

Marketing & Distribution

Protect Your Flanks and Lawyer-Up

- All Things Legal will confront the risk management, legal, and compliance issues facing the sales and marketing world



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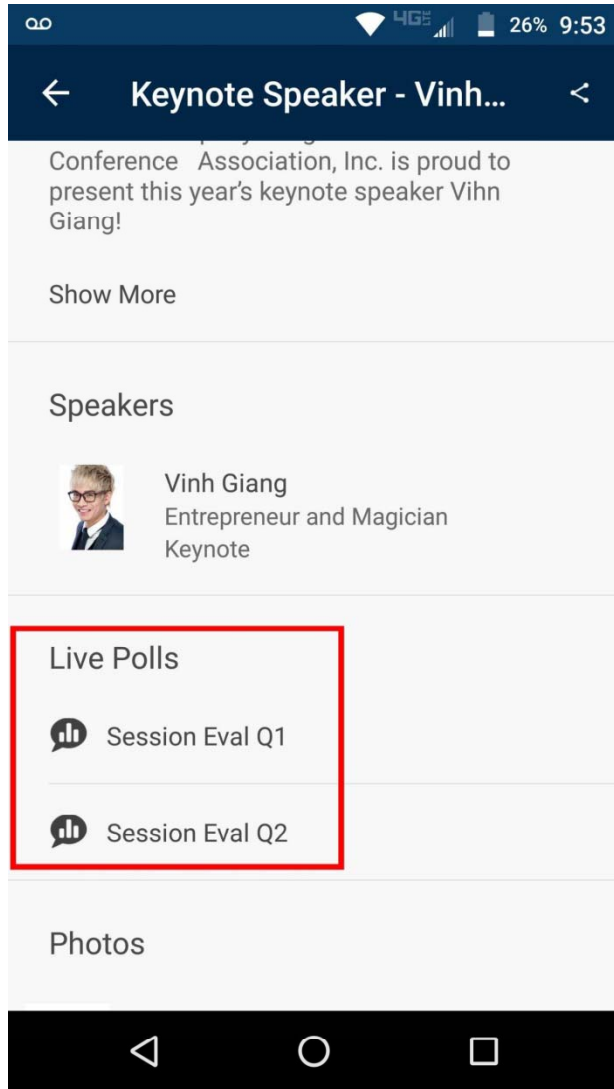
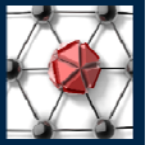
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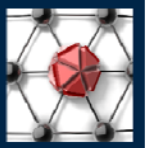


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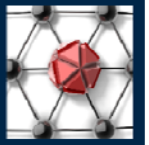
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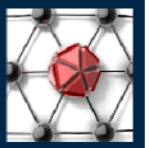
- This session will confront the risk management, legal, and compliance issues facing the sales and marketing world

Speakers

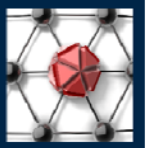


- **Bruce Moon,**
 - VP, Product Management, Individual Life and Financial Services at OneAmerica
- **Michael D. Rafalko,**
 - Member, Chair, Long-Term Care Insurance Practice, Cozen O'Connor
- **Jamie Hopkins,**
 - Co-Director of the American College's New York Life Center for Retirement Income & Associate Professor of Taxation

What's New In The World of Fiduciary



- Federal Rule Status
 - DOL
 - SEC
- State Involvement
 - New York
 - Maryland
 - Massachusetts - Scottrade lawsuit
 - Industry response
- NAIC -- Suitability in Annuity Transactions Model



- Revised Guaranty Association Model Act
- LTC Shopper's Guide updates
- Short duration LTC
- LTCI Innovation
- Rate Restriction Legislation

Marketing & Distribution

Potential Sources of Litigation Risk Arising From Distribution

Michael D. Rafalko

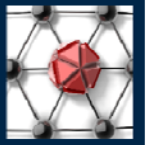
Chair, Long-Term Care Insurance Practice

Cozen O'Connor



18th Annual Intercompany Long Term Care Insurance Conference

AGENDA



(1) **Three Case Studies**

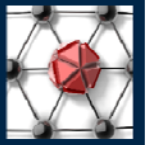
- Risk arising from taking of an Application
- Risk arising from statements about a Policy
- Risk arising from failure of a Duty

