ALABAMA UPDATE

THE INSURANCE CONSUMER FRAUD CASE

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TRYING MARKET CONDUCT CASES

Trying a successful market conduct case, normally referred to among lawyers as a consumer fraud case, begins with meaningful discovery.

DISCOVERY

Meaningful discovery in the consumer fraud case begins with the initial discovery filed with the complaint, along with deposition notices of those persons that the plaintiff's attorney wishes to depose once he has received all of his responses to request for production and responses to interrogatories. Every consumer fraud case should have a discovery plan, and that plan must begin with the initial filing of discovery with the complaint. This initial discovery will set the tone of the case, and in particular, it will set the tone of discovery being conducted in the case.

Typically, there is a discovery battle which inevitably will end up before a trial judge. In these type consumer fraud cases, some of the most critical discovery is that of pattern and practice evidence. This evidence can be developed through the use of customer lists of defendants, as well as ex-agents' lists from the defendants. A protective order is usually necessary with this type of evidence to guard against proprietary information being disseminated. (A more detailed discussion of pattern and practice evidence is contained below.)

Follow-up discovery is critical in most cases, given the particular facts and circumstances of each case. Typically, a first round of depositions must be taken, followed by additional requests for production and discovery requests of defendants, which are then again followed by a second round of deposition testimony. More often than not, it is the former employees of the corporation that actually bring to light the real issues that the plaintiff seeks. This can be done through the use of independent investigators, or the names can be revealed during the actual discovery process. These depositions must be taken.

Much of the "paper discovery" in the consumer fraud case, in particular the insurance fraud case, are policy files, actuarial files, compliance files, consumer complaint files, training materials, marketing materials, and often times, Minutes from the Board of Directors and some proprietary investment information is necessary. Many of these type files require the review of an expert or actuary consultant. The investment in a consultant or an expert to help decipher some of the information contained in these files, is almost unavoidable. (More about expert testimony is contained below.)

Finally, the use of the Internet to develop evidence on market conduct has become invaluable. There is a colossal amount of information on the Internet, in particular about State insurance departments throughout this nation that provide much of the consumer market information on the Internet. Information from the National Association of Insurance

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Commissions (NAIC), reveals information such as fines imposed on insurance companies, reprimands, and other disciplinary action that has been taken against an insurance defendant concerning market misconduct.

While these are just a few of the items that are necessary in order to conduct meaningful discovery in the market conduct case or the insurance fraud case, there are numerous other avenues of discovery that can be utilized. It simply depends on what type of issues exist in the case.

EXPERTS

The use of a consultant or expert in a marketing conduct case has become almost unavoidable in recent years. It is amazing that insurance companies, and insurance executives, have full knowledge that the ordinary consumer does not read their insurance policies. However, possessed with this knowledge, insurance companies continue to develop more complicated policies, that disclose less information, and are less understandable than policies that were issued ten years ago. This is not by accident. Nonetheless, inevitably, the insurance company will rely on the defense of the contract itself. To overcome this defense, an insurance expert, or other type of expert, is necessary in order to reveal to a jury where the ambiguities lie, where the contradictions are contained, and more importantly, what is actually the product that the plaintiff has purchased. This information will almost certainly lead to a successful fraudulent suppression or fraudulent concealment claim.

In particular, the cases involving vanishing premiums, or policies known as "vanishing insurance policies", also known as the universal life insurance policy, or flexible premium adjustable life insurance policy, all contain very complicated language in the policy itself, and fail to disclose the true operation of the policy. Many companies utilize "policy adjustments", but fail to disclose that the adjustments will occur throughout the life of the policy. An expert can uncover these revelations, and once a jury sees such revelations, they inevitably conclude that at the point of the sale of the product, not only did the insurance company fail to disclose, but often times the company itself has failed to disclose the true operations of the product to its own agent. These type of cases result in large verdicts, and are often unfairly criticized by the industry itself.

Whether or not an expert needs to testify at a trial involving marketing conduct, depends on the case. Typically, the insurance expert or consultant will provide you with enough ammunition to present an effective cross-examination of a corporate representative, thereby eliminating the need for an expert. Simply, the plaintiff can prove his case through effective cross-examination through the use of an expert's information. This is the best scenario. However, on certain cases, it is necessary to provide expert testimony to the jury to clarify certain denials that will typically be made by the corporate representative.

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While an expert is almost mandatory in the market conduct case, the decision of whether to use him at trial varies by case. Nonetheless, an expert is necessary in at least the preparation of the case for trial, and sometimes for the presentation of evidence to the jury.

PATTERN AND PRACTICE

The use of pattern and practice evidence before a jury may be the most effective evidence that the plaintiff can present in any case involving consumer fraud. The discovery of this type of evidence is relatively difficult without the assistance of the trial court ordering that a defendant produce a customer list of the defendant of the type of product that the plaintiff alleges to have been sold fraudulently. Because of the extreme burden placed on plaintiffs in proving their case, there is a most compelling argument that plaintiff is entitled to this evidence especially given the recent restrictions placed on the plaintiff in the consumer fraud cases by the courts.

This evidence is allowed as prior similar acts of misconduct by the defendant. Particularly in cases where the plaintiff is alleging a fraudulent scheme to market a particular type of product. This type of pattern and practice evidence is most effective in proving that there is, in fact, a common scheme to defraud consumers. It is best to take a representative sample of the pattern and practice evidence that has been collected as a result of the customer list, typically five pattern and practice witnesses are allowed by most courts, and this brings a cross-section of consumers to the jury testifying about the same or similar acts of misconduct by different agents in different of either a particular state or of the country.

