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**The State of the Civil Union  
and Other Recent Developments  
in Life Insurance Litigation**

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**TABLE OF CONTENTS**

- I. INTRODUCTION .....1
- II. RECENT DEVELOPMENTS IN LIFE INSURANCE LITIGATION.....1
  - A. Vanishing Premiums.....1
  - B. Cost Of Insurance .....5
  - C. Class Actions Based On Dividends Paid From Divisible Surplus Funds.....7
  - D. Implications Of Not Enforcing Reinstatement Requirements .....9
  - E. Accidental Death In The DUI Context .....12
    - 1. Treatment of alcohol-related deaths where no exclusion applies – was the death an accident? .....13
    - 2. An enforceable alcohol/intoxication exclusion typically will bar coverage even if the alcohol-related death is an accident .....17
  - F. Annuities – Suitability, Marketing Practices And Other Potential Liability .....22
    - 1. Improper annuity withdrawals .....28
  - G. Discovery Of Documents In The Possession Of A Non-Party: Are You In Control?.....30
    - 1. Control of information in the possession of a third-party .....31
    - 2. Discovery of documents in the possession of a litigation corporation’s parents, subsidiaries, sisters and affiliates .....34
  - H. A Plaintiff’s Stipulation To The Amount In Controversy Cannot Prevent Removal Under CAFA .....36
- III. CIVIL UNIONS, SAME-SEX DOMESTIC PARTNERSHIPS, AND SAME-SEX MARRIAGE: POTENTIAL EFFECTS ON LIFE INSURANCE LITIGATION .....38
  - A. Survey Of State Laws .....38
    - 1. States allowing civil unions/domestic partnerships .....38

2. Federal regulations concerning benefits for domestic partners of federal employees .....	41
3. States permitting same-sex marriage .....	43
B. Conflicting State Laws Concerning Same-Sex Relationships Will Likely Complicate Beneficiary Determinations For Life Insurance Companies .....	45
1. It is not clear whether states that prohibit same-sex relationships would recognize them for limited purposes under the common-law doctrine of comity .....	47
2. The Full Faith and Credit Clause requires states to recognize adoptions by same-sex couples but not marriages, civil unions, or domestic partnerships .....	48
3. DOMA’s definition of “marriage” and “spouse” for purposes of federal law may be unconstitutional .....	51
4. What can insurers do? .....	54
IV. CONCLUSION.....	55

## **I. INTRODUCTION**

Developments in the laws and doctrines governing life insurance typically move at a glacial pace. In most instances, those laws and doctrines remain largely unchanged from a generation ago. More recently, however, the pace of developments in life insurance laws have sped up, whether through evolution of judicial thinking or legislative action by the states and federal government. This paper highlights the changing laws and doctrines, as well as those in which there have been few changes, and discusses their effects on the types of litigation insurance companies are likely to encounter as a result.

## **II. RECENT DEVELOPMENTS IN LIFE INSURANCE LITIGATION**

### **A. Vanishing Premiums**

The vanishing premium concept of whole life insurance policies and litigation related to that concept dates back to the 1980s. When interest rates soared in the late 1970s and early 1980s, companies began illustrating policies using a “vanishing premium” plan, where out-of-pocket premiums would cease after a certain number of years.<sup>1</sup> However, lower interest rates in the late 1980s upset the economics behind the model, resulting in lower dividend rates and additional out-of-pocket premiums, and many insureds sued on a variety of theories, including fraud, misrepresentation and unfair or deceptive trade practices.<sup>2</sup> The current economic environment and sustained low interest rates, which insurance company CEOs cite as one of the largest risks facing the industry, warrant reviewing recent decisions in this recurring area of life insurance litigation.

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<sup>1</sup> See *Kaldenbach v. Mut. of Omaha Life Ins. Co.*, 178 Cal. App. 830 (Cal. Ct. App. 2008) (citing *Gaidon v. Guardian Life Ins. Co. of Am.*, 725 N.E.2d 598, 602-03 (N.Y. 1999)).

<sup>2</sup> *Id.*

Not surprisingly, courts have taken different approaches to these cases:

While several courts have held that insurance policy terms stating that premiums were payable “for life” clearly contradicted the vanishing premium representations, thereby defeating reasonable reliance on the representations, and triggering statutory limitations periods at the time of the delivery of the policies, other courts, like the court in Broberg v. Guardian Life Ins. Co. of America, 171 Cal. App. 4th 912, 90 Cal. Rptr. 3d 225, 61 A.L.R.6th 707 (2d Dist. 2009), review denied, (May 20, 2009), have taken the position that a reasonable insured could interpret the same language as meaning that premiums were payable by the insured until the promised vanish point, and by the policy thereafter, and as such did not necessarily contradict the representation.<sup>3</sup>

The legal issues usually involve questions for the trier of fact, such as: When did the claim or cause of action accrue? What was the plaintiff’s sophistication with and understanding of insurance? Are the plaintiff’s claims regarding the alleged promise of vanishing premiums consistent with the actual terms and conditions of the policy?<sup>4</sup>

A crucial issue in these cases is when the plaintiff’s cause of action accrued. In *Morrison v. Protective Life Ins. Co.*,<sup>5</sup> the plaintiff alleged the defendant insurer sold him a vanishing premium policy in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (the “IFCA”).<sup>6</sup> The policy was purchased in 2000 and it terminated on June 7, 2010, when the plaintiff did not make any additional premium payments. The statute of limitations under the ICFA is three years and claims for damages require proof of actual damages proximately caused by the defendant.<sup>7</sup> The plaintiff argued his claim was timely and brought within the statute of

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<sup>3</sup> 61 A.L.R.6th 239 (2011).

<sup>4</sup> See e.g., *Broberg v. Guardian Life Ins. Co. of Am.*, 171 Cal. App. 4th 912, 922 (2d Dist. 2009) (“The adequacy of a disclaimer in the context of an action for fraud is judged by reference to the plaintiff’s knowledge and experience.”).

<sup>5</sup> No. 10-7894, 2012 WL 4361295 (N.D. Ill. Sept. 21, 2012).

<sup>6</sup> 815 ILL. COMP. STAT. 505/1-12 (2013).

<sup>7</sup> *Id.* at \*3.

limitations because he did not suffer any actual damage until his policy was terminated. The court disagreed with the plaintiff's argument because claims involving an allegedly misleading or unfair insurance policy accrue when the policy was purchased and issued.<sup>8</sup> At the point of purchase, "a person knows or reasonably should know of his injury and also should know that it was wrongfully caused."<sup>9</sup>

In *Weathers v. Metro. Life Ins. Co.*,<sup>10</sup> the plaintiffs purchased policies that included "vanishing" premiums. The Supreme Court of Mississippi granted the plaintiffs' writ of certiorari to decide the question of whether, in a summary judgment context, the court could identify *as a matter of law*, the point at which the plaintiffs knew or should have known or should have made an inquiry, based on the information available to them.<sup>11</sup> As stated by the court, if an insured is put on notice by the plain language of the policy that the verbal representations are false, a fraud claim accrues on the date of the sale.<sup>12</sup> On the other hand, if the plain language of the policy does not clearly contradict the representations such that the insured is put on notice, a fraud claim accrues when the insured becomes aware of the misrepresentation.<sup>13</sup> The policy at issue was entitled "Life Paid-up at Age 98" and clearly stated that premiums were to be paid for 59 years, but it also contained an alternate payment provision by which premiums could be paid other than directly from the insured. Because the policy did not expressly address *how* the premiums were to be paid after the vanishing date, the court could

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<sup>8</sup> *Id.* at \*4.

<sup>9</sup> *Id.* (quoting *Knox College v. Celotex Corp.*, 88 Ill. 2d 407 (1982)).

<sup>10</sup> 14 So. 3d 688 (2009).

<sup>11</sup> *Id.* at 692.

<sup>12</sup> *Id.* at 693.

<sup>13</sup> *Id.*

not, as a matter of law, determine the triggering date for the fraud and there was a question of fact as to whether the policy language put the insured on notice.<sup>14</sup>

Recently, two federal District Courts in California denied motions for summary judgment in vanishing premium cases. In *Maraldo v. Life Ins. Co. of the Southwest*,<sup>15</sup> the plaintiffs brought a putative class action alleging fraud and statutory unfair business practices stemming from their purchase of policies that were sold with promises of vanishing premiums.<sup>16</sup> The defendants moved for summary judgment, in part, claiming the fraud claim could not stand because it was not reasonable, as a matter of law, for the plaintiffs to rely upon oral representations that were contradicted by the terms of the insurance policy and illustrations.<sup>17</sup> The court disagreed, ruling the defendants could not show that the plaintiffs' reliance on an oral representation of "vanishing premiums" was unreasonable as a matter of law.<sup>18</sup> As stated by the court, reasonable reliance is a question of fact for the jury and will only be decided as a matter of law if the facts permit reasonable minds to come to just one conclusion.<sup>19</sup> The purported oral representation was not inconsistent, on its face, with the terms or illustrations showing premium payments being due beyond that date and, therefore, more than one conclusion could be reached.<sup>20</sup> The court also found the plaintiffs' claims were ripe and not premature because a "vanishing premium" fraud claim that is based on oral representations made at the time of purchase is considered to be a harm that already occurred.<sup>21</sup> In *Dias v. Nationwide Life Ins. Co.*,<sup>22</sup> the issue again involved the reasonableness of the plaintiffs' reliance on the alleged misrepresentation for purposes of

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<sup>14</sup> *Id.* at 694.

<sup>15</sup> No. 11-4972, 2012 WL 1094462 (N.D. Cal. Mar. 30, 2012).

<sup>16</sup> *Id.* at \*1-2.

<sup>17</sup> *Id.* at \*5.

<sup>18</sup> *Id.* at \*7.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 3.

<sup>22</sup> 700 F.Supp.2d 1204 (E.D. Cal. 2010).

maintaining a fraud claim. Justifiable reliance is normally a question of fact for the jury, except in “rare cases” in which there is only one conclusion that reasonable minds could reach.<sup>23</sup> The court ruled that this was not one of those “rare cases” because the defendant did not show the representation was “directly at variance” and contradicted any of the policy’s terms.<sup>24</sup> To the contrary, the misrepresentation was independent of or consistent with the policy.<sup>25</sup>

### **B. Cost Of Insurance**

Recent cases remind insurers they remain vulnerable to suits, including class actions, attacking their interpretations and administration of cost of insurance charges. Plaintiffs in these recent cases have survived motions to dismiss and have been successful on some of their summary judgment motions.

