \$5,470.

In 2011, Stickney applied to Omaha for a second-to-die flexible premium life policy as a replacement for the Pac Life policy. He applied for the policy through independent insurance agents authorized to sell Omaha policies and associated with UIG. Stickney testified that he initially consulted with one of the agents to see if he could get a replacement policy on his parents for less than the \$5,400 annual premium he was paying for the Pac Life policy. The agents testified that Stickney had asked them “if he could do better” than the Pac Life policy. Over the course of several months, they provided Stickney with multiple policy illustrations

Ultimately, after having been shown numerous illustrations, Stickney applied for an Omaha policy with a \$750,000 death benefit and a \$333.12 monthly premium. He indicated on the application that he was applying for the policy to replace the Pac Life policy through a Section 1035 exchange. He wrote on the application that he sought to replace his Pac Life policy because it was "too expensive."

Nearly four months later, the agent received an email from Omaha in response to the application. The e-mail indicated that Stickney's parents had both been "rated up" based on their medical records. The agent called Stickney to tell him that his parents had been rated and testified that Stickney understood that the policy would be more expensive than the prior contract. However, the agent did not specifically tell Stickney what the new premium was during that phone call even though she either knew or could have ascertained the premium based on the underwriting offer.

On April 22, 2012, Stickney met with the agents to discuss the policy offer from Omaha. Stickney understood that the premium would be higher because his parents were rated, but testified that he was told the premium had only increased from \$4,200 to \$4,500. At \$4,500 the annual premium would still have been more than \$1,000 less than the in-force Pac Life policy.

Nearly two months later, on June 11, 2012, another policy illustration was created. This illustration also provided for a \$750,000 death benefit and it rated Stickney's father as table 2(B) 150% and his mother as standard non-tobacco. The premium outlay was \$8,753.33 annually. The illustration also reflected a Section 1035 exchange deposit of \$23,157 from the Pac Life cash value. Thus, in year one the policy premium was \$31,910 after which the annualized premium outlay for all future years was \$8,753. The illustration stated that the "Lifetime Level Premium" was \$8,753.33 and the "Short-Term Level Premium" was \$4,543.02.

On July 19, 2012, Omaha created a revised policy illustration and forwarded it to one of the agents. Stickney testified that he read the July 2012 revised illustration and specifically asked the agent to explain the difference between the "Lifetime Level Premium" of \$8,753.33 and the "Short-Term Level Premium" of \$4,406.81 that were listed on the final page.

Based on the testimony in the record, it seems rather likely that Stickney did not fully understand the illustration. Specifically, the record reflects his testimony:

[B]efore I signed any documents, I seen to where we have different numbers that are skewed from the top of the page. We have at the very top of the page \$8,753.33 where it says premium outlay. Then where it says Lifetime Level Premium right underneath the line that says \$8,566.74, which is different from the premium outlay. And then there was this Short-Term Level Premium \$4,406.81. I questioned to [the agent], I said, time out. I'm being told the 44, \$4,500 number, I'm seeing three different numbers here. What is my annual premium that I am going to pay year in, year out? Because I see on the other page that it's different than what you're telling me. These numbers here are different to where I wanted to know what's short-term, what's lifetime, what the premium outlay. There's too much going on.

And I said, is this going to cost me more or less than what I'm paying? What am I going to pay for the life insurance? [B]ecause [the agent] was also explaining along with [another agent], which was in meetings, that you can over fund a policy to where there is a minimum to sustain a policy and then you can over fund a policy if you needed to put money in for tax purposes. So I wanted to make sure what level am I talking about when I'm paying for a premium outlay for \$750,000, because I knew I wasn't going to pay any more than what I was paying with Pac Life. And I wanted to know clarity. She verbally told me this \$4,400.

Stickney signed the July 2012 revised illustration on August 7, 2012 and gave the agent a \$400 premium check on that day. Throughout August to December 2012, the parties engaged in extended conversations about how much further premium needed to be paid when. On December 21, 2012, Omaha mailed a letter to Stickney stating that it had discontinued the processing of his application because the initial premium of \$4,293.20 hadn't been paid.

When the policy wasn't issued, this civil action followed, with Stickney seeking recovery of the value of the Pac Life Policy or (alternatively) the value of the Omaha policy reduced by the value of the replacement policy which was ultimately obtained to replace the Pac Life policy which was surrendered pursuant to the 1035 exchange.

In his motion *in limine*, he sought a ruling that:

- (1) plaintiff "may present evidence and argument pertaining to his future damages, including the value of a life insurance policy";
- (2) plaintiff may present evidence and argument "pertaining to damages for adverse tax

consequences"; (3) Defendant "may not present evidence or argument pertaining to any right of setoff"; and (4) Defendant may not present evidence "pertaining to [p]laintiff's] failure to mitigate [his damages].

The court found no reason to preclude Stickney from presenting at trial his evidence of future damages. Essentially, the court held that damages, if proven, would be equal to the value of either the Pac Life policy or the Omaha policy, reduced by the value of the Lincoln policy. The case didn't get into how to value these policies – noting that valuation would be determined at trial based on the evidence presented. For that reason, the court was not willing to limit the evidence that can be presented at trial.

Stickney had sought a ruling that damages should be "grossed-up" for taxes. The court refused to rule on the issue noting that a motion *in limine* is not the appropriate vehicle for deciding whether the plaintiff is entitled to a "tax gross-up" on his potential damage award. That said, the court did note that damages, if any, probably would not be "grossed-up" for taxes because life insurance benefits are generally received free of income taxes according to longstanding and appropriate tax principles. Damages, if any, would seemingly be a replacement for the insurance death benefits.

The court specifically found that the parties could submit evidence regarding failure to mitigate damages or set-off of damages. In essence, the court simply ruled that it is appropriate to allow all relevant evidence pertaining to damages at trial. It did not want to limit admission of evidence at this time in this motion *in limine*.

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