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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 15.09.01 was written by James S. Bainbridge, Esquire of The Bainbridge Law Firm, LLC.***

TOPIC: Dispute Between Carrier and Agent Over Responsibility for Expiration of Policy Conversion Rights Continues

CITATION: *Lincoln Benefit Life v. Wilson*, 2015 WL 4092851, No. 4:13-CV-3210 (D. Nebraska July 7, 2015).

SUMMARY: A Nebraska federal court recently ruled that a dispute concerning responsibility for selling two term life insurance policies with expired conversion rights required additional evidence and briefing in order to make a ruling. The court stated it required this additional material before it could decide whether the agent or the carrier was responsible for selling two key man policies on the life of a 75 year old man with policy conversion rights that expired at age 70.

The carrier argued that responsibility rested with the agent for failing "to properly ascertain the terms and conditions contained in the term policies." The agent maintained that the carrier, "because of its desire to collect premiums for the two life insurance policies totaling $29 million [in face value], had waived any age limitation with respect to conversion."

The additional evidence and briefing will address the issues raised in prior litigation in New York federal court between the policy owner and carrier concerning the convertibility of the policies.

RELEVANCE: The right to convert a term insurance contract to permanent coverage is an extremely important one – especially in a business or estate planning context. While the ultimate issue of responsibility has yet to be determined, the fact remains that two very large term policies were issued and sold in spite of already-expired conversion rights. Indeed, no one (including the insured) appears to have questioned the lack of convertibility for a 75 year old insured at the time of policy issuance. Yet that is precisely the time when this issue should have been addressed.

A thorough analysis of the policy terms would have revealed that the conversion rights had already expired and the parties could have dealt with this situation at that time. For example, the parties could have revised the terms of the policy to account for the insured's age. In the alternative, the insured, the agent and the carrier could have properly documented each party's knowledge and waiver of the expiration of conversion rights at issuance. Had this been accomplished, the current litigation, as well as the New York litigation, could have been avoided altogether.

FACTS: In 1999, Defendant James W. Wilson, an insurance producer, was retained to procure key man life insurance on the life of Samuel Gindi, one of the co-founders of a company called Lollytogs, Inc. The insurance was to fund a buyout of Gindi's interest in the company upon his death. The company wanted to replace an existing policy issued by another carrier. "Wilson entered into a special agent's agreement with [Lincoln Benefit], which then issued two term policies [totaling $29 million] with 10-year level premium periods." The premiums would escalate after 10 years; however, the term policies allowed for conversion to permanent insurance "[p]rior to the earlier of the policy anniversary next following the insured's seventieth birthday or the end of this level premium period." Gindi was 75 years old when the policies were issued." No one appears to have questioned the issue of convertibility given the age of the insured at the time of policy issuance.

Sometime in 2000, Lollytogs brought the issue of convertibility to the attention of Wilson, who in turn raised the issue with Lincoln Benefit. Lincoln Benefit responded by fax stating "[t]his policy will have conversion privileges up to the term of the policy." In 2003, Wilson again inquired about the policies' conversion rights. Lincoln Benefit responded that the policies were not convertible because of "Gindi's advanced age" but in light of the 2000 fax they would convert them within the next 30 days. Lincoln Benefit then "issued five universal life insurance policies for a 'free look' period, but they were not accepted by" Lollytogs. Lincoln Benefit "then reinstated the two term policies."

In 2007, Lollytogs informed Lincoln Benefit that they intended to convert the two terms policies before the expiration of the 10-year level premium period which expired in 2009. Lincoln Benefit replied that "although an exception had been granted in 2003, 'these policies no longer have a conversion privilege due to the age of the insured.'"

Lollytogs then initiated a breach of contract action against Lincoln Benefit in the Southern District of New York in 2009. During the pendency of the litigation, "[a]nnual premium payments were ordered paid into escrow." Gindi died in 2012. In 2013, the jury returned a verdict, and the court entered judgment, in favor of Lollytogs in the amount of the full $29 million death benefit. The court also ordered the escrow agent to pay Lincoln Benefit approximately $7.3 million for premiums due from 2009-2012.

Subsequently, Lincoln Benefit brought suit against Wilson in the District of Nebraska in order to recover "the difference between the $7.3 million premium amount that was determined by the jury and the amount it otherwise would have received as premium payments under the two term policies," which is pled as approximately $15 million in damages. Wilson countersued seeking to recover "the amount of additional commissions he would have earned if [Lincoln Benefit] had allowed conversion of the term policies in 2009," which is pled as approximately $2.7 million in damages. Cross-motions for summary judgment were ultimately filed.

With respect to Lincoln Benefit's claims, Wilson argued that the carrier's claims for breach of contract and negligence failed because (1) "the duties he allegedly breached were owed to the Lollytogs shareholders, not" Lincoln Benefit, and (2) relying on the doctrine of *res judicata*, "the jury's verdict in the New York litigation conclusively establishes that [Lincoln Benefit's] injury resulted solely from its own actions, and not because of any prior breach of the special agent's agreement or negligence on his part."

The court focused on Wilson's argument that "the New York litigation [between Lincoln Benefit and Lollytogs] precluded [Lincoln Benefit] from claiming that its injury resulted from Wilson's alleged acts or omissions." The court held that *res judicata* was inapplicable because Wilson was neither a party to the New York action nor in privity with Lollytogs.

The court stated, however, that the "lack of privity does not prevent Wilson from relying on the collateral estoppel doctrine, but he must establish "that 'the identical issue was necessarily decided in the prior action and is determinative in the present action.'"

The court stated that while it was "inclined to rule as a matter of law that [Lincoln Benefit] is collaterally estopped from proving its breach of contract and negligence claims, the evidence which has been presented regarding the New York litigation is incomplete" and ordered Wilson to file a complete record of the New York litigation and directed the parties to brief the limited issue of collateral estoppel.

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