In *U.S. Bank Nat’l Ass’n v. PHL Variable Ins. Co.*,<sup>26</sup> the plaintiff, in its capacity as securities intermediary for the owner of 12 life insurance policies,<sup>27</sup> alleged PHL breached the terms of the policies and violated various statutes by raising the cost of insurance rates in 2010 and 2011. Under the terms of the policies, the insurer could adjust the cost of the rates, based on certain factors, the most significant of which being mortality. The plaintiff alleged PHL “misrepresented the circumstances under which rate increases might occur and, after the sales, further misrepresented that the rate increases were ‘in accordance with’ the [p]olicies’ terms.” In addition, the plaintiff alleged that despite the fact life expectancy increased (which allegedly should have led to a decrease in the cost of insurance), PHL increased the cost of insurance rates,

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<sup>23</sup> *Id.* at 1218.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*; see also *Fazio v. Guardian Life Ins. Co. of Am.*, No. 1240 WDA 2011, 2012 WL 6177271, at \*15 (Pa. Super. Ct., Dec. 12, 2012), *reargument denied* (Feb. 15, 2013) (where agent explained premiums were due for 35 years, the evidence at trial was sufficient to establish that insurer did not make misrepresentations to the insured).

<sup>26</sup> No. 12-6811, 2013 WL 791462, at \*1 (S.D.N.Y. Mar. 5, 2013)

<sup>27</sup> The policies, issued by PHL Variable Insurance Company (“PHL”), were known as Phoenix Accumulator Universal Life policies.

in order to encourage policyholders to let policies lapse rather than pay higher fees, relieving PHL of the risk of having to pay benefits under the policies. PHL moved to dismiss the plaintiff's claims under the Connecticut Unfair Trade Practices Act ("CUTPA")<sup>28</sup> and the Connecticut Unfair Insurance Practices Act ("CUIPA").<sup>29</sup> The magistrate judge recommended granting PHL's motion as to the claims based on the defendant's representations after the policies were purchased regarding the legality of rate increases, and as to the CUIPA claim. The court held that "[a] litigant can nevertheless pursue a CUIPA claim as a CUTPA claim, as the plaintiff has done in this case."

In a multidistrict class action matter, *In re Conseco Life Ins. Co. Life Trend Ins. Marketing & Sales Practice Litig.*,<sup>30</sup> the plaintiffs - holders of life insurance policies issued by two other insurance companies in the 1980s and 1990s - alleged the policy administrator's changes to policy documents seeking to restructure the "cost of insurance charges" and "expense charges" constituted breach of contract, breach of implied covenant of good faith and fair dealing, fraud, and negligent misrepresentation.<sup>31</sup> The plaintiffs alleged the policies tied the "cost of insurance charges" to mortality rates, and because mortality rates decreased, the policy administrator improperly raised those charges.<sup>32</sup> After the court certified the class, the plaintiffs moved for partial summary judgment, and the policy administrator moved for summary judgment and class decertification.

The court granted the plaintiffs' motions in part and denied them in part, and denied the policy administrator's motions. Following the general rules of contract interpretation, the court

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<sup>28</sup> CONN. GEN. STAT. § 42-110a - 110q (2013).

<sup>29</sup> CONN. GEN. STAT. § 38a-815 - 823.

<sup>30</sup> No. 10-02124, 2013 WL 359997 (N.D. Cal. Jan. 29, 2013)

<sup>31</sup> *Id.* at \*1.

<sup>32</sup> *Id.* at \*8.

found the term “cost of insurance” ambiguous.<sup>33</sup> The court resolved the ambiguity against the insurer and found the “cost of insurance” rate increases could not be divorced from mortality rates.<sup>34</sup> The court found, however, that there was still a factual dispute regarding the policy administrator’s motives for increasing the “cost of insurance charges” because it provided an alternative, nonbreaching factual scenario to support the increase in costs.<sup>35</sup> The court, in granting partial summary judgment to the plaintiffs, also held that the insurer could not use the length of the policyholders’ policy ownership when setting the cost of insurance.

### **C. Class Actions Based On Dividends Paid From Divisible Surplus Funds**

Recently, a new type of sophisticated class action lawsuit has appeared on the litigation landscape. The actions target mutual life insurance companies for allegedly failing to make dividend payments to policyholders of participating policies in accordance with statutes specifying limitations on accumulation of surplus. These types of class actions are highly technical, require the interpretation of decades old statutes that have never or rarely been interpreted by the courts or insurance commissioners, and focus on the particulars of policies, actuarial valuations, accounting methods and other factors, including the discretion of the board of directors in determining dividend payments.<sup>36</sup>

Generally, through the receipt of premiums paid, mutual insurance companies accumulate two types of funds: a legal reserve mandated for protection against liabilities and a surplus from

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<sup>33</sup> *Id.* at 9.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*; see also *Thao v. Midland Nat'l Life Ins. Co.*, No. 09-C-1158, 2013 WL 119871, at \*1 (E.D. Wisc. Jan. 9, 2013) (summary judgment granted to insurer, whose interpretation of the policy language that (in contrast to the methodology the plaintiff alleged) it considered more than the five enumerated mortality factors when calculating its cost of insurance rates was “the only reasonable interpretation”).

<sup>36</sup> See e.g., *Harshbarger v. Pennsylvania Mutual Life Ins. Co.*, 2:12-06172, Def.’s Mot. Dismiss, ECF No. 8 (E.D. Pa. Dec. 28, 2012).

which dividends are paid to participating policyholders. The legal reserve is sometimes called a “safety fund” and some states mandate that it be maintained at particular percentages.<sup>37</sup>

The surplus of a life insurance company is largely derived from the following sources: Income from investments, mortality savings, savings from the amount by which policy premiums are loaded to meet expenses and extraordinary losses, and gain from forfeited policies. Where the company is conducted on the mutual plan, so much of the surplus as is not held as a contingent reserve is apportioned among the policyholders as a dividend. Similarly, dividends may be received by the holders of participating policies in a stock company.

108 A.L.R. 1212. The divisible surplus is excess surplus that a company is prohibited (either by policy, state statute or both) from accumulating above the safety fund limits and is to be paid to the policyholders as a dividend.

Unless some restraint is imposed by statute, charter, by-laws, contract, or otherwise, whether a dividend shall be declared, and, if declared, its amount, rests in the sound discretion of the directors. However, the duty of the company to distribute the surplus, and the time and manner of making such distribution, usually are provided for either by statute or by the policy or the charter of the company. If the facts warrant the distribution of a dividend, the directors may not by resolution lawfully withhold the dividend.<sup>38</sup>

In these types of cases, the methodologies used to determine dividends are scrutinized to determine whether an argument exists that the divisible surplus dividends are/were paid at an improperly low level. Class action plaintiffs’ counsel can evaluate information publicly filed by insurance companies, premium adequacy (for sufficiency in building reserves), the value of a company’s investments in securities, interest rates on investments and bonds, among myriad others. Class counsel often seize upon the broad discretion that policy language gives to companies to determine the amount of dividends, arguing the company had an obligation to exercise discretion in good faith (and/or had a fiduciary duty when exercising discretion) and that

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<sup>37</sup> See, e.g. Massachusetts, MG.L. c. 175, § 141; Pennsylvania, 40 PS § 614.

<sup>38</sup> 44 C.J.S. Ins. § 182.

the company's dividend payments abused that discretion. Suits of this nature are fact specific and turn on specific policies, calculations and statutes. In addition, it is plausible, depending on the statutes of the state where an action is pending, that a class action could reach back decades to include thousands of policies.

#### **D. Implications Of Not Enforcing Reinstatement Requirements**

As a general rule, policies which lapse due to non-payment of premium may be subject to reinstatement provided the outstanding premium is paid and, if the mandatory grace period has expired, an insured resubmits to medical underwriting. From time to time, however, the question arises whether it is preferable for a carrier to insist that underwriting requirements be satisfied before reinstating a lapsed policy. Business considerations – such as accommodating a valued, long time policyholder or avoiding litigation contesting a lapsed policy – understandably may cause a carrier to consider making an exception in certain circumstances.

Significantly, allowing reinstatement of a lapsed policy without insisting on underwriting requirements might affect a carrier's rescission remedy *both* as to that particular insured *and* as to other insureds. For example, if a carrier foregoes requiring medical underwriting as part of reinstating a lapsed policy, is the carrier then precluded from insisting the insured submit to medical underwriting in the future to reinstate the same policy? Has the carrier effectively forfeited its right to seek rescission of the insured's policy? Has the carrier impaired its right to insist other insureds submit to medical underwriting as part of reinstatement? Have the carrier's rescission remedies as to other insureds been impaired at all? This Section D highlights some considerations in this context.

Generally speaking, a carrier opting not to insist on underwriting as a contractual reinstatement requirement faces two arguments from an insured: waiver and estoppel. Waiver and estoppel are distinct but related, and the legal elements of each informs how a carrier might consider protecting itself in these circumstances. Waiver is generally understood as the intentional and voluntary relinquishment of a known right.<sup>39</sup> Estoppel, unlike waiver, is not concerned with intent, but rather solely with conduct.<sup>40</sup> If an insurer's action or inaction is prejudicially relied upon by an insured, estoppel may bar an insurer's contractual rights.<sup>41</sup>

In the context of a lapsed policy, most courts recognize that a carrier may waive or be estopped from asserting the effect of a policy's lapse if, by some act, statement, or course of conduct toward the insured, the carrier affirms the policy's existence.<sup>42</sup> But in the typical case of a lapsed policy due to non-payment of premium, neither waiver nor estoppel generally applies if a carrier requires an insured to submit to reinstatement requirements, or if a carrier makes it clear that late premium payments will no longer be accepted.<sup>43</sup> From these general rules, if a carrier elects *not* to require an insured to submit to reinstatement requirements, such as medical underwriting, then the carrier should make it clear to the insured, preferably in writing, that reinstatement of the policy does not in any way waive, relinquish, or impair its right to require strict compliance with reinstatement requirements in the future.

What effect, however, does reinstating a lapsed policy without insisting on formal reinstatement requirements have on other policies? Presumably, from the carrier's perspective, the answer is none.

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<sup>39</sup> 26 AM. JUR. 2D *Proof of Facts* §3 (2013).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> 44 AM. JUR. 2D *Insurance* § 902.

<sup>43</sup> *Id.*

Waiver and estoppel arguably are confined to conduct between a carrier and an individual insured. Waiver addresses conduct purportedly evincing a carrier's relinquishment of a known policy right. But if a carrier's supposed conduct is strictly limited to its rights under one individual policy, presumably then other policies are unaffected and so too are the carrier's rights under those policies, without waiver. The same is seemingly true for estoppel. Estoppel requires an insured's prejudicial reliance on the carrier's conduct.<sup>44</sup> But if a carrier's conduct is limited to its rights under one particular policy, presumably then other insureds who are unaware of the carrier's conduct cannot claim they somehow prejudicially relied on it.<sup>45</sup> Notwithstanding this, there is potential for an insured who learns that others received more favorable reinstatement underwriting to claim discrimination and unfair business practices.