(2) **Ancillary Considerations**

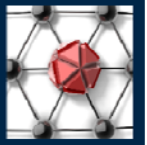
- Venue/Removal
- Errors and Omissions Coverage

** Interactive Format

CASE STUDY 1: THE APPLICATION

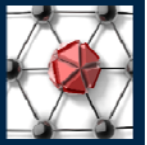


FACTS



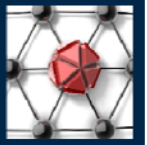
- Young Insured; high face amount policy; unlimited lifetime benefits
- Seven years after coverage takes effect, insured files claim related to early-onset dementia
- Medical records reveal significant family history of early onset dementia
- Application sought information concerning diagnosis or treatment of cognitive issues
- Insured consulting with psychologist re: memory decline prior to application; psychologist refers insured for neuropsych evaluation to screen for early onset dementia
- Application taken before neuropsych exam; insured answers cognitive question in the negative
- Coverage issued
- Neuropsych evaluation two weeks later formally diagnoses early onset dementia

RESULT



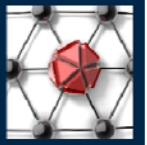
- Claim denied on basis that insured knowingly defrauded the company in order to obtain coverage
 - Company begins evaluation of law re: termination of contract and retention of premium
- Insured threatens suit against company and producer; claims that:
 - There was no misrepresentation; but
 - To the extent there was a misrepresentation, the producer was aware of it and clean-sheeted the application
- Dispute settled pre-litigation posture at voluntary mediation
 - Producer participated in mediation

QUESTION



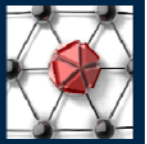
How might the policy's two year contestable period have factored into this dispute?

ANSWER



The two year contestable period had no material effect on this dispute

TAKE AWAYS



(1) The Common Myth: two year contestable periods are a “get out of jail free” card

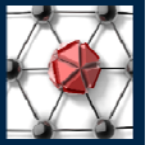


(2) Tell the truth and beware the risk of trying to outsmart an application

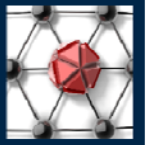
(3) Assume your knowledge and statements may be imputable to yourself and an insurer, although this may not be the case 100% of the time

- **Final Point:** dispute highlighted by this case study would have been much more clear cut absent allegation involving producer; producer's E&O carrier paid a material sum to resolve the claims

CASE STUDY 2: THE POLICY

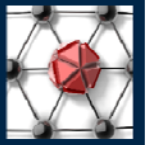


FACTS



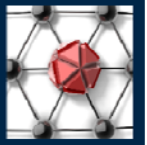
- Insured purchases LTCI coverage through producer
- Producer allegedly makes representations at point of sale concerning policy itself, including:
 - Claims would be paid according to provisions of policy
 - Claims would be paid without delay
 - Claims would be paid in full
 - Level of benefits would not be reduced
 - Premiums paid would be affordable
 - Benefits received would cover reasonable healthcare expenses
- Insured later claims that, but for these representations by the producer, she would not have purchased coverage

RESULTS



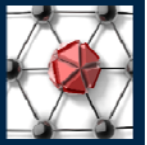
- Insured undergoes several rate increases
- Insured ultimately files a claim for benefits
- Claim does not proceed as insured thinks it should have, and alleges:
 - Insurer ignores telephone calls and other correspondence
 - Insurer always intended to deny claims under false pretense
 - Insurer always intended to delay a deny claims until faced to do so by government or legal action
 - Insurer always intended to pay less than full value of claims
 - Insurer always intended to increase amount of premiums without increasing amount of benefits
- Alleged that insurer had duty to disclose these points
- Initiates significant class action lawsuit; producer named in first (of several) complaints
- Alleges fraud, fraudulent inducement, elder abuse and other “intentional” torts
- Putting aside myriad legal defenses, suit went on for 5+ years and had defense costs in the seven figures

Question



What steps can producers take to help mitigate the risk of similar claims against themselves and insurers?

