

THE WORK-UP OF A DEBIT INSURANCE FRAUD CASE

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THE WORK-UP OF A DEBIT INSURANCE FRAUD CASE

I. INTRODUCTION

Debit insurance fraud cases are numerous in Alabama. Alabama's low income and uneducated population make many citizens sitting ducks for the unscrupulous debit insurance fraud agent. Debit insurance is distinguished from other types of insurance because of the agent's involvement and the smaller value of the policies. The debit insurance agent goes to the policyholder's home once a month and collects a small amount of premium usually in cash for the policies. Typical policies are \$5,000 burial insurance policies, small life insurance policies, accidental expense policies, and hospital expense policies. When the policyholder gives the agent money, the agent is trusted to take the money back to the company and credit it to the policyholder's policy. Normally, the agent is required to give the policyholder a receipt showing he has received the money or to put a check-mark in the policyholder's payment book showing that the money has been received.

As stated above, many of the policyholders have low incomes and are unsophisticated regarding insurance. They simply trust the agent to be honest. On many occasions, these policyholders have their policies canceled and the cash value stolen by the agent, they give money to the agent that it is never credited to the policy, they have loans taken out on their policy without their knowledge, they are talked into canceling their old policies with cash value and taking out new policies with the cash value, and they have their signatures forged to important documents.

This paper is designed to show the practitioner the steps in developing a fraud case in the debit insurance context. Since there is a debit involved, there are numerous differences in the development of this type of fraud case and other types of insurance fraud cases.

II. THE INITIAL CLIENT INTERVIEW

Many times you are dealing with uneducated policyholders. Many of them have literally 20-30 small policies on their entire family. Some have had policies 20 and 30 years. Most don't know exactly what they have. Often, these people bring in a grocery bag full of insurance papers that they have had for many years. The papers are normally incomplete and unorganized. For this reason, understanding the actual facts and discovering the fraud can be the most difficult task involved in these cases.

A. Listen to the Policyholder

First, listen to what the policyholder thinks the agent or company has done wrong. Try to elicit the facts from the policyholder. It is important that you know what they think has been done wrong. What they think is a good starting point. After that, you can search for other theories based on other questions you ask them. If you cannot elicit the facts from them, talk to some of their family members who have been involved with the payment of the policies or the policyholder's financial affairs over the years. Carefully study each document and ask questions about them.

If you are still unable to discover the actual fraud, as a last resort, write the Alabama Insurance Department and ask them to write the company to get a list of all of your client's policies that are currently in force, when other policies went out of force, why the policies went out of force and whether or not there have been any loans on any of the policies. You can also request copies of all of your client's policies and all documents he/she signed. Since the Alabama Insurance Department regulates the insurance company, the company will always respond to this request.

When the insurance company sees that a lawyer is involved, many times they do a quick fix to try to help themselves in future litigation. However, once the fraud has been perpetrated, they cannot undo the fraud. See the cases of National States Insurance Co. v. Jones, 393 So. 2d 1361 (Ala. 1980), Old Southern Life v. Woodall, 348 So. 2d 1377 (Ala. 1976), Pihakis v. Cottrell, 243 So. 2d 685, (Ala. 1971). Therefore, if you cannot understand all of the facts or the exact fraud in any other way, write the Alabama Insurance Department. If the insurance company does a quick fix based on your letter, you can argue that their quick fix is an admission of prior wrongdoing.

B. Start Developing Pattern and Practice Evidence

Pattern and practice evidence is the single most important area of discovery. Start in the initial client interview to discover this information. Ask the family if they have any neighbors or friends who also deal with the same insurance company. Contact those neighbors or friends to be witnesses as soon as possible. The debit insurance routes are usually geographically close. In other words, your client will have neighbors in their community who are on the same debit route. Therefore, the same agent deals with them. Where there's smoke, there's fire. If the same agent has similarly defrauded other policyholders, certainly this will be admissible evidence at trial. While the cap on punitive damages has recently been overturned, this type of evidence is still admissible at trial on

other grounds which will be discussed later in this paper.

