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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 #15.03.20 was written by Randy Zipse of The Prudential Insurance Company of America, Newark, NJ.*

TOPIC: Appeals Court Affirms Dismissal of Complaint Against Insurance Company in Leveraged Annuity Arrangement

CITE: *Nova Bank v. Schenker*, No. 36-2-5915 (N.J. App Div Feb 24, 2015).

SUMMARY: The New Jersey court of appeals affirmed a 2013 summary judgment granted to American General Life Insurance Company. The case involved a leveraged annuity arrangement where the insured sued his agent, the financing bank and American General for fraud. The appeals court affirmed summary judgment in favor of American General.

RELEVANCE: On first glance, it might appear that this was a win-win for the insurance producers and the carrier. However, that really isn't the full story. American General, as well as the producers, were forced to expend valuable time and energy—not to mention significant money—defending this matter. American General engaged outside attorneys to defend itself on both the original motion and the appeal.

One can only assume that the client allowed himself to believe that the program would create financial benefit for him without any out of pocket cost. Although the client was obviously a highly educated professional, he was convinced that this structure could create wealth without cost or risk. He willingly signed the loan guaranty and participated in an arrangement that promised a result that was, in the light of how things actually turned out, "too good to be true".

The primary relevance and the lesson of this case is something that we already know and have seen and heard many times: If something sounds too good to be true, it probably isn't true. Although it isn't exactly clear what the client lost (because we don't know the terms of his settlement with the bank), it seems likely that he lost considerable money. The life insurance producers were forced to defend themselves against allegations of fraud, which undoubtedly cost them time and legal fees and may have damaged their reputations. American General was forced to defend itself both at the trial court and on appeal.

FACTS: Samuel Schenker, MD met with Atlast Financial Services, LLC ("Atlast") in January of 2005 to discuss the purchase of a "wealth accumulation and asset protection plan" known as the Magnifier Advantage program.

The program was a leveraged annuity arrangement where the proceeds of a bank loan were used to purchase a single premium immediate annuity ("SPIA") with the annuity payments used to pay the premiums on a life insurance policy and, it appears, interest on the bank loan. Atlast represented to Dr. Schenker that the program would provide him with creditor protection and tax deferred growth. Although it isn't clear what written representations were made, it appears that Dr. Schenker believed that the program would be free of cost to him.

A limited liability company ("LLC") was created. The LLC obtained a $700,000 commercial loan with a five year term from Nova Bank. The loan was personally guaranteed by Dr. Schenker. It is undisputed that the loan agreement did not obligate the bank to extend the loan past the original five year term. In the pleadings, Dr. Schenker asserts that he received oral assurances from both Atlast and the bank that "it would not be a problem" to renew the loan indefinitely.

The loan proceeds were used to purchase both the SPIA and a life insurance policy from American General. Both the SPIA and the life insurance policy were assigned to Nova Bank as the primary security for the loan, which in total amounted to $700,000.

When the five year loan term matured in January of 2010, the bank agreed to extend the maturity until May of 2010. However, the bank, citing changes in the banking industry caused by the 2008 recession, refused to further extend the loan. When Dr. Schenker defaulted on the loan, the bank foreclosed on the SPIA and life policy. In addition, the bank filed a lawsuit against Dr. Schenker and the limited liability company for failure to repay the loan.

Dr. Schenker responded to the lawsuit by counter-suing the bank, as well as Atlast, its officers and American General, under a number of theories, including breach of contract and fraud. Dr. Schenker reached an undisclosed settlement with the bank and opted not to pursue claims against Atlast and its officers. Dr. Schenker maintained his lawsuit against American General, based on American General's apparent agency relationship with Atlast, alleging common law fraud and conspiracy to commit fraud.

American General filed for summary judgment which was granted by the trial judge. In granting summary judgment the judge held that a statement about future intent cannot constitute a misrepresentation. In other words, even if Atlast was an *agent* of American General (and not a *broker* as American General contended), the action brought by Dr. Schenker had no basis because there was no misrepresentation. The loan commitment was for only five years and even if Atlast or its officers orally stated that "renewing it would be no problem", that statement was merely their opinion. The clear language of the loan agreement reflected that the Bank had no such obligation.

The trial judge held and the appeals court agreed that a statement as to future intent cannot be a misrepresentation. Because Atlast's statement was not a misrepresentation, it

did not matter if Atlast (and its officers) were agents of American General or were merely independent brokers. Since Atlast hadn't committed fraud, American General could not be responsible for fraud.

American General was able to get the action dismissed on summary judgment and, presumably, Atlast retained the commissions received on the SPIA and life sales.

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