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TOPIC: Default Judgment Entered Against Financial Advisor Who Ignored Life Insurance Rebating Lawsuit Filed Against Him

CITATION: *North American Co. for Life and Health Ins. v. Feldman,* No. 14-CV-02823 (U.S.D.C. E.D.Pa. March 15, 2016).

SUMMARY: A Pennsylvania federal court recently entered a default judgment against a financial advisor who was alleged to have participated in a rebating scheme involving the sale of a life insurance policy to one of his clients. The North American Company for Life and Health Insurance (NACOLAH) filed an action against the financial advisor and one of its former life insurance producers alleging that the financial advisor, who was not under contact with NACOLAH, solicited and sold the policy and used the life insurance producer to sign the application as the writing agent. The producer is then alleged to have remitted a portion of the commissions to the financial advisor who then rebated the commission to the clients.

The court found that the financial advisor chose to willfully and deliberately ignore the lawsuit filed by NACOLAH and therefore, a default judgment was entered against him for the amount of the rebate paid to the clients.

RELEVANCE: Rebating is commonly defined as the act of giving something of value (generally a portion of the producer's commission) to an applicant in return for purchasing a life insurance policy. It is a practice that is disallowed in all states except California and Florida. Even under Florida statutory law, rebating is allowed only in *very* limited circumstances. Specifically, Florida law states that:

> (1) No agent shall rebate any portion of his or her commission except as follows:
>
> > (a) The rebate shall be available to all insureds in the same actuarial class;
> >
> > (b) The rebate shall be in accordance with a rebating schedule filed by the agent with the insurer issuing the policy to which the rebate applies;
> >
> > (c) The rebating schedule shall be uniformly applied in that all insureds who purchase the same policy through the agent for the same amount of insurance receive the same percentage rebate;
> >
> > (d) Rebates shall not be given to an insured with respect to a policy purchased from an insurer that prohibits its agents from rebating commissions;
> >
> > (e) The rebate schedule is prominently displayed in public view in the agent's place of doing business and a copy is available to insureds on request at no charge; and
> >
> > (f) The age, sex, place of residence, race, nationality, ethnic origin, marital status, or occupation of the insured or location of the risk is not utilized in determining the percentage of the rebate or whether a rebate is available.

§ 626.572, Fla. Stat. (2015). *Additionally*, under Florida law:

- the agent must maintain a copy of all rebate schedules for the most recent 5 years and their effective dates,

- shall not withhold or limit in amount a rebate based on factors which are unfairly discriminatory,

- shall not give a rebate that is not reflected on the rebate schedule, and

- shall not refuse or grant a rebate based upon the purchase or failure of the insured or applicant to purchase collateral business.

So even though it is technically true that "rebates are allowed in Florida," (and this case involved the application of Florida law), the rebate to the client here was found to be illegal and judgment was entered against the financial advisor who was required to pay back the amount of the rebate (which he had already paid to the policy owners).

This should serve as a reminder that even in the only two states where it is permissible, rebating is legal *only* if the provisions of the applicable rebating law are strictly and completely met. Rebating is generally frowned upon in the insurance community, often subjected to intense scrutiny, and almost always leads to litigation in one form or another. For example, in the instant case it is apparent that the policy owners were incentivized to purchase a policy that was unsuitable for them and that appeared to provide the wrong type of coverage. It is not hard to imagine that they were more concerned with the rebate then they were about the appropriateness of the coverage they were purchasing. Regardless, it led to at least two separate lawsuits. Moreover, this type of scheme can also expose those involved to disciplinary action from carriers with whom they are contracted, as well as from licensing and regulatory agencies.