Of course, separate and apart from an insured's waiver and estoppel arguments, reinstatement exceptions may make a materiality argument vulnerable to attack in a rescission action involving other insureds. In any rescission, an insurer must demonstrate the materiality of a misrepresentation. Stated differently, the insurer must demonstrate that it would not have issued the policy if the truth concerning the misrepresentation were known to the insurer at the time the risk was accepted. For example, New York law provides that:

No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented **would have led to a refusal by the insurer to make such contract...** In determining the question of materiality, evidence of the practice of the insurer which made such contract **with respect to the acceptance or rejection of similar risks shall be admissible.**<sup>46</sup>

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<sup>44</sup> 26 AM. JUR. 2D *Proof of Facts* § 3 (2013).

<sup>45</sup> *Id.*; see also *Seattle Pump Co., Inc. v. Traders & Gen. Ins. Co.*, 93 Wash. App. 743, 751-52, 970 P.2d 361, 366 (Wash. Ct. App. 1999) (insurer's prior reinstatement of other insureds' lapsed policies is irrelevant to insured's estoppel defense, particularly where no evidence insured relied on or even knew of insurer's practice toward other insureds).

<sup>46</sup> N.Y. Ins. Law § 3105(b) and (c) (emphasis added).

The law is similar in other jurisdictions and does not differentiate between “materiality” at the time of original issue versus reinstatement. Thus, if an insurer’s acceptance of similar risks is inconsistent, for example, in reinstating a lapsed policy of an insured with a claim history, such inconsistency raises the question of whether a misrepresentation by an insured with a similar medical history is material. While an insurer may still be able to demonstrate materiality, it likely becomes a question of fact for the jury rather than an issue of law for the court to decide.

Discovery presents another important consideration. Plaintiffs’ counsel in individual insurance cases increasingly inquire about a carrier’s conduct vis-à-vis other insureds. Where carriers seek to rescind policies, courts may tend to permit such discovery. In the context of electronic discovery and permissive discovery rules, the potential implications of excusing one insured from a reinstatement requirement, like medical underwriting, may be subject to discovery in litigation with other insureds. Accordingly, insurers should evaluate their reinstatement practices, applicable law and the potential impact that giving an exception to one insured may have on their contractual rights with *all* their insureds.

#### **E. Accidental Death In The DUI Context**

While many issues arise in the context of accidental death insurance policies, much of the litigation in this area concerns deaths involving intoxication from alcohol or drugs. A key factor in the outcome of these cases is whether the policy at issue includes an applicable, enforceable alcohol or intoxication exclusion. Without such an exclusion, the insurer may face an uphill battle – even though it’s the insured’s burden to prove that a covered “accident” occurred under the policy. We address some of the more significant, recent cases in this area, which demonstrate the challenges presented when no alcohol or intoxication exclusion is included in an

accidental death policy, and offer insight regarding how courts are interpreting alcohol and intoxication exclusions.

**1. Treatment of alcohol-related deaths where no exclusion applies – was the death an accident?**

Whether in the context of a drunk-driving death or other fatality, the first step in determining coverage under an accidental death policy is to determine whether the death qualifies as an “accident” under the policy’s terms. Consideration of any pertinent policy exclusions is also vital, because they can often be determinative in intoxication cases, as discussed below. But, where the policy does not include any applicable exclusions, the outcome of the case may rest on the critical, initial inquiry of whether an accident occurred.

The term “accident” is often either undefined in accidental death policies or ambiguously defined.<sup>47</sup> For years, under such circumstances, many federal courts have applied the test the First Circuit developed in *Wickman v. Northwestern National Insurance Co.*,<sup>48</sup> to determine whether an event was an “accident.” In *Wickman*, the question “What is an accident?” arose as the court considered whether the accidental death policy at issue covered the death of an insured who died from either falling or jumping off of a bridge, located forty to fifty feet above railroad tracks, after having climbed over a three to four foot high guardrail. In answering that key inquiry, the First Circuit expressly avoided the previously popular and problematic “accidental means” and “accidental results” analyses in favor of creating what is now the prevalent standard for determining what constitutes an “accident” under federal common law.

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<sup>47</sup> For example, in *Wickman v. Northwestern Nat’l Ins. Co.*, 908 F.2d 1077, 1085 (1st Cir. 1990), the policy defined “accident” as “an unexpected, external, violent, and sudden event.” Whether the circumstances which led to the insured’s death were unexpected, however, is often the main dispute in accidental death cases. As such, courts often look beyond the policy’s definition for guidance in interpreting the term “accident.”

<sup>48</sup> 908 F.2d 1077 (1st Cir. 1990).

As the Fifth Circuit recently explained in *Firman v. Life Ins. Co. of N. Am.*, the *Wickman* court found that for a death to be an “accident” (1) the insured must have subjectively expected to survive the circumstances; and (2) that expectation must have been objectively reasonable “from the perspective of the insured, allowing the insured a great deal of latitude and taking into account the insured’s personal characteristics and experiences.”<sup>49</sup> When there is insufficient evidence of the insured’s actual expectations, the next step under the *Wickman* test is to apply a purely objective analysis.<sup>50</sup> Under that objective analysis, death is not an “accident” if “a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as highly likely to occur as a result of the insured’s intentional conduct.”<sup>51</sup> So, the insured’s subjective expectations come first under the *Wickman* test, and an objective, reasonable person analysis is only conducted if the evidence of the insured’s actual expectations is insufficient.

Thus, insurers who continue to rely on arguments that do not consider the subjective intent of the particular insured on the day of the incident, *i.e.* claiming that it was foreseeable that the insured could have died from drunk driving or asserting that a reasonable person would have known death was likely to occur from driving while intoxicated, can foresee problems if the *Wickman* approach is applied in their case. The recent *Firman* decision is illustrative. There, the Fifth Circuit applied the *Wickman* test to determine whether an insured died from an “accident” after he crashed his truck when veering off the roadway while driving with a blood alcohol content (“BAC”) of .20%, in clear weather and dry road conditions.<sup>52</sup> In denying accidental death benefits, the insurer explained the insured’s death was not an accident because it was a

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<sup>49</sup> *Firman*, 684 F.3d 533, 541 (5th Cir. 2012) (citing *Wickman*, 908 F.2d at 1088).

<sup>50</sup> *Firman*, 684 F.3d at 541; *Wickman*, 908 F.2d at 1088.

<sup>51</sup> *Firman*, 684 F.3d at 541; *Wickman*, 908 F.2d at 1088.

<sup>52</sup> *Firman*, 684 F.3d at 535.

foreseeable result of his actions -- the insured would have been aware of the risks of drunk driving because all states criminalized this conduct.<sup>53</sup> After noting the absence of an intoxication exclusion in the subject policies, the Fifth Circuit concluded the insurer used a legally incorrect definition of the word “accident” and abused its discretion by applying a *per se* rule that death from driving while intoxicated cannot be deemed accidental.<sup>54</sup> It explained that the *Wickman* approach -- which starts with the insured’s actual expectations and is “tempered only by patently unreasonable expectations” -- should have been applied to define “accident” instead of the insurer’s improper foreseeability test.<sup>55</sup>

The *Firman* decision represents the current trend in accidental death cases involving intoxication where there is no relevant exclusion – courts generally apply the *Wickman* standard and reject insurers’ attempts to apply a *per se* rule that drunk driving deaths are not accidental.<sup>56</sup> Indeed, just a few months after *Firman* was decided, the Eighth Circuit applied the *Wickman* test in *McClelland v. Life Ins. Co. of N. Am.*,<sup>57</sup> finding it was an abuse of discretion for the insurer to deny coverage for the death of an insured who crashed while driving his motorcycle with a BAC over .20%. The *McClelland* court explained the insurer failed to consider the insured’s subjective expectations on the day of the collision as *Wickman* requires, choosing instead to rely on its expert’s “rather categorical conclusion that those who drink and drive should reasonably expect to be killed.”<sup>58</sup> Analyzing the insured’s behavior on the day of his death, the Eighth

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<sup>53</sup> *Id.* at 536.

<sup>54</sup> *Id.* at 540.

<sup>55</sup> *Id.* at 541-542.

<sup>56</sup> *But see LaAsmar v. Phelps Dodge Corp. Life, Accidental Death & Dismemberment and Dependent Life Ins. Plan*, 605 F.3d 789 (10th Cir. 2010) (Tenth Circuit refused to apply the *Wickman* inquiry because it was only “generally relevant” to the drunk driving case before it since *Wickman* did not involve an intoxicated driver; instead, the court found the death was covered on the grounds that a reasonable person in the insured’s position would have understood “accident” as used in the policy to include the crash which killed him).

<sup>57</sup> 679 F.3d 755 (8th Cir. 2012)

<sup>58</sup> *Id.* at 760.

Circuit ultimately concluded there was overwhelming evidence the insured subjectively intended to return safely home after his motorcycle ride and not even a scintilla of evidence he thought he was likely to die.<sup>59</sup> After noting the absence of an applicable policy exclusion, the court affirmed the district court's judgment for the insured.<sup>60</sup>

District courts in recent decisions have also continued to follow the trend towards applying *Wickman* and rejecting an argument that drunk-driving deaths are not accidental *per se*.<sup>61</sup>

The court in *Hauser v. Stonebridge Life Ins. Co.*,<sup>62</sup> also applied the *Wickman* principles to the drunk driving case before it, but arrived at an atypical result for these cases. In a fairly cursory opinion adopting a magistrate judge's recommendation, the district judge found that the insured, who died from a collision while driving with a BAC of .32%, did not die in an accident. In so holding, the court emphasized that its conclusion was limited to the facts before it and did not "represent a categorical rule," as there is "little empirical support for a categorical conclusion that intoxication . . . is highly likely to result in injury or death, making the event non-accidental."<sup>63</sup> It differentiated the case before it from a standard case, however, due to the insured's extreme level of intoxication and the insurer's submission of an affidavit from a doctor explaining the risks and symptoms a person with a BAC of .32% faces -- including the risk of

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<sup>59</sup> *Id.* at 761.

<sup>60</sup> See also *LaAsmar*, 605 F.3d at 802 (collecting cases that reject a *per se* rule that all deaths from driving while intoxicated are not accidental).

<sup>61</sup> See *Buzzanga v. Life Ins. Co. of N. Am.*, No. 4:09-1353, 2013 WL 64656 (E.D. Mo. Jan. 4, 2013) (rejecting both the insurer's claim that it was impossible to determine the insured's subjective intentions as *Wickman* requires because he was dead and its attempt to apply a *per se* rule excluding deaths where the driver was intoxicated, the court concluded it was an abuse of discretion to find the insured's death from a collision while driving with a BAC of .232% was not an accident because the subjective evidence suggested the insured reasonably did not think it was highly likely he would die that day); *Loberg v. CIGNA Group Ins.*, No. 8:09-280, 2012 WL 3527718 (D. Neb. Aug. 14, 2012) (abuse of discretion to deny coverage for death of insured who crashed a truck while driving with a BAC of .172% without taking into account the insured's characteristics on the day of the accident, as there was no evidence the insured intended to injure himself or die).