C. Advise Client Not to Talk to the Agent

Again, debit insurance fraud cases present a unique problem. Your client many times needs to keep some of his/her insurance in force because of health or other reasons. The agent will continue to come by and collect money from your client on a monthly basis even though the litigation is pending against the agent and the company. Many policyholders do not have transportation to the company's office to make their payments. Therefore, it is best for the client to mail his/her payments to the company. On many occasions, I have actually made stamped, addressed envelopes for the client to mail the payment into the company. This is probably the best way to handle it.

D. Who is the Proper Plaintiff?

It is very important at the initial client interview to determine who is the proper party plaintiff. There are some exceptions to the rule, but the general rule is the proper party plaintiff can be the owner of the insurance, the beneficiary of the insurance, or the person who has made the premium payments on the insurance. However, just about anyone who has been cheated and has injuries, can be a party plaintiff.

In National States Insurance v. Jones, 393 So.2d 1361 (1980) the Alabama Supreme Court held that a niece had standing to bring an action regarding her aunt's policy, although she was not the applicant, the insured, the beneficiary or the owner of the policy. In Old Southern Life Insurance v. Woodall, 295 Ala. 235, 326 So. 2d 726 (Ala. 1976) the Alabama Supreme Court held that a husband could bring a fraud claim regarding an insurance policy covering his wife because the husband had paid the policy premiums and was the exclusive party with whom the insurance company had dealt and the husband suffered the direct injury. In Lowe v. American Medical Intern, 494 So. 2d 413 (1986) the Alabama Supreme Court held that a plaintiff may bring a misrepresentation claim if she can show she has been injured. See also Davis v. Southern United Insurance Company, 494 So. 2d 48 (1986).

It is probably best to have the owner, insured or premium payor as a party plaintiff. However be careful and make sure you have a proper party plaintiff.

E. Begin Early to Develop a Motive

Why would an unscrupulous agent defraud your client in the manner he did? Money is always the motive. In each case, you must determine how the agent profited from the fraud. Why would a agent cash in your client's old policy which has substantial cash

value and use the cash value to sell your client a new policy? Normally, the agent gets 50 percent of the first year's premium on a new policy. On the old policies, he/she gets somewhere between 5 and 10 percent of the premium per year. On many old policies that were sold by another agent on which the agent is currently collecting money, he/she gets no commission for collecting that money.

Other frauds are more clear--the agent taking the money and never turning it in to the company, the agent making loans on the policy without telling the policyholder and keeping the money. Again, money is always the motive.

The initial client interview is very important to the debit insurance fraud case. It is a time to lay the groundwork for the entire case. You must be well aware of all facts involving the case. Since you are dealing with unsophisticated people, it is sometimes very difficult and you must be extra careful.

III. THE COMPLAINT

A. Broad Pleading

Many times it is hard to understand all of the facts regarding the type fraud that has been perpetrated on the plaintiff. On many occasions you must file general fraud allegations and develop facts in detail during discovery. Therefore, it is crucial to plead your fraud as general as possible. On some occasions, I have pleaded the fraud as the agent fraudulently canceled the policy, fraudulently took out loans on the policy, fraudulently failed to credit money to the policy or fraudulently failed to disclose that he was doing the above. Sometimes this causes the defense lawyer to ask for more definite statement. If pressed, you must give a more definite statement. However, start out as broad as possible.

Beware of the statute of limitations. Many times the policyholder does not know they have been defrauded at all. On many occasions, the fraud took place more than two years ago. For instance, if the agent had cashed in the policyholder's policy or not credited money to the company several years ago, the policyholder may not have been aware of it. You must plead that the plaintiff found out about the fraud within two years of filing the complaint.

In the case of Howard v. Mutual Savings, 608 So.2d 379 (Ala. 1992), the Alabama Supreme Court stated that the statute of limitations began to run when the lawyer told the client that she had a case. It can be argued that this case also stands for the proposition that in determining when the policyholder should have discovered the fraud, we are to now to use the justifiable reliance standard instead of the reasonable reliance standard. This is the first case that has stated this. This almost always

makes the statute of limitations a jury question when you are dealing with an uneducated plaintiff.

Broad pleading will also allow you to open up discovery which will allow you to better develop your theories of fraud. You can always amend your complaint later when you discover new evidence.