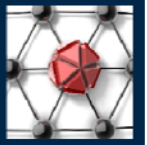
ANSWERS



The Rafalko Top 5:

- (1) Know the coverage you are selling
- (2) Document your process (think, what would a doctor do?)
- (3) Be responsive
- (4) Avoid broad, sweeping generalities
- (5) Be wary of hiding undesirable facts or telling “half-truths”

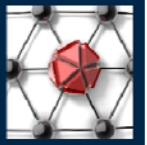
TAKE AWAYS



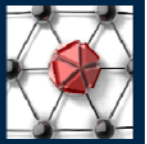
- (1) Producers – whether captive or independent – are the face of the company
 - When the company is sued, there is potential to get dragged in
 - Producers have power to mitigate personal and company exposure

- (2) Strength of producer's documentation and awareness of events may significantly affect whether insurer will offer to defend

CASE STUDY 3: THE DUTY



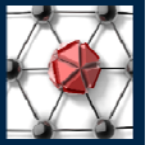
FACT PATTERN A



- Financial/retirement planner advises clients of ability to purchase LTCI
- Client declines
- Planner fails to document file
- Planner sued by clients' POA when they need LTCI but don't have it
- BIGFOOT
- But, not all that implausible

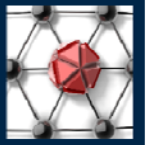


FACT PATTERN B (BORROWED FROM LIFE INSURANCE)



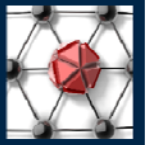
- Young, healthy, affluent applicant seeks \$3 million in coverage
- Application allows applicant to pay minimal premium up front to auto bind \$1 million in coverage for 30 days while application is underwritten
- Applicant asks producer to place the \$1 million and sends him a check
- Producer decided applicant is wasting his money, never places the \$1 million
- Applicant dies on day 28 of a brain aneurism with no coverage in place

QUESTION



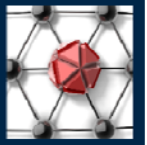
What duty(ies) appear to have been violated in fact Patterns A and B?

ANSWERS



- (1) Fiduciary Duty (possibly)
- (2) Negligence/Gross Negligence
- (3) Other?

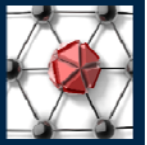
TAKE AWAYS



- (1) Know the role you fill and the duties it creates
 - Duties may be different if individual comes to you for financial/retreat/insurance planning than if individual already knows they want a specific coverage
 - State laws may affect considerably

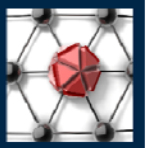
- (2) Do not disregard the client's preferences
 - Counsel on “bad” decisions
 - Get informed consent
 - Document your file

FINAL CONSIDERATIONS



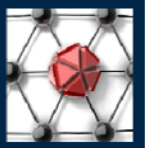
- (1) Venue/Removal
- (2) Errors and Omissions coverage

Retirement Income Planning Process



1. Evaluate the client's current situation
2. Identify and prioritize retirement goals
3. Estimate retirement income needs
4. Identify sources of income and assets available to generate retirement income
5. Make a preliminary calculation of the client's preparedness for retirement
6. Develop strategies for addressing a shortfall
7. Consider legal and tax issues that can derail plan
8. Consider retirement risks in developing solutions
9. Determine an appropriate strategy for converting assets into income
10. Integrate all considerations, present alternatives, and agree upon a plan

Are you a fiduciary?

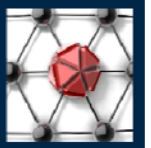


- Would it be prudent to ignore all of a client's stocks?
- Their bonds?
- Their tax rate?
- Their risk tolerance?
- Their cash flow/liquidity needs?
- Their insurance needs?

Why do we do financial planning?

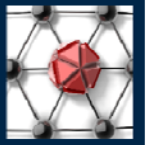


Planning is all about you and your family, less so about money!



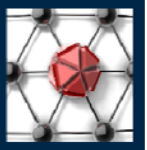
Haven't found a case where a long-term care insurance policy was required to be advised (despite lots of article on line saying this has happened.)