<sup>62</sup> No. 10-423, 2012 WL 1936682 (D.R.I. May 29, 2012).

<sup>63</sup> *Id.* at \*1.

coma or death.<sup>64</sup> For these reasons, the *Hauser* court found “a reasonable person with the background and characteristics similar to the insured, would have viewed the injury as highly likely to occur as a result of the insured’s intentional conduct.”<sup>65</sup> In light of this finding, the court declined to even reach the policy’s exclusions.<sup>66</sup> The court in *Riddle v. Life Ins. Co. of N. Am.*,<sup>67</sup> also found an insured’s death from drunk driving was not an accident. After discussing the *LaAsmar* court’s divergence from *Wickman*, and deciding *Wickman* was the better approach, the *Riddle* court held that an insured who died from driving his vehicle more than 50 miles per hour over the speed limit, at night, with a BAC of .222%, and who apparently did not take any “evasive action to avoid crashing into a tree,” did not die in an accident.<sup>68</sup> The court ultimately concluded that since the insured’s actions “fail the *Wickman* test,” the insurer correctly denied benefits under the accidental death policy.<sup>69</sup>

## **2. An enforceable alcohol/intoxication exclusion typically will bar coverage even if the alcohol-related death is an accident**

While establishing that an alcohol-related death was not an accident may be an uphill battle, the presence of an alcohol or intoxication exclusion can make all the difference in whether benefits are payable. The following cases demonstrate the issues and arguments parties and courts have recently analyzed.

### **i. Status exclusions are generally upheld where not barred by state law**

Status exclusions, which prevent coverage if the insured was intoxicated at the time of the loss, have a checkered past. Historically courts have been divided on whether it is

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<sup>64</sup> *Id.* at \*2.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> No. 11-1034(FLW), 2011 WL 4809037 (D.N.J. Oct. 11, 2011)

<sup>68</sup> *Id.* at \*5-7.

<sup>69</sup> *Id.* at \*7.

appropriate to impose a causation requirement on a status based intoxication exclusion that does not require that the insured's intoxication caused the loss. Some states have taken a clear stand on the issue by statutorily mandating that alcohol or intoxication exclusions in accidental death policies have a causal connection between intoxication and loss.<sup>70</sup> Unless within such a state, however, recently courts have generally enforced status exclusions when the insured dies while driving drunk under state law. In *River v. Edward D. Jones Co.*,<sup>71</sup> the insured died as a result of a motorcycle accident while driving with a BAC of 0.128%, which exceeded Missouri's legal limit. In affirming summary judgment for the plan, the court enforced the policy's alcohol exclusion, which excluded loss if the injured party was intoxicated at the time of the incident (as determined by state law) and operating a vehicle involved in the incident.<sup>72</sup> In so deciding, the court enforced the exclusion without requiring causation between the insured's intoxication and loss after finding the insured was drunk at the time of his death.<sup>73</sup>

Following the Eighth Circuit's decision in *River*, the court in *Shaw v. Prudential Ins. Co. of Am.*,<sup>74</sup> similarly enforced an alcohol exclusion barring loss resulting from an accident that occurred while the insured was driving with a BAC of 0.126%, over Missouri's .08% limit under the Public Safety Offenses statute. There, the policy excluded "an accident that occurs while operating a motor vehicle involving the illegal use of alcohol."<sup>75</sup> The court rejected plaintiff's

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<sup>70</sup> Courts have struck down status alcohol or intoxication exclusions that violate such statutes. See, e.g., *Cabernoch v. Union Labor Life Ins. Co.*, No. 06 C 1515, 2009 WL 928998 (N.D. Ill. Apr. 6, 2009) (court refused to enforce an alcohol exclusion that barred "loss caused by or resulting from ... an injury that occur[red] while intoxicated" because it violated 215 ILL. COMP. STAT. 5/357.26, an Illinois statute prohibiting status exclusions, which has since been repealed).

<sup>71</sup> 646 F.3d 1029 (8th Cir. 2011).

<sup>72</sup> *Id.* at 1033-1034.

<sup>73</sup> *Id.*

<sup>74</sup> No. 10-3355, 2012 WL 3264021 (W.D. Mo. Jan. 2, 2011).

<sup>75</sup> *Id.* at \*1.

argument that this exclusion was ambiguous because it failed to define “the illegal use of alcohol,” concluding that, by its plain terms, the loss clearly fell within the alcohol exclusion.<sup>76</sup>

In a similar fashion, the court in *Goeringer v. Sun Life Assurance Co.*,<sup>77</sup> affirmed the plan’s denial of accidental death benefits where the insured, who had a BAC of 0.126%, died after starting his vehicle while in an enclosed garage. Enforcing the alcohol exclusion, which provided that no benefits would be paid for a loss due to or resulting from the employee’s operation of any motorized vehicle while intoxicated, the court found the plan reasonably interpreted it to include the insured’s conduct.<sup>78</sup> Significantly, the court expressly rejected plaintiff’s claims that the phrase “operation of a motorized vehicle” is limited to using a motorized vehicle for the “transportation nature” of the vehicle.<sup>79</sup> In other words, the insured didn’t have to be actually driving the car at the time of his death for the exclusion to apply – it was enough that the engine was on.

Likewise, the court in *Johnson v. Prudential Ins. Co. of Am.*,<sup>80</sup> rejected plaintiffs’ attempts to avoid the alcohol/intoxication exclusion where the insured died after losing control of her vehicle and crashing into a concrete median with a BAC of 0.15%. In granting the plan’s summary judgment motion, the court disagreed with plaintiffs’ position that the loss was not excluded under the policy due to ambiguities in the alcohol/intoxication exclusion, which barred coverage for loss resulting from “an accident that occurs while operating a motor vehicle involving the illegal use of alcohol, PCP, LSD or other hallucinogens, cocaine, heroin or other narcotics, amphetamines or other stimulants; barbiturates or other sedatives or tranquilizers, or

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<sup>76</sup> *Id.* at \*5-6.

<sup>77</sup> No. 11-409, 2012 WL 393618 (W.D. Okla. Feb. 6, 2012).

<sup>78</sup> *Id.* at \*4.

<sup>79</sup> *Id.*

<sup>80</sup> No. 2:11-664, 2012 WL 393618 (S.D. Ohio Oct. 13, 2012).

any combination of these substances.” Specifically, while the court found plaintiffs’ interpretation of “illegal use” to mean underage consumption reasonable, it concluded the plan did not abuse its discretion by applying an equally reasonable interpretation of “illegal use” – illegally driving after using alcohol to the point of legal intoxication.<sup>81</sup>

**ii. Exclusions requiring causation between the loss and the insured’s intoxication**

When an accidental death policy includes an alcohol or intoxication exclusion requiring a causal connection between the loss and the insured’s intoxication, an issue that arises is what type of causation is required. Does the intoxication have to be the sole cause of the loss for the loss to be excluded, or is it enough that it played some role in the events leading to the loss? Recently, courts have generally found alcohol/intoxication exclusions are enforceable and that the insured’s intoxication need only be a proximate cause, not the sole cause, of the insured’s death. In *Likens v. Hartford Life & Accident Ins. Co.*,<sup>82</sup> the court enforced an alcohol exclusion barring coverage for loss resulting from injury sustained as a result of being legally intoxicated from the use of alcohol (as defined in by the law in that jurisdiction) after finding the insured died from falling and hitting his head while he had a BAC of 0.262%.<sup>83</sup> There, plaintiff claimed that intoxication needed to be the *sole* cause of the insured’s death for the exclusion to apply, which it supposedly was not because the insured was “clumsy” and prone to falling.<sup>84</sup> The Fifth Circuit rejected plaintiff’s argument, concluding that the insured’s intoxication only had to be a proximate cause of his death to be excluded. The court also rejected as unreasonable plaintiff’s

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<sup>81</sup> *Id.* at \*5.

<sup>82</sup> 688 F.3d 197 (5th Cir. 2012).

<sup>83</sup> *Id.* at 201.

<sup>84</sup> *Id.*

claim that the insured had to be engaging in an illegal or prohibited activity for the alcohol exclusion to apply because the intoxication limit was borrowed from the Texas criminal statute.<sup>85</sup>

Following the decision in *Likens*, the court in *Arrendondo v. Hartford Life & Accident Ins. Co.*,<sup>86</sup> enforced an alcohol exclusion that barred loss resulting from injury sustained as a result of being legally intoxicated after finding the insured's intoxication was a proximate cause of his death.<sup>87</sup>

Insurers can avoid unnecessary confusion over what level of causation will apply by drafting alcohol/intoxication exclusions that make clear the insured's intoxication need only be a proximate cause of the insured's death. For example, in *James-Smith v. Total Affiliates Accidental Death & Dismemberment Ins. Plan*,<sup>88</sup> the court upheld the plan's denial of benefits under the plan's alcohol exclusion, which barred benefits for a covered injury "which, directly or indirectly, in *whole or in part*, is caused by or results from ... operating any type of vehicle under the influence of alcohol."<sup>89</sup> There, the insurer further provided that intoxication, for the purposes of the alcohol exclusion, was defined by the law of the state where the covered accident occurred.<sup>90</sup> Based on this clear language, the court found that, under the plain meaning of the alcohol exclusion, the insured's intoxication need only be a cause, not the sole cause, of the insured's death and *de minimus* causation was sufficient.<sup>91</sup>

Notably, unlike the courts above, at least one court has recently deemed the phrase "legal intoxication" in an alcohol/intoxication exclusion ambiguous. In *Loan v. Prudential Ins. Co. of*

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<sup>85</sup> *Id.*

<sup>86</sup> 860 F. Supp. 2d 363, 370 (S.D. Tex. 2012).

<sup>87</sup> See also *Fitzgerald v. Colonial Life & Accident Ins. Co.*, No. 12-38, 2012 WL 1030261 (D. Md. Mar. 26, 2012) (Alcohol intoxication need only be a proximate cause of death for coverage to be barred under exclusion barring loss caused by, contributed to by, or resulting from alcohol intoxication under state law).

<sup>88</sup> No. 3:10-2640, 2011 WL 4899992 (N.D. Ohio Oct. 13, 2011).

<sup>89</sup> *Id.* at \*6.

<sup>90</sup> *Id.* at \*2.

<sup>91</sup> *Id.* at \*6.