B. Negligent Hiring

Always include a count alleging that the insurance company negligently hired the agent. This opens up discovery regarding all background investigations and checks that were done by the company of the agent prior to its hiring him. On many occasions, this can provide crucial information, especially if they did not investigate.

It is imperative to note that every insurance agent who is licensed with a company is required by the Alabama Insurance Department to be investigated by the company prior to their hiring him. Every insurance company signs a document which is on file at the Alabama Insurance Department stating that they believe the agent is of good character and fitness. These documents are public record. These documents can be very damaging to the company when on many occasions they do absolutely no screening or checking of the agent prior to hiring him/her.

Also, a negligent hiring count could trigger some insurance coverage which could help settle the case. Many insurance companies have insurance policies of their own that cover their negligent acts.

In conclusion, the properly pleaded complaint is crucial to the development of the debit insurance fraud case. I have attached a sample copy of a complaint.

IV. INITIAL DISCOVERY

A. Interrogatories

As stated above, many times you are forced to develop the detailed facts through discovery due to the limited education and understanding of the policyholder. Therefore, discovery is more crucial in these cases than other types of insurance fraud cases.

Some of the more important things to ask are set out below. For more detailed questions, see the sample interrogatories attached.

In the initial interrogatories, you must ask for the following:

1. every time the company has been sued for similar occurrences;
2. what steps they have taken since they have found out other agents have cheated people;
3. what steps they took to investigate the agent prior to hiring him;
4. the general corporate history of the company;

5. name of all agents and employees of the company who have had contact with plaintiff;
6. the name and address of former agents;
7. Were any of Plaintiff's policies ever canceled?
8. Were any loans ever taken out on Plaintiff's policy?

B. Request for Production

The request for production of documents is a vital part of the discovery process in debit insurance cases. Many times the companies cannot live with their own documents. Some of the more important things to ask for are set out below. For a more detailed request, see the sample Request for Production attached.

The most important thing to get is the debit route list. This shows the name and address of all policyholders on the debit route of the agent. Once you get this list, you can contact other policyholders on the route to be witnesses for you. This can show that there is widespread fraud going on. Normally, where there is one fraud, there's another.

Always ask for audits or appraisals of the debit route list. Periodically, the insurance company does an audit or appraisal of the debit route. They do this by comparing the amount of money that has been credited to the customer's policy at the home office versus the amount the customer has receipts for. On many occasions, there are shortages in the accounts and this shows that the agent has stolen money from the policyholder. These internal audits or appraisals are extremely important. You must insist on getting them.

Always ask for the policy and procedures manual. On many occasions, this shows the exact training that the agents have received. If you can show they violated the company's written guidelines, this can be very helpful to your case.

Regardless of the fraud you have alleged in the complaint, you must ask for all documents that show that a loan was taken out on the policy. Many times loans are taken out on the policy without the customer being aware. This can involve a different type fraud than you've alleged and allow you to amend your complaint to pursue additional theories.

Always ask for the cash surrender forms. This shows where the policies have been cashed in many times without the policyholder's knowledge. These documents can be crucial to the case.

Always ask for payment history on the policies. This can be very cumbersome when the plaintiff has had policies with the company for years. However, you need documents showing the amount of money that was credited to each policy with the company at each interval. You can compare it to the plaintiff's receipt to see if the money plaintiff gave to the agent was turned into the company timely or at all. Many times if the money was not credited

timely, it causes plaintiff to lose cash value. This could open up another area of fraud in your case.

Ask for all documents showing the investigation done of the agent to make sure he's honest. If there are no such documents, this can be devastating to the company.

Ask for all correspondence with the insurance department where policyholders have complained about a similar policy.

Alabama law requires that the State Department of Insurance send the insurance company a copy of all complaints received. Companies keep these complaints on file. These complaints will sometimes indicate that the company engages in the wrongful conduct on a regular basis.

Request any and all written reprimands or written evidence of disciplinary actions taken against the company from the state insurance department, attorney generals, etc.