In addition to the pattern and practice witnesses, testimony from a former employee, usually an ex-agent of the insurance company, provides confirmation not only to the plaintiff's allegation of common fraudulent scheme or plan, but confirms what the pattern and practice witnesses have stated to the jury, as well as that of the plaintiff. The former agent, or former employee, usually provides credible testimony because there is no bias in the witness's testimony because the witness no longer works for the insurance company at the time they are testifying. However, attorney for plaintiff must be selective in whom they bring before a jury to testify because, like the old saying, "you must dance with the one you brung". If the former employee or the pattern and practice witnesses are unappealing to the jury, they will lose all of their effectiveness. Be careful in the selection of these type witnesses.

A consumer fraud case that does not have pattern and practice evidence, and does not have testimony of a former agent, has little likelihood of being successful.

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TYPES OF MARKET CONDUCT CASES

There are numerous types of market conduct cases, but some of the most popular ones are as follows:

1. "vanishing premium" cases - cases that involve a representation of a set period of time for the consumer to pay premiums, and no premiums are required after that set period of time. These allegations are false, and typically the sales presentation used, including illustrations, are fraudulent on their face.

2. "vanishing insurance" cases - typically these involve universal life policies, or flexible premium adjustable life policies whereby the consumer was told that the premium was fixed, and that their cash values would grow much like a retirement plan. However, these policies require increased premiums in the future, and the policy adjustments that are contained in the policy are typically not disclosed and cause the policies often times to "crash". A typical case is where a consumer's policy was replaced out of a whole life product into a universal life product, and the policy is on a crash course from the day it is sold.

3. failure to disclose policy adjustment in the policy, normally involved in the universal life and adjustable life policies, and often found in policies labeled "whole life", but are actually a hybrid of policies of term and universal life.

4. unilateral amendments to health policies causing decreased health benefits. We have seen an up-rise in these type policies recently.

5. bad faith failure to defend cases - whereby companies are misinterpreting exclusions in the policy to gain benefit of not having to pay the claims. There is a recent rise in these type of cases.

6. bad faith refusal to pay benefits, and bad faith failure to investigate - these cases still remain steady in the market.

7. debit route cases - these typically involve agents collecting premiums on industrial policies, and the agents simply keeping the premiums especially those paid in cash by lower income policyholders. There are other issues involved in these type cases such as forgery and outright theft.

8. rollovers and replacements - these type cases involve consumers being taken out of one insurance product and placed into another and being told that it is a transaction to their advantage. However, nearly ninety-five percent of the time the transaction is detrimental to the consumer.

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9. clean-sheeting - this involves an agent cleaning up an application where the policyholder may have adverse health conditions, the application is altered in order to pass underwriting guidelines. Ultimately, the company denies the claim, blames the agent, and the only person who really loses is the consumer.

10. cancer policy switching - these type cases involve consumers having purchased cancer policies years ago, and the insurance company agents visiting them and stating that they should update their cancer policy, with no additional premium, when in fact, they are lowering the benefits of the policy, particularly those benefits covering chemotherapy and radiation, the most costly types of treatment with cancer patients.

11. simple failure to disclose - these type cases involve policies that contain numerous ambiguities, and simply do not disclose all of the fees and expenses that are involved in the policy. An expert is usually necessary in these cases, but can produce a wealth of knowledge that is not commonly known not only by consumers, but by the selling agent.

All of the above-stated topics provide good legal theories for consumers involved in the insurance cases. There are an equal number of topics that are being pursued in the financial industry. In particular, there are a number of cases involved with financing of satellites, consumer appliances, and a number of causes of action available by way of class action against pawn shops "payday loans" businesses, and "cash for title" operations that simply take advantage of the consumer with little or no disclosure, and even in some cases deny that they are making loans to consumers, when the transaction can be nothing but a loan.

CLASS ACTON LAW UPDATE IN ALABAMA

The law in Alabama used to be that a class action could be filed and conditionally certified on the same day of the filing of the complaint. This was necessary in order to protect the class from being abated by a subsequent filing of a class action. However, the Alabama Supreme Court recently reversed that ruling in the case of *Ex parte First National Bank of Jasper*, 1997 WL 773364 (Ala. 1997), whereby the court stated that there must be a "rigorous analysis" before a class action can be certified.

The Alabama Supreme Court also issued an opinion entitled *First National Bank of Jasper v. Crawford*, 689 So. 2d 43 (Ala. 1997), whereby it stated that the "first to file" rule protects the first lawsuit to be filed on a particular issue, and be protected by subsequent filings by abatement. Simply, any subsequent class action that was filed on the same legal theory, would be abated by the fact that the first case was dated and filed prior to the

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subsequent filing. This was a significant ruling because of the number of class actions that were being filed at one time in the state.

Finally, the Alabama Supreme Court recently ruled in the case of *Ex parte Government Employees Insurance Company*, [Ms. 1970673, Jan. 15, 1999] _____ So. 2d ________ (Ala. 1999) found that class actions with allegations of misrepresentation could very likely not sustain the scrutiny of the “rigorous analysis” test of Rule 23, *A.R.Civ.P.*, Alabama’s class action rule, because of the element of “reliance” being different in each case by each consumer. The court did not completely prohibit a class action from being filed based on misrepresentation, but it did in this particular case because of an agent misrepresentation that was being stated in a class action. This ruling has changed the way plaintiff’s attorneys view consumer class actions with regard to allegations of fraud.

CONCLUSION

Class actions continue to be a viable tool for consumer protection, particularly in the state of Alabama, where consumer protection laws have little or no teeth, and are not enforced against corporate America. If not for class actions, consumers may have no other alternative for social change, other than individual consumer lawsuits.

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