*Am.*,<sup>92</sup> the Sixth Circuit concluded an alcohol or intoxication exclusion that barred losses resulting from being “legally intoxicated” was ambiguous because Kentucky had multiple statutes that defined legal intoxication and the policy failed to designate which one applied.<sup>93</sup> Ultimately, the court found the insurer’s reliance on the legal intoxication level from the motor vehicle statute was unreasonable because the insured was not operating a motor vehicle at the time of his fall, and remanded the case for further consideration.<sup>94</sup>

#### **F. Annuities – Suitability, Marketing Practices And Other Potential Liability**

Equity-indexed annuities made the news in 2010 when the Securities and Exchange Commission (“SEC”) promulgated Rule 151A, which stated that fixed indexed annuities were not annuity contracts within the meaning of the Securities Act of 1933,<sup>95</sup> and therefore, did not fall within the Securities Act exemption for annuity contracts subject to state insurance laws. After insurers filed petitions seeking review of Rule 151A, however, the U.S. Court of Appeals, D.C. Circuit, held in *American Equity Investment Life Ins. Co. v. S.E.C.*<sup>96</sup> that, while Rule 151A was reasonable, the SEC had acted arbitrarily and capriciously in considering the effect of the Rule. Therefore, the Rule was vacated and the regulations supplied by state law remained in place.

Regardless of the status of the regulatory debate, however, several recent decisions in lawsuits filed by senior citizens show that concerns about suitability and misrepresentations in marketing the equity-indexed annuity product, as well as traditional annuities, are ongoing.

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<sup>92</sup> 370 F. App’x 592 (6th Cir. 2010).

<sup>93</sup> *Id.* at 596.

<sup>94</sup> *Id.*

<sup>95</sup> 15 U.S.C. §§ 77a–77aa (2013).

<sup>96</sup> 613 F.3d 166, 168 (D.C. Cir. 2010).

In *Rowe v. Bankers Life & Cas. Co.*,<sup>97</sup> Rowe, an elderly woman, filed a lawsuit on behalf of herself and all others similarly alleging that equity-indexed deferred annuities were unsuitable investment vehicles for anyone over sixty-five years old. As discussed in the decision by the federal court in the Northern District of Illinois,<sup>98</sup> a traditional fixed annuity product requires the purchaser to make an upfront, lump sum payment (premium) or a series of payments to the insurance company. In return, the insurer agrees to make payments to the purchaser over a period of time. If a deferred annuity product is purchased, the insurance company does not begin to make payments immediately. Instead, the premium grows on a tax-deferred basis until payments to the purchaser begin. A fixed deferred annuity is an annuity in which the insurance company pays a guaranteed interest rate on the premiums payments for a set period of time.

An equity-indexed deferred annuity typically pays a lower rate of interest on the premium payments, but also is tied to a market index, such as the S&P 500. If the market index goes up, the rate of interest increases. In return for the possible increase in the value of the annuity, the purchaser accepts less liquidity.<sup>99</sup>

Rowe alleged that two sales agents for Bankers Life recommended that she and her late husband, both of whom were over the age sixty-five at the time of purchase, liquidate a variable annuity in the amount of \$105,000 that they had with another company and use the proceeds to purchase a Bankers Life annuity. The new annuity had an initial ten percent surrender charge and a maturity date in 2025, which meant that Mr. Rowe would have been ninety-nine years old before he received any payment on the annuity. Less than six months later, because the Rowes needed money, they surrendered the annuity and incurred a charge of more than \$10,198.59.

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<sup>97</sup> No. 09-cv-491, 2012 WL 1068754 (N.D. Ill. Mar. 29, 2012).

<sup>98</sup> *Id.* at \*1.

<sup>99</sup> *Id.*

Rowe filed a lawsuit alleging violations of the Racketeer Influenced and Corrupt Organization Act (“RICO”)<sup>100</sup>, elder abuse under the California Elder Abuse Act<sup>101</sup>, and violations of the California False and Misleading Advertising Act<sup>102</sup> and the California Unfair Trade Practices Act,<sup>103</sup> among others. Rowe moved to certify a nationwide class related to the RICO claims and a sub-class of California residents related to the California statutory and common law claims. The court denied Rowe’s motion to certify the nationwide class and denied, without prejudice, the motion to certify the California subclass.

In denying the motion to certify the nationwide class, the court found that the proposed class did not satisfy Fed. R. Civ. P. Rule 23(b)(2) because a single order granting declaratory or injunctive relief would not end the case, as Rowe also demanded individual monetary relief for each member of the class, as well as punitive, treble and statutory damages for the alleged violations of RICO and California law.<sup>104</sup> The court also found that the proposed class did not satisfy Fed. R. Civ. P. Rule 23(b)(3) because Rowe did not identify any uniform misrepresentations or omissions made to each potential member of the nationwide class or a uniform policy in its system to ensure suitability.<sup>105</sup> In addition, because seniors might purchase equity indexed deferred annuities for a multitude of reasons and may have varying degrees of need for liquidity, the court was not convinced that common issues predominated on the questions of causation and reliance.<sup>106</sup>

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<sup>100</sup> 18 U.S.C. §§ 1961-1968 (2013).

<sup>101</sup> Cal. Welf. & Inst. Code §§ 15610-15675 (2013).

<sup>102</sup> Cal. Bus. & Prof. Code §§ 17500-17509 (2013).

<sup>103</sup> Cal. Bus. & Prof. Code §§ 17000-17101 (2013).

<sup>104</sup> *Id.* at \*6.

<sup>105</sup> *Id.* at \*7-9.

<sup>106</sup> *Id.* at \*12.

Whereas the *Rowe* lawsuit focused on the suitability of equity-indexed deferred annuities for consumers over the age of 65, *Negrete v. Allianz Life Ins. Co. of N. Am.*,<sup>107</sup> pending in federal court in the Central District of California, involves two related class action lawsuits, which allege misleading statements and omissions in marketing deferred annuities. The plaintiffs in *Negrete*, on behalf of themselves and a nationwide class of an estimated 200,000 senior citizens, claim that Allianz schemed to defraud its customers by misrepresenting in its marketing materials that its deferred annuity product carried “no sales charges,” offered an “immediate bonus,” and would pay “full value” if certain deferral requirements were met.<sup>108</sup> The plaintiffs alleged violations of RICO and the same California statutes that plaintiffs relied on in *Rowe*.<sup>109</sup> In *Negrete*, however, the court granted plaintiffs’ motion to certify a nationwide class as well as a California-only subclass.

Allianz filed a motion for judgment on the pleadings arguing that the RICO claims of the plaintiffs and class members residing in at least sixteen states were barred by the McCarran-Ferguson Act<sup>110</sup> and that the claims under the California Elder Abuse Act<sup>111</sup> failed because plaintiffs did not plead physical harm or pain or mental suffering as a result of the alleged abuse.<sup>112</sup>

In a lengthy and detailed decision that analyzes reverse-preemption based on the McCarran-Ferguson Act and the interpretation of the relevant state insurance laws regulating the advertisement of life insurance and annuity products and related sales practices, the court concluded that prosecution of the RICO claims on behalf of the class members in the states at

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<sup>107</sup> Nos. 05-6838 and 05-8908, 2013 WL 793239 (C.D. Cal. March 4, 2013).

<sup>108</sup> *Id.* at \*2.

<sup>109</sup> *Id.* at \*1.

<sup>110</sup> 15 U.S.C. §§ 1011-1015 (2013).

<sup>111</sup> *Supra* note 100.

<sup>112</sup> *Id.* at \*3.

issue would not impair and, in fact, would complement the states' schemes for regulating insurance.<sup>113</sup> With regard to the alleged violation of the California Elder Abuse Act, the court rejected Allianz's interpretation of the statute as requiring a showing of physical harm, pain or mental suffering in order to find financial elder abuse.<sup>114</sup> Accordingly, the court denied Allianz's motion for judgment on the pleadings.

Annuities also played a supporting role in a complicated "investment plan" marketed at a seminar titled "Mortgage Mistakes and Misconceptions: how to save a fortune on your mortgage." The plaintiffs in *Rasgaitis v. Waterstone Fin. Group, Inc.*<sup>115</sup> attended this seminar because they wanted to pay off the balance on their mortgage prior to retirement. Their mortgage balance was \$66,000, and plaintiffs had about \$250,000 in equity in their home.

In spite of warnings from FINRA that 100% mortgages were not suitable, the defendant investment advisory firm and its representatives convinced plaintiffs to mortgage their home for \$280,000, nearly 100% of its value, and use the proceeds of \$213,125.56 from the new mortgage to purchase a five-year fixed term annuity that would fund two universal life insurance policies. In addition, the plaintiffs sold their Charles Schwab S&P indexed mutual funds, in which they had invested their individual retirement accounts and purchased two individual flexible premium equity-indexed annuities.

After defendants failed to return plaintiffs' phone calls, the plaintiffs sought other professional advice and learned that the "investment plan" would never have generated the

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<sup>113</sup> *Id.* at \*6-15.

<sup>114</sup> *Id.* at \*16-17.

<sup>115</sup> No. 2-11-1112, 2013 WL 622146, \*2 (Ill. App. Ct. Feb. 20, 2013).

promised returns.<sup>116</sup> Plaintiffs filed a lawsuit against Waterstone and its representatives alleging causes of action for fraudulent concealment, breach of fiduciary duty, consumer fraud, common-law fraud, negligence and negligent supervision, among others. Defendants moved to dismiss under a number of theories, and the trial court granted the motion, with prejudice, finding that the plaintiffs' claims were time-barred.

Plaintiffs appealed, and the Appellate Court of Illinois reversed and remanded the trial court's dismissal on limitations grounds finding that the discovery rule tolled the applicable statute of limitations. While the defendants argued that the discovery rule was inapplicable because of the period of repose contained in section 13 of the securities law,<sup>117</sup> the court found that, because the life insurance policies and annuities were not securities, this action was not governed by the securities law.

Finally, in *Bankers Life and Cas. Co. v. Superintendent of Ins.*,<sup>118</sup> the Supreme Court of Maine, affirming the Superior Court, found that the Superintendent of Insurance did not err in her factual findings or statutory interpretation and did not abuse her discretion in holding Bankers Life accountable for the misconduct of its agent and, therefore, imposing restitution, with interest, and a civil penalty of \$100,000.

The agent met with a seventy-five year old woman, who recently had been treated for cancer, to discuss issues related to Medicare, health and prescription insurance, long-term care insurance and individual retirement account ("IRA") and certificate of deposit ("CD") options. As a result of the meeting, the woman purchased three Bankers Life annuities by liquidating

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<sup>116</sup> The investment plan purportedly was designed to "generate returns to pay off their [the plaintiffs'] mortgage; provide them with retirement income; be safe and appropriate, offering high returns without risk of loss; and result in tax benefits of 31%." *Id.* at \*3.

<sup>117</sup> 815 Ill. Comp. Stat. 5/13(D).