C. Depositions

The main goal in taking early depositions is to get documents. Therefore, you should take the depositions at the corporate headquarters of the insurance company involved. By doing this, you can insist that documents mentioned during the deposition testimony be retrieved immediately for inspection.

In order to receive a substantial judgment, it is necessary to place the blame on the company rather than the agent. One way is through pattern and practice evidence. Another way to prove knowledge by the company is by taking the deposition of the highest ranking corporate officers. While you are not likely to get any evidence to prove your case, the officer might inform you that he knows nothing about your client. You could argue that he is too busy. He may inform you that he is very knowledgeable of the day-to-day operations. If this is true, you can argue that he knew that this type of activity was going on in his company, and did nothing about it.

When possible, request that the materials and documents be produced the day before the deposition. Always try to get documents requested in a deposition notice prior to the date of the deposition. It is hard to examine a witness on the contents of documents which have been produced just prior to the deposition. By obtaining the documents on the day prior to the taking of the deposition, you can be better prepared and organized.

VI. THE ALABAMA INSURANCE DEPARTMENT

The Alabama Insurance Department is the best outside source for information in the discovery process. There are numerous areas in which the Insurance Department can help you. Most of their documents are public records.

Each company is required to file an annual statement with the Alabama Insurance Department. This is a thick blue book which shows the financial condition of the company, the ownership of the company, different policies the company sells, and litigation the company has been involved in. This can be purchased for \$100 by calling Blueprint Services of Montgomery. Simply call them and they will mail you a copy. This is public record. The most important part of the annual statement is the part which shows the net worth of the company. This can be very helpful in settlement negotiations. If the company's lawyer states that the company is doing bad financially, you will have the documents in front of you to prove them wrong.

Another area that is of extreme importance in the annual statement is the Schedule J. This shows the name of all law firms that the insurance company has paid legal fees to in the past year. This can be very helpful in your pattern and practice discovery. If the insurance company claims that they have not been sued for similar cases, you can ask them what the cases were about wherein they paid a certain law firm a certain fee. If they paid a fee to a known defense firm, this can help you show that they have had other lawsuits which will help in your discovery.

The Insurance Department also has a public record of all consumer complaints against the insurance company and agents. They normally keep these for two years. It is public record and you are free to go and look at the complaints and make notes. However, in order to get a copy of the complaints, you must have a subpoena. These complaints can be extremely helpful to your pattern and practice discovery. On many occasions, you are able to find other similar complaints which can show the company had knowledge of wrongful conduct. You can also contact the people who made the complaints to be witnesses for you.

Each agent that is licensed with the Alabama Insurance Department has an agent's file which is public record. If there is any ongoing investigation by the Insurance Department regarding the agent, that investigation information will not be in the agent's file. However, once the investigation is concluded, it will be a part of the agent's file and you will be entitled to receive it without a subpoena. On many occasions, if you can show that the agent is being investigated by the Alabama Insurance Department, this can be very helpful to your case. The Department has hearings that are transcribed. If you can get access to the transcript, it can be very helpful.

As stated earlier, pattern and practice discovery is so important with debit insurance fraud cases. The best type pattern and practice discovery is ex-agents of the company who are willing to testify against them. The Alabama Insurance Department has a perfect source to gain this information. You can get a list of the name and address of every agent that is licensed with the company in one year and compare it to the name and address of

every agent that is licensed with the company the following year. You then can deduce which agents are no longer licensed with the company. You can then contact these agents and hope that one or two of them is willing to testify about the pattern of activity of the insurance company. This can be absolutely devastating information and can make your case. While this is time consuming and cumbersome, it is definitely worth the effort.

It is helpful to get a witness from the Alabama Insurance Department to come to trial. The testimony of such a witness can be devastating to the insurance company at trial. As stated above, the Alabama Insurance Department is charged with regulating the insurance companies and making sure that they follow the laws of Alabama. A witness from the Insurance Department who is not a paid expert is a naturally credible witness and can be very helpful to your case. He can be particularly helpful to testify about consumer complaints against the company or the company's violations of certain Insurance Department guidelines.