FACTS: In 2008, NACOLAH received an application for life insurance on the life of Carole Cohn. The application was submitted by William J. Fuhrmeister, at the time a Pennsylvania life insurance producer under contract with NACOLAH. However, despite what was represented to the carrier, Fuhrmeister was not the soliciting agent. The soliciting agent was actually a Florida financial advisor named Robert Feldman. According to the pleadings, Feldman was the individual who solicited and sold the policy to the Cohns. Because he was not licensed with NACOLAH, Feldman purportedly entered into an agreement with the Cohns and Fuhrmeister whereby Fuhrmeister would sign "the application as the soliciting agent and he would then remit a portion of the commissions earned on the sale of the policy, which Feldman [then] rebated to the Cohns." On May 9, 2009, NACOLAH issued the policy, with a $5 million face amount, to the Cohns.

The rebating scheme was uncovered by NACOLAH when the Cohns filed a separate suit in Pennsylvania State Court against NACOLAH and the Fuhrmeister Agency alleging various causes of action arising out of the insurance policy. Specifically, "the Cohns alleged that Fuhrmeister was aware at the time the policy was issued that the Cohns intended to sell the life insurance policy on the secondary market" and "that Fuhrmeister had misrepresented to them or otherwise led them to erroneously believe that their initial premium payment of approximately $128,000 would be sufficient to keep the policy in force for at least two years without the need for any further payments." During the course of the state court action, NACOLAH learned for the first time that Fuhrmeister had not been the soliciting agent for the policy and, in fact, an individual named Robert Feldman had taken Cohn's application and had delivered the policy to Cohn after it was issued by NACOLAH." NACOLAH also discovered that, without its "knowledge or permission, and in violation of NACOLAH's rules, the Agreement, and Pennsylvania's and/or Florida's antirebate statute, Fuhrmeister" remitted "at least $100,000 of [the] commissions to Robert Feldman, an insurance agent who was not licensed or contracted with NACOLAH" who then rebated the commissions to the Cohns.

Subsequent to the state court lawsuit, NACOLAH filed suit against Fuhrmeister and Feldman "alleging breach of contract, breach of fiduciary duties, fraud, violations of the Pennsylvania and/or Florida anti-rebate statutes and unjust enrichment" seeking to recover, among other things, the commissions paid to Fuhrmeister, remitted to Feldman, and ultimately rebated to the Cohns.

NACOLAH filed its original complaint in 2014 and amended it in early 2015. Fuhrmeister filed an answer to the amended complaint, and ultimately entered into "a stipulation [with NACOLAH] dismissing all claims against each other with prejudice." Feldman was served with the amended complaint on January 27, 2015, but he chose not to answer it, and a default judgment was entered against him on June 9, 2015. Seeking to finalize the default and have a judgment entered against Feldman, NACOLAH filed a motion for entry of a final default judgment against Feldman on January 21, 2016. Feldman failed to respond to the motion. However, shortly before the court granted the motion as unopposed and entered judgment against Feldman, Feldman emailed the court asking to be heard. The court scheduled a hearing and Feldman appeared, without counsel, by telephone.

Feldman asked the court to not enter a default judgment against him. Feldman argued that he had a valid defense; i.e., that the rebate he paid to the Cohns was "a hundred percent legit" under Florida law. Since "[t]he primary question for the Court to

consider [on a motion for entry of a default judgment] is whether the defendant has a meritorious defense," the court looked to Florida rebate law to determine if the rebate in the instant matter was permissible under Florida law. The court found that it was not.

The court opined that Florida law "generally prohibits rebating unless certain conditions are met, which is not the case here." Specifically, "Florida law defines an 'unlawful rebate' as, inter alia: [p]aying, allowing, or giving, or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance contract, any unlawful rebate of premiums payable on the contract, any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract." Here, the court held that "Feldman's payment of $100,640 to the Cohns—which by his own admission was a 'rebate' - clearly constitutes 'valuable consideration' paid directly to the Cohns. Moreover, Feldman admitted [at his deposition in the state court action] that he agreed to pay the first year's agent commissions in connection with the purchase of the policy as an inducement for the sale of the contract." Consequently, "Feldman's assertion that his rebate was 'a hundred percent legit' is belied by his own deposition testimony. Feldman has accordingly failed to establish any meritorious defense" and the court entered a final default judgment against Feldman in the amount of $100,640.