<sup>118</sup> Docket No. BCD-12-110, 2013 WL 117038 (Me. Jan. 10, 2013).

three CDs, selling her General Electric stock, and rolling over an existing IRA annuity into a Bankers Life annuity.<sup>119</sup>

The effect of investing the majority of the proceeds in annuities left the woman with insufficient liquid assets to cover expenses related to her house and to pay off her credit card debt. The suitability of the IRA annuity rollover was questionable because the Bankers Life annuity had a lower guaranteed long-term minimum interest rate than the existing IRA annuity, had stricter limits on withdrawals, and would not mature for ten years, which was longer than this woman's likely life expectancy.<sup>120</sup>

The Superintendent found that the agent failed to make reasonable efforts to obtain the information necessary to evaluate the suitability of his recommendations, had been incompetent in his annuity sales, and made misleading comparisons between the woman's existing investments and those offered by Bankers Life. The findings supported liability against Bankers Life under the statute even without a finding of independent misconduct, although the Superintendent also imposed liability on Bankers Life for failing to conduct adequate supervision and by failing to follow its own suitability review process.<sup>121</sup>

### **1. Improper annuity withdrawals**

In *Hass v. Wentzloff*,<sup>122</sup> an insurance agent stole thousands of dollars from Severson, an elderly client, who paid the agent approximately \$200 per month to help manage his financial affairs, pay his bills, and provide bookkeeping services. When Severson and the agent first met, Severson had investments in mutual funds and annuities. Severson authorized the agent to convert all of these funds into annuities from two insurance companies. The agent then began to

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<sup>119</sup> *Id.* at \*2.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at \*4.

<sup>122</sup> 816 N.W. 2d 96 (S.D. 2012).

submit requests to the insurers to withdraw funds from the annuities and directed the insurers to deposit the funds into Severson's checking account. Severson, who was told that the money was needed to pay his bills or would be reinvested, signed the withdrawal requests, and the insurers sent letters to Severson advising of each withdrawal, the surrender charges, and tax consequences. The agent wrote checks from Severson's account to a bank account for a company owned by the agent and used most of the funds for the agent's personal and business expenses and to cover thefts from another client for whom the agent provided similar services.

Severson's personal representative sued the agent and the insurers, alleging securities fraud, conversion, fraud and deceit, breach of fiduciary duty and negligence. The Supreme Court of South Dakota affirmed the trial court's decision granting the insurers' motions for summary judgment, finding no vicarious liability because the agent did not disclose that he was providing these services and was not acting within the scope of his authority when he stole the money.

In *Banco Multiple Santa Cruz, S.A. v. Moreno*,<sup>123</sup> however, the federal court in the Eastern District of New York denied the insurer's motion for summary judgment, finding that the insurer had an independent duty to process withdrawal requests in a non-negligent manner and, on its own, deemed the third-party complaint amended to include a claim for breach of contract against the insurer.

MetLife processed two withdrawals – one for \$220,000 and one for \$151,000 - from a joint variable annuity account. The withdrawals were requested by the ex-wife, who forged her ex-husband's signature on the withdrawal slips. MetLife's procedure for processing withdrawals for less than \$250,000 was to make sure that the withdrawal slip had a signature of a person whose name was on the account, but not to verify the authenticity of the signature. Here, even if

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<sup>123</sup> No. 09-1271, 2012 WL 3775998 (E.D.N.Y. Aug. 31, 2012).

MetLife's procedures governing withdrawals did not violate a duty of care, the court found that there were red flags in a letter from the wife, just prior to the couple's second divorce, alerting MetLife to the fact that the couple was separating, that the wife had a new address, and that husband and wife were no longer actively cooperating as joint owners of the account.<sup>124</sup>

### **G. Discovery Of Documents In The Possession Of A Non-Party: Are You In Control?**

There can be no question that a litigant's duty to preserve documents and electronically stored information is a serious one. Judge Shira A. Scheindlin's<sup>125</sup> opinion in *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*,<sup>126</sup> surely erased any lingering doubts about this duty. Indeed, as Judge Scheindlin stated, "[B]y now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records – paper or electronic – and to search in the right places for those records, will inevitably result in the spoliation of evidence."<sup>127</sup> Moreover, a litigant's failure to preserve relevant documents within its control can lead to sanctions or an adverse inference jury instruction.<sup>128</sup>

Far murkier is the scope of the duty to preserve documents in the possession of third-parties and a party's corporate parent, affiliate, sister or subsidiary. Federal courts have invariably ruled that counsel for a litigating party must investigate thoroughly to determine who

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<sup>124</sup> *Id.* at \*14.

<sup>125</sup> Judge Scheindlin penned the landmark "Zubulake" decisions concerning the duty of "parties and their counsel" to "preserve and produce electronically stored information." *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) ("*Zubulake V*"); *see also Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 312 (S.D.N.Y.2003) ("*Zubulake I*") (addressing the legal standard for determining the cost allocation for producing e-mails contained on backup tapes); *Zubulake v. UBS Warburg LLC*, No. 02 Civ. 1243, 2003 WL 21087136, 230 F.R.D. 290 (S.D.N.Y. May 13, 2003) ("*Zubulake II*") (addressing Zubulake's reporting obligations); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y.2003) ("*Zubulake III*") (allocating backup tape restoration costs between Zubulake and UBS); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) ("*Zubulake IV*") (ordering sanctions against UBS for violating its duty to preserve evidence).

<sup>126</sup> 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

<sup>127</sup> *Id.* at 462.

<sup>128</sup> *See Chin v. Port Authority of New York & New Jersey*, 685 F.3d 135, 162 (2d Cir. 2012).

the party's "key players" are and ensure that any relevant documents in their "possession, custody or control" have been preserved.<sup>129</sup> There is still some question, however, as to whether a litigant has "control" of documents in the possession of a third-party or its corporate subsidiaries, parents, sisters and affiliates.

Under FED. R. CIV. P. 34, documents are considered to be under a party's control when that party has "the right, authority or practical ability to obtain the documents from a non-party to the action." *Goodman v. Praxair Services, Inc.*,<sup>130</sup> Control is a question of fact and is determined on a case-by-case basis.<sup>131</sup> The burden of showing control exists is on the party seeking the production of documents or information.<sup>132</sup>

### **1. Control of information in the possession of a third-party**

A litigant may have control over documents in the possession of a third-party because of a contractual or other relationship. In *Haskins v. First Am. Title Ins. Co.*,<sup>133</sup> the court considered whether the defendant had possession, custody or control of closing files in the possession of its agents such that it must produce the documents and whether the defendant needed to issue a "litigation hold" to its agents to ensure that the requested documents were preserved.<sup>134</sup> The court first noted that federal courts construe "control" very broadly for Rule 34 purposes and control exists if a party "has the legal right or ability to obtain the documents from another source upon demand," explaining, that physical possession of documents is not necessary for

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<sup>129</sup> *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004); FED. R. CIV. P. 34.

<sup>130</sup> 632 F. Supp. 2d 494, 515 (D. Mass. 2009); *In re NTL, Inc. Securities Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007) ("Control" the court said "does not require that the party have legal ownership or actual possession of the documents at issue....").

<sup>131</sup> *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1145 (N.D. Ill. 1979) ("the issue of control is more a question of fact than of law....").

<sup>132</sup> See *Wachovia Securities, LLC v. Loop Corp.*, No. 05 C 3788, 2008 WL 2625907, at \*1 (N.D. Ill. Jun. 27, 2008).

<sup>133</sup> No. 10-5044, 2012 WL 5183908 (D.N.J. Oct. 18, 2012).

<sup>134</sup> *Id.* at \*1.

control to be present.<sup>135</sup> The court then concluded that it “logically follows that a litigating party has control of documents if a contractual obligation requires a non-party to provide requested documents to the litigating party upon demand.”<sup>136</sup> Control also exists, the court found, when a party has a right to access the documents or copy them. Since the defendant’s agency contracts contained language giving the defendant control over and access to its agents’ closing files, the court found that the defendant controlled those files.<sup>137</sup>

In addressing the plaintiffs’ request that defendant be ordered to direct its agents to preserve the closing files for the possible use or production in the litigation, the court found that litigation holds may extend to third-parties, noting prior rulings in which courts have issued orders to this effect.<sup>138</sup> Consequently, the court ordered the defendant to implement a litigation hold to preserve all documents relevant to the litigation in its possession, custody or control, including those relevant documents in the possession of its independent title agents.<sup>139</sup>

Similarly, in *GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc.*,<sup>140</sup> in support of a spoliation motion, the defendant argued that the plaintiff should have directed its third-party consultant, FTI, to preserve its evidence when the plaintiff reasonably anticipated litigation.<sup>141</sup> At that time, defendant contended that FTI was functioning as the plaintiff’s agent and that plaintiff had legal and practical control over FTI’s information.<sup>142</sup> The court concluded that the plaintiff had only practical control over FTI’s information concerning a relevant audit, and

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at \*2.

<sup>138</sup> *Id.* at \*3-4 (citing *In re Flash Memory Antitrust Litig.*, No. C-07-0086-DBA, 2008 WL 1831668, at \*1 (N.D. Cal. Apr. 22, 2008) (stating that the duty to preserve “extends to documents...in the possession, custody or control of the parties to the action, and any employees, agents...or other non-parties who possess materials reasonably anticipated to be subject to discovery”)).

<sup>139</sup> *Id.* at \*5.

<sup>140</sup> 282 F.R.D. 346 (S.D.N.Y. 2012)

<sup>141</sup> *Id.* at 353.

<sup>142</sup> *Id.*

therefore, should have directed FTI to take steps to preserve that information.<sup>143</sup> In particular, the court found that in light of FTI's continuing relationship with the plaintiff, there was little doubt that FTI would have complied with a timely request by the plaintiff to preserve its information.<sup>144</sup> Ultimately, however, the court determined spoliation sanctions were not warranted because the defendant was not prejudiced by the failure to direct the third-party to preserve the documents.<sup>145</sup>

Where the letter governing the defendant's relationship with a third-party consultant was silent as to whether the defendant would have possessory rights, access to or control of any documents prepared and maintained by its third-party consultants, the court found control did not exist. *See Goodman v. Praxair Services, Inc.*,<sup>146</sup> The *Goodman* court considered a breach of contract claim in which the plaintiff alleged that the defendant spoliated relevant information and violated the duty to preserve when it failed to implement a litigation hold on documents in the possession of its third-party consultants.<sup>147</sup> During depositions, the plaintiff's learned that the defendants did not notify the consultants to retain or preserve documents related to the project at issue in the case and had, in fact, destroyed relevant information during the course of the litigation.<sup>148</sup> These failures resulted in a loss of data and information that was clearly relevant to the case.<sup>149</sup>

The court concluded the defendants "did not have sufficient legal authority or practical ability to ensure the preservation of documents prepared by" the consultants.<sup>150</sup> Not only was the

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<sup>143</sup> *Id.* at 354-56.

<sup>144</sup> *Id.* at 355-56.

<sup>145</sup> *Id.* at 356-60.

<sup>146</sup> 632 F. Supp. 2d 494 (D. Ma. 2009).

<sup>147</sup> *Id.* at 497.

<sup>148</sup> *Id.* at 513.