Contact the insurance department of the state where the insurance company's home office is located. Many times that state is where the company does a majority of its business. Therefore, they are likely to have more consumer complaints in that state insurance department than others. On one occasion, we contacted the Department of Insurance of Georgia and received a statement from the insurance company. The statement had the president's picture on the front of it with a quote by him that "fraud by our agents is on the rise". Once we received this document, the case settled for a substantial amount. Again, that information would never have been received if we hadn't contacted the insurance department where the company's home office was located.

Some of the most important discovery in these type cases comes from the Alabama Insurance Department. You must use this resource to develop your cases properly.

VII. APPLICABLE REGULATIONS

There are many regulations that apply to the sale of certain types of insurance. These regulations were promulgated by the Alabama Insurance Department and have the force and effect of law.

They equally apply to the sale of debit insurance policies. On many occasions, the regulations are technical in nature and are not followed by agents. Further, insurance companies rarely train their agents regarding the contents of the regulations. It can be very damaging at trial to show that the insurance agent is violating regulations set out by the state of Alabama. These regulations are designed to protect the policyholders and when they are violated, the policyholder is injured. You can make a great jury argument when the agent violates the regulations that are designed to protect the policyholder. On many occasions, a

representative from the Alabama Insurance Department can come to trial and testify that the regulations have been violated.

The three areas of regulations that come into play most often in the debit insurance context are: Regulation No. 71--Medicare Supplement Insurance Minimum Standards; Regulation No. 69--Life Insurance and Annuity Marketing Practices; Regulation No. 70--Life Insurance Replacement Regulation. A copy of these regulations are available through the Alabama Insurance Department or by contacting my office.

A. Highlights of Regulation 70: Medicare Supplement

Section 16A(2) - An insurance company is required to establish marketing procedures to assure that excessive insurance is not sold or issued. Normally, the fraud in medicare supplement cases is that too many policies are sold. This a direct violation of the standards and this violation can make your case.

Section 16A(5) - The insurance agent is required to find out whether the applicant for medicare supplement insurance already has accident and sickness insurance and the types and amounts.

Section 16B - Knowingly making any misleading misrepresentation or incomplete comparison for the purpose of inducing the person to convert insurance is illegal.

Section 16B(2) - High pressure tactics are illegal.

Section 17 - The agent is required to make sure that the purchase of additional medicare supplement insurance is appropriate for the insured. Therefore, it can be argued that the agent must consider the income of the insured and how much insurance he/she already has and their health. On most occasions this is not done. On numerous occasions, insurance agents violate these and other parts of the medicare supplement regulations. Most are not even aware that the regulations exist.

Developing this evidence and testimony at trial can be crucial to your case.

B. Highlight of Regulation 69--Life and Disability Insurance Marketing Practices

Section V1A - Any advertisement or written proposals given to the insured must be truthful and not misleading by implication. This can be very important. Many times the agent's proposals can be misleading by implication. Sometimes, you can make a good argument that the document given to plaintiff is in fact misleading. The overall impression of the insured is important in determinnig whether or not the regulation has been violated.

Section V1D - It is not permissible to omit material information or words that can mislead or deceive the policyholder.

Section V1G - No advertisement shall make inaccurate or incomplete comparisons of policies.

Section V5A - You cannot use the word, "free" or "no cost" or "without cost" regarding other similar insurance.

There are numerous other paragraphs under this regulation which must be studied to see if they fit your particular case. In almost every case, you can find some violation of a regulation. While it may be a minor and technical violation, it can certainly add heat to your case at trial when you can show a company to be in violation of the laws of the state that are designed to protect the policyholder.

C. Highlights of Regulation 70 - Life Insurance Replacements

Section 6 - When the agent is replacing life insurance, he must leave a copy of all sales proposals that he shows the applicant with the applicant. He must also have a statement signed that the applicant is replacing insurance.

Section 6C(2) - The agent is required to send the insurer whose insurance is being canceled a copy of the sales proposal.

Section 7 - The insurer is required to teach its agents about the requirements.

The violation of regulations can definitely add settlement value to your case and heat to your trial. These regulations must be thoroughly explored in each case to see if any violation fits your facts.