But there are cases about refinancing, about not considering liquidity, risk tolerance, or debt management



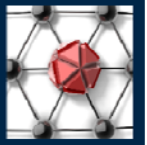
- *Larry Grill, et al. v. Lincoln National Life Insurance Company*, a class action suit where an insurance carrier is facing suit for failing to inform a policyholder of the life settlement option.
- Court did say that failing to inform the clients, and clients making continue premiums was enough to at least make a claim – could not be thrown out – doesn't mean it's a winner – but it has some validity

What is DOL advise?



“Recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made.”

What is a Filial Law?



- 23 Pa. Cons. Stat. 4603 (a) Liability

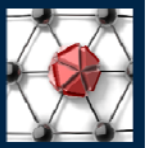
1. Except ...in paragraph (2), all of the following individuals have the responsibility tomaintain or financially assist an indigent person...

- (i) The spouse of the indigent person
- (ii) A child
- (iii) A parent

2. Paragraph (1) does not apply in any of the following cases:

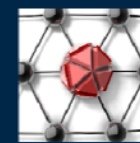
- (i) If an individual does not have sufficient financial ability to support
- (ii) A child shall not be liable for the support of a parent who abandoned the child ...for a period of ten years during the child's minority.

Old is New Again – Filial Laws



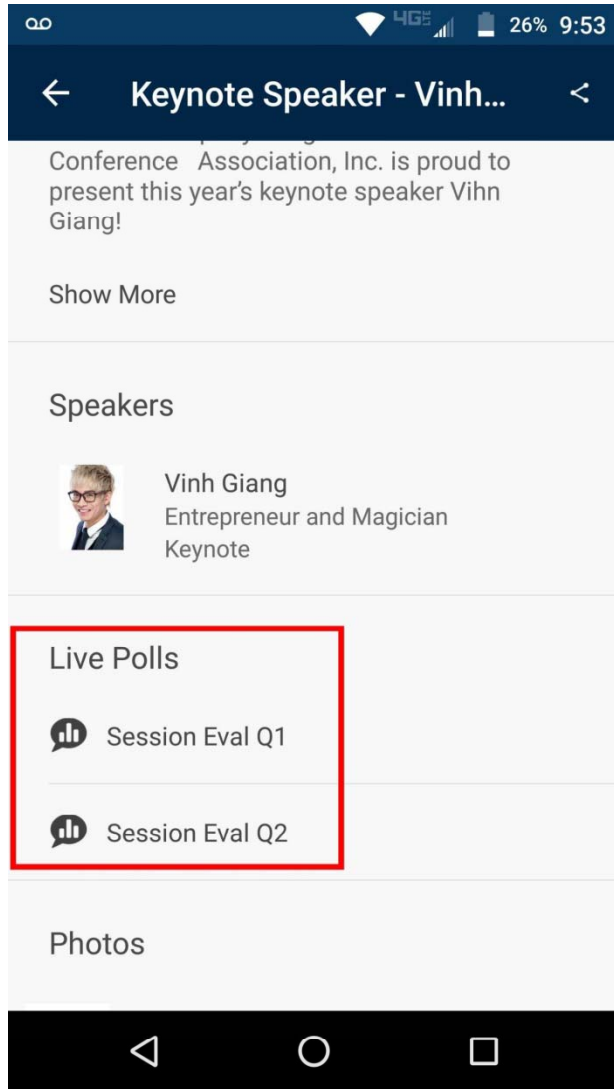
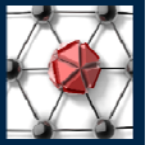
- Long term care planning is a family decision
- PA – HCRA v. Pittas
 - Son stuck with \$93,000 nursing home bill
 - Legally responsible for family's care in 20+ states (28 states)

Eori vs. Eori



- PA Superior Court
- Brother sued two siblings under PA Filial Law
- Mom likely would have been Medicaid eligible
- The plaintiff son, who himself provided a lot of the care at home, was able to demonstrate that his mother could not pay all of her costs and needed financial assistance.
- Pennsylvania upheld a monthly filial-support obligation of \$400 from one brother to another in order to pay for long-term-care support for their seriously ill mother.

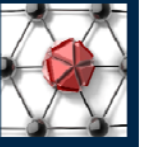
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Questions?