<sup>149</sup> *Id.* at 513-14.

<sup>150</sup> *Id.* at 515.

governing letter silent on defendant's ability to control the third-party's documents or information, there was no other evidence to suggest that the relationship included any agreement to share documents.<sup>151</sup> As such, the court concluded that the defendant did not have the requisite control and was not under a duty to preserve the third-party consultants' documents and the fact that relevant documents had been destroyed did not lead to a finding of spoliation.<sup>152</sup>

## **2. Discovery of documents in the possession of a litigating corporation's parents, subsidiaries, sisters and affiliates**

Under the auspices of Rule 34, courts have permitted the discovery of documents in the "possession, custody or control" of non-party parents, subsidiaries, sisters and affiliates of corporate parties involved in litigation. Federal courts have also asserted their power under Rule 34 to order litigants to produce documents located abroad for use in proceedings in the United States. This is true even where the long arm of U.S. discovery orders clashed with other countries' civil and penal laws.<sup>153</sup>

In determining a litigating corporation's control over documents in the possession of its non-party parent, affiliate or subsidiary, courts consider several factors. In what is perhaps the foundational decision on the issue of "control," the Northern District of Illinois analyzed the corporate affiliations of four defendants to determine if they had the requisite control over documents possessed by foreign corporations outside the court's jurisdiction.<sup>154</sup> The court focused on a number of factors, including: the parent's ownership share in the subsidiary or affiliated corporation; whether the corporations had interlocking management structures; and the

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<sup>151</sup> *Id.* (citing *In re NTL, Inc. Securities Litig.*, 244 F.R.D. 179 (S.D.N.Y. 2007)).

<sup>152</sup> *Id.* at 515-16.

<sup>153</sup> See *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127, 129 (D. Del. 1986) ("the question...is whether a litigant subject to the jurisdiction of the court has sufficient control over documents in the possession of third parties for Rule 34 purposes); see also *In re Uranium Antitrust Litig.*, 480 F. Supp. at 1145 ("the existence of a conflicting foreign law which prohibits the disclosure of the requested documents does not prevent the exercise of this power.").

<sup>154</sup> *In re Uranium Antitrust Litig.*, 480 F. Supp. at 1144.

degree of control exercised by the parent over the subsidiary's directors, officers and employees. *Id.* at 1151-53. Many federal courts have addressed the issue of control by examining these factors. *See, e.g., Wachovia Securities*, 2008 WL 2625907, at \*1-2 (“Courts analyzing a party’s control of documents in the possession of a non-party affiliate look to several factors, including: (1) the party’s and non-party’s corporate structure; (2) the degree of ownership exercised by the parent over the subsidiary; (3) the financial relationship between the party and the non-party; (4) the amount of overlap of directors, officers, and employees; and (5) the party’s access to the non-party’s documents in the ordinary course of business.”).

Some courts have found a litigating corporation had Rule 34 “control” over documents in the possession of a non-party parent or affiliate where the “alter ego” doctrine justified a piercing of the corporate veil.<sup>155</sup>

A close relationship between a litigating corporation and non-party parent, affiliate, subsidiary or sister corporation can be grounds for the requisite control under Rule 34. In *Steele Software Sys., Corp. v. Dataquick Info.Sys., Inc.*,<sup>156</sup> the court considered a number of factors including shared office location and an overlap of directors, officers and employees between related entities in finding that the plaintiff had control over documents held by a non-party sister entity. *See also Uniden America Corp. v. Ericsson Inc.*,<sup>157</sup>

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<sup>155</sup> *See Perini American, Inc. v. Paper Converting Machine Co.*, 559 F. Supp. 552, 553 (E.D. Wis. 1983) (finding documents of Fabio Perini, S.p.A. were under the control of its plaintiff-sister corporation, Perini America, Inc., because “both corporations are the ‘alter ego’ of Fabio Perini” who owned 100% of stock in plaintiff-Perini America, Inc. and 99.5% of stock in Fabio Perini, S.p.A., and until July 1982 was its “Presidente”); *Advance Labor Service, Inc. v. Hartford Accident & Indemnity Co.*, 60 F.R.D. 632, 634 (C.D. Ill. 1973) (veil-piercing where two corporations had identical stockholders and directors and one of non-party corporation’s primary functions was to provide transportation for workers employed by litigating corporation).

<sup>156</sup> 237 F.R.D. 561, 564-65 (D. Md. 2006).

<sup>157</sup> 181 F.R.D. 302, 307 (M.D.N.C. 1998) (finding litigating corporation had control over non-party sister corporation’s documents and information where both corporations work together to coordinate sales efforts, litigating party’s VP reports not only to its own CEO but to non-party sister corporation’s VP and General Manager,

In a similar vein, control exists where one entity acts as the other's agent. For example, the court in *Afros S.P.A. v. Krauss-Maffei Corp.*,<sup>158</sup> found the litigating agent-subsi-dary had control over documents held by its non-party German parent corporation because the litigating subsidiary was the exclusive seller of the parent's products in the United States.<sup>159</sup> Additionally, their relationship was a close one: the subsidiary was wholly owned by the parent, had overlapping employees, the non-party parent's "upper echelon" employees had "substantial oversight responsibility" in the litigating subsidiary, and "key decisions" regarding the litigation were made by the non-party parent corporation "with no direct connection to" the litigating subsidiary, which demonstrated that the information requested in discovery was within the litigating party's reach.<sup>160</sup>

On the other hand, where the non-party is truly a "separate entity," as where the entities are organized under the laws of different countries, maintain separate control over resources and profit tools, and have different partners, members, and management, a court may not order discovery by the foreign entity.<sup>161</sup>

#### **H. A Plaintiff's Stipulation To The Amount In Controversy Cannot Prevent Removal Under CAFA**

The Class Action Fairness Act of 2005 ("CAFA") provides that federal district courts "shall have original jurisdiction" over class actions where, *inter alia*, the "matter in controversy

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and non-party corporation gave litigating party sister corporation documents and affidavits in the litigation to assist in opposing plaintiffs).

<sup>158</sup> 113 F.R.D. 127 (D. Del. 1986).

<sup>159</sup> *Id.* at 131.

<sup>160</sup> *Id.* at 132. See also *Cooper Industries v. British Aerospace Corporation*, 102 F.R.D. 918, 919 (S.D.N.Y. 1984) (finding it was "inconceivable" that litigating subsidiary could not obtain aircraft manuals and related documents from non-party U.S. parent corporation, where the wholly-owned litigating subsidiary was the marketer and servicer of non-party parent's aircraft).

<sup>161</sup> See, e.g., *Goh v. Baldor Electric Co.*, No. 3:98-064, 1999 WL 20943, at \*3 (N.D. Tex. Jan. 13, 1999) ("Other than shared membership in the common association of Ernst & Young International, Ernst & Young LLP, Ernst & Young Singapore, and Ernst & Young Thailand are separate entities.").

exceeds the sum or value of \$5,000,000.”<sup>162</sup> In *Standard Fire Ins. Co. v. Knowles*,<sup>163</sup> the respondent asserted claims in Arkansas state court on behalf of himself and a purported class of similarly situated policyholders concerning the calculation and payment of certain homeowner loss payments. The aggregate value of those claims exceeded five million dollars and, thus, provided federal courts with original jurisdiction over the claims of respondent and the purported class. In an effort to deprive the federal courts of jurisdiction and, thereby, prevent removal to federal court, the respondent stipulated on behalf of himself and the purported class that “they will seek to recover total aggregate damages of less than five million dollars.”<sup>164</sup> The petitioner removed and the district court remanded, finding that the stipulation meant CAFA’s amount-in-controversy requirement could not be satisfied.

The United States Supreme Court vacated the district court’s order. It concluded that so long as CAFA’s requirements are satisfied, federal courts have jurisdiction over purported class claims irrespective of a plaintiff’s pre-certification stipulation concerning the amount in controversy.<sup>165</sup> The Court observed that, for purposes of removal, jurisdiction must be decided based on “the case as of the time [the action] was filed in state court.”<sup>166</sup> Because a plaintiff has no authority to bind a class until the class has been certified, a plaintiff’s stipulations at the time a purported class action is filed are not binding on absent class members. Consequently, a plaintiff’s pre-certification stipulation that the total amount in controversy for a class of plaintiffs

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<sup>162</sup> 28 U.S.C. § 1332(d)(2), (d)(5).

<sup>163</sup> -- U.S. --, -- S.Ct. --, 2013 WL 1104735 (2013).

<sup>164</sup> *Id.* at \*2.

<sup>165</sup> *Id.* at \*6.

<sup>166</sup> *Id.* at \*4.

is less than five million dollars does not deprive the federal courts of original jurisdiction over those claims and cannot prevent removal by a defendant.<sup>167</sup>

While the case did not involve a life insurance policy, the holding in *Knowles* has implications for all class action litigation, including those involving life insurance policies. For one thing, it will make removal under CAFA easier. Class counsel are not likely to be happy with the holding in *Knowles* and the effect, we believe, will be that class counsel will turn their attention to avenues other than limiting the amount-in-controversy to avoid removal.

### **III. CIVIL UNIONS, SAME-SEX DOMESTIC PARTNERSHIPS, AND SAME-SEX MARRIAGE: POTENTIAL EFFECTS ON LIFE INSURANCE LITIGATION**

For life insurance companies, the states of civil unions, same-sex domestic partnerships, and same-sex marriages are, in a word, conflicted. The laws defining interpersonal relationships are in a state of transition, which can lead to confusion and uncertainty when it comes to identifying the proper beneficiary of a life insurance policy. Insurance companies can take some steps to mitigate the challenges created by the changing laws but, ultimately, they have to be patient and wait for a fuller development of the law surrounding these issues. These issues are discussed more fully below, starting with a survey of the state laws re-defining the interpersonal relationships that affect life insurance beneficiary determinations.

#### **A. Survey Of State Laws**

##### **1. States allowing civil unions/domestic partnerships**

Six states allow civil unions, which provide “state-level spousal rights to same-sex

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<sup>167</sup> *Id.* (“At that point, *Knowles* lacked the authority to concede the amount-in-controversy issue for the absent class members.”).

couples: Delaware, Hawaii, Illinois, New Jersey, Rhode Island”<sup>168</sup> and Colorado.<sup>169</sup> New Jersey has allowed civil unions since February 2007. The other states signed civil unions into law in 2011. In Hawaii, both same-sex and opposite-sex couples were eligible for civil unions as of January 1, 2012. Under Delaware, Rhode Island, and Hawaii’s laws, same-sex couples have the same rights as married couples. The “Illinois Religious Freedom Protection and Civil Union Act” grants those in civil unions “some of the same benefits available to married couples, including the right to visit a sick partner in the hospital, disposition of a deceased loved one’s remains and the right to make decisions about a loved one’s medical care.”<sup>170</sup> The National Conference of State Legislators notes that in New Jersey, “[c]ivil unions offer same-sex couples” and opposite-sex couples older than 62, “state-level spousal rights and responsibilities, but none of the federal protections (such as Social Security survivor benefits), and there is no guarantee that the unions will be recognized by other states or the federal government.”<sup>171</sup>

Oregon, Washington, Maine, Hawaii, the District of Columbia,<sup>172</sup> Nevada, and

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<sup>168</sup> See National Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws* (last updated March 2013), available at <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last accessed March 20, 2013).