VIII. DEVELOPING PATTERN AND PRACTICE EVIDENCE

The development of pattern and practice evidence is the single most important area in the workup of a debit insurance fraud case. While the \$250,000 cap on punitive damages and the pattern and practice evidence necessary to pierce the cap are no longer an issue, pattern and practice evidence is still admissible at trial. Under McElroys, Section 70.03, other similar occurrences are relevant to show that the defendant intentionally defrauded the plaintiff on this occasion. In other words, if you are claiming an intentional fraud by defendant, you are able to show that the defendant through its agent or other agents intentionally defrauded others on other occasions in a similar manner. Therefore, pattern and practice discovery and evidence are very much alive. Some of the most important things we do in developing pattern and practice evidence are set out below.

Do a WESTLAW search to find every time the company has been sued for similar cases in past ten years. This can be very helpful to you. Once you get a reported opinion, you can read the facts of the case. You can then contact the attorneys who

represented the plaintiffs if the facts are similar. Most of the time, attorneys are happy to cooperate.

Do an ATLA search. The American Trial Lawyers Association keeps a computer list of every time an attorney requests information on a certain insurance company. You can contact these attorneys to see what kind of cases that they have. As stated above, usually they will cooperate.

Put an advertisement in the ATLA Advocate. The American Trial Lawyers Association has an insurance exchange list where you can put an advertisement stating that you are seeking information about a certain insurance company. On many occasions, we have received phone calls from attorneys all over the country who have added valuable information to our case.

As stated above, pattern and practice evidence can be found through interrogatories and request for production dealing with other complaints and lawsuits, through getting the debit route list, through Insurance Department complaints and through use of former agents. When you have determined who your pattern and practice witnesses are, do a request for production to the insurance company requesting a copy of the witness' entire file.

Two other areas that have been very vital to our pattern and practice discovery are our computer linkage to the Administrative Offices of the Courts and the new Insurance Exchange Group for Alabama attorneys.

There is currently a computer system available that allows you to tap into the Administrative Office of the Court's computer.

You can contact the Administrative Office of the Courts to get on line. Basically, there are approximately 20-30 counties in the state that are on this computer system. You can plug in the name of the defendant company and the computer will tell you the style of the complaint on each occasion the company has been sued in each county. You then call the county clerk and get them to mail you a copy of the complaint or send someone to the clerk's office to get a copy. This is an excellent way to get a copy of complaints against the company. You can then contact the plaintiff's lawyer and share information and see if their client will be willing to be a witness for you.

We have recently started an Insurance Exchange Group. Our group involves approximately 15 Alabama firms that handle a lot of insurance fraud and bad faith cases. Every six months, we gather a list of the insurance company defendants that each firm has ongoing litigation against. We then compile the list and spread it among the firms. It has been very helpful in that each firm can contact other firms to see what discovery the other has. On many occasions, we have asked for the same discovery from the same company and gotten different responses. This type information can be very helpful at trial. If you need any information from this group, please contact me or Lisa Harris in my office. If you would like to join the group, then send us a list of your current

insurance company defendants and we will send you the group's current list.

Developing pattern and practice evidence is the single most important part of the discovery process. Through the above methods, a persistent attorney can always develop some pattern or practice evidence.

IX. CASE LAW

Below is a list of important cases that deal with debit insurance fraud in Alabama. This is not an exhaustive list but a list of some of the most important cases.

Kerri L. Henson v. Celtic Life Insurance Company, et al., Supreme Court of Alabama, No. 1910941 (Ala. 1993); Reserve National Insurance Company v. Ray Crowell and Myrtle Crowell, 614 So.2d 1005 (Ala. 1993); Pugh v. Southern Life and Health Ins., 544 So.2d 143 (Ala. 1988); Rosa Mae Howard v. Mutual Savings Life Insurance Company, 608 So.2d 379 (Ala. 1992); Southern Life and Health Ins. Co., v. Turner, 571 So.2d 1015 (Ala. 1990); Liberty National Life Insurance Company v. Sherrill, 551 So.2d 272 (Ala. 1989); Grimes v. Liberty National Life Insurance Company, 551 So.2d 329 (Ala. 1989); Lillie Allen v. Gulf Life insurance Company, et al., 617 So.2d 664 (Ala. 1993).