<sup>169</sup> Dan Frosch, *Colorado Legalizes Civil Unions for Same-Sex Couples*, N.Y. TIMES, Mar. 13, 2013.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Per the National Conference of State Legislators:

(Note: In 2009, the DC Council passed a law recognizing same sex marriages performed in other states. At the end of 2009, the DC Council passed a resolution to allow same sex marriage in the District of Columbia.)

In 1992 the District of Columbia City Council passed a law that allows unmarried couples to register as domestic partners. Since that time, several rights have been added, including hospital visitation, the right to make medical decisions, the right to control the remains of a deceased partner, the right to take sick leave to take care of a partner and the right to sue for the wrongful death of a partner. Effective March 3, 2010, couples in a domestic partnership prior to the legalization of same-sex marriage are able to apply for a marriage license without an additional fee.

(DC’s domestic partner registry was created in law in 1992, but Congress prohibited DC from expending any public money on the registry. This ban was lifted in 2002.)

Wisconsin<sup>173</sup> have passed laws recognizing domestic partners.<sup>174</sup> In Oregon, same-sex domestic partnerships have the same benefits of marriage, but no federal protections, such as Social Security survivor benefits. There is no guarantee that those domestic partnerships will be recognized by the federal government or other states.<sup>175</sup> In Maine, domestic partners' limited rights include: “[i]nheritance without a will[,] [m]aking funeral and burial arrangements[,] [e]ntitlement to be named a guardian or conservator if [their] partner becomes incapacitated or to be named a representative to administer a deceased partner’s estate[,] [e]ntitlement to make organ and tissue donation[, and] [e]xplicit protection in the state’s domestic violence laws.”<sup>176</sup> One law in Hawaii allows “reciprocal beneficiary relationship[s]” for same-sex couples. Such couples are entitled to the following benefits: “inheritance without a will, ability to sue for the wrongful death of their reciprocal beneficiary, hospital visitation and health care decisions,

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Citations: D.C. Code §1-307.68; §1-612.31, 32(b); §3-413; §16-1001; §5-113.31, 33; §21-2210; §32-501, 701, 704, 705(a), 705(b), 705(c), 705(d), 706; §42-1102, 3404.02(b)(c), 3651.05(c)(3); §47-858.03; §47-902; §50-1501.02(e)(4) and various other sections of the D.C. Code.

National Conference of State Legislatures, Civil Unions & Domestic Partnership Statutes, available at <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> (last visited 3/23/2013).

<sup>173</sup> As the National Conference of State Legislators reports:

In June, 2009, the Wisconsin legislature passed a law (2009 Wisconsin Act 28, Assembly Bill 75, Section 774) establishing a statewide domestic partnership registry. Registered domestic partners in Wisconsin are now afforded some of the spousal benefits of marriage, including: inheritance and survivor protections, family and medical leave, medical/hospital visitation rights and exemption from the real estate transfer fee.

Wisconsin has a constitutional amendment defining marriage between one man and one woman. The amendment includes a clause that bans any legal status that is identical or substantially similar to marriage. Wisconsin is the first state with this type of constitutional amendment to also establish a domestic partner registry. The registry was challenged in court. In December 2012 the Wisconsin Fourth District Court of Appeals ruled the registry was constitutional and did not violate the intent of the marriage amendment.

National Conference of State Legislatures, Civil Unions & Domestic Partnership Statutes, available at <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> (last visited 3/23/2013).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

consent to postmortem exams, loan eligibility, property rights (including joint tenancy), tort liability and protection under Hawaii domestic violence laws.”<sup>177</sup> Another Hawaii law, the Hawaii Reciprocal Beneficiaries law, “provides limited state rights to same-sex couples, relatives and friends.”<sup>178</sup> In Nevada, “[t]he benefits are substantially comparable to the rights and responsibilities afforded in traditional marriage, though employers are not mandated to provide health care coverage for domestic partners.”<sup>179</sup>

## **2. Federal regulations concerning benefits for domestic partners of federal employees.**

Federal regulations permit some federal employees to obtain benefits for their same-sex domestic partners and for the children of their domestic partners. The U.S. Office of Personnel Management defines a “domestic partner” as follows:

a “domestic partner” is defined in OPM regulations (e.g. 5 C.F.R. § 875.213) as a person in a domestic partnership with an employee or annuitant of the same sex. The term “domestic partnership” is defined as a committed relationship between two adults, of the same sex, in which the partners— (1) are each other’s sole domestic partner and intend to remain so indefinitely; (2) maintain a common residence, and intend to continue to do so (or would

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<sup>177</sup> *Id.*

<sup>178</sup> The National Conference of State Legislators notes:

Among the benefits extended to non-married reciprocal beneficiaries under the law are: property rights, including joint tenancy; the right to visit your partner in a hospital and make health care decisions for her or him; ability to inherit property without a will; and protection under Hawaii's domestic violence laws. After the creation of civil unions in 2011, the legislature specified if two reciprocal beneficiaries enter into a civil union with each other, the rights, benefits, protections, or responsibilities created by the reciprocal beneficiary relationship shall be continuous through the civil union and deemed to have accrued as of the first date these rights existed under the reciprocal beneficiary relationship. (Hawaii’s law establishing reciprocal beneficiaries is not limited to same-sex couples and can be used to contractually bind two parties, even those who may be already related, such as a brother and sister.)

National Conference of State Legislatures, Civil Unions & Domestic Partnership Statutes, available at <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> (last visited 3/23/2013).

<sup>179</sup> *Id.*

maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle); (3) are at least 18 years of age and mentally competent to consent to contract; (4) share responsibility for a significant measure of each other's financial obligations; (5) are not married or joined in a civil union to anyone else (6) are not the domestic partner of anyone else; (7) are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the partnership was formed; (8) are willing to certify, if required by the agency, that they understand that willful falsification of any documentation required to establish that an individual is in a domestic partnership may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification, as well as constitute a criminal violation under 18 U.S.C. § 1001, and that the method for securing such certification, if required, shall be determined by the agency; and (9) are willing promptly to disclose, if required by the agency, any dissolution or material change in the status of the domestic partnership.<sup>180</sup>

Presently, a federal employee may designate a same-sex domestic partner as their beneficiary to receive unpaid pay and allowances at their death<sup>181</sup> and to receive lump sum amounts payable under CSRS or FERS on their death.<sup>182</sup> Also, federal employees who can claim a same-sex domestic partner as a tax dependent may be reimbursed under their Federal Flexible Spending Account Program account for eligible expenses.<sup>183</sup> Same-sex domestic partners are also entitled to child-care cost subsidies for their children and for their partner's children, and are entitled to assistance under the Employee Assistance Program (EAP) for their partners.<sup>184</sup> They may also take 24 hours of leave without pay "for school and early childhood educational activities, routine family medical purposes, and elderly relatives' health or care needs, of

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<sup>180</sup> *Id.*

<sup>181</sup> *See* 5 U.S.C. § 5582(b).

<sup>182</sup> *See* 5 U.S.C. § 8342(c) (CSRS), § 8424(d) (FERS).

<sup>183</sup> National Conference of State Legislatures, Civil Unions & Domestic Partnership Statutes, available at <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> (last visited 3/23/2013).

<sup>184</sup> *Id.*

children and elderly relatives of [their] same-sex partner.”<sup>185</sup> Same-sex partners are eligible for coverage under the Federal Long Term Care Insurance Program (FLTCIP).<sup>186</sup> Further,<sup>187</sup>

OPM has published amendments to its regulations to establish that an employee's same-sex domestic partner qualifies, and should be treated as, a family member for purposes of eligibility for noncompetitive appointment based on overseas employment, as provided in section 315.608 of title 5, Code of Federal Regulations. See 5 CFR 315.608(e).

Further, individual federal agencies are currently reviewing their benefit programs and proposing or implementing, to the extent permitted by law, changes to their programs to ensure domestic partners of federal employees have access to the same benefits provided to employees’ spouses and children.<sup>188</sup> And while a federal employee cannot cover their domestic partners under the Federal Employees’ Group Life Insurance (FEGLI) Program, she may designate her same-sex domestic partner or that partner’s child as their beneficiary under FEGLI.<sup>189</sup>

### 3. States permitting same-sex marriage

Presently, nine states and the District of Columbia recognize same-sex marriages<sup>190</sup> while 37 states specifically prohibit them.<sup>191</sup> Of the 37 states that prohibit same-sex marriage, seven of

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<sup>185</sup> *Id.*

<sup>186</sup> See 5 U.S.C. §§ 9001-9009; 5 C.F.R. § 875.213.

<sup>187</sup> National Conference of State Legislatures, Civil Unions & Domestic Partnership Statutes, available at <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> (last visited 3/23/2013).

<sup>188</sup> Presidential Memorandum “Extension of Benefits to Same-Sex Domestic Partners of Federal Employees,” available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-extension-benefits-same-sex-domestic-partners-federal-emplo> (last visited 3/21/2013).

<sup>189</sup> *Id.*

<sup>190</sup> Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington and the District of Columbia. See National Conference of State Legislatures, Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws (last updated March 2013), available at <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last accessed March 20, 2013).

<sup>191</sup> Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, Wyoming. See National Conference of State Legislatures, Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws (last updated March 2013), available at

them recognize at least some rights for same-sex couples.<sup>192</sup> Only three states are silent concerning the validity (or not) of same-sex marriages: New Jersey, New Mexico, and Rhode Island.<sup>193</sup> California's position concerning same-sex marriages in legal limbo pending the Supreme Court's determination of whether an amendment to California's constitution that purports to *withdraw* from same-sex couples the right to marry is constitutional. In November 2008, California voters adopted a constitutional amendment commonly referred to as "Proposition 8" which provided: "Only marriage between a man and a woman is valid or recognized in California."<sup>194</sup> On February 12, 2012, the United States Court of Appeals, Ninth Circuit concluded the amendment violated the Fourteenth Amendment to the United States Constitution.<sup>195</sup> The effect of the court's holding is stayed pending resolution by the United States Supreme Court. The Court heard oral arguments in the case in late March 2013 and a decision is expected sometime in June 2013.

The federal Defense of Marriage Act<sup>196</sup> ("DOMA") provides for purposes of federal statutes, regulations, or administrative rulings that the word "'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."<sup>197</sup> As we discuss below, the Supreme

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<http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last accessed March 20, 2013).

<sup>192</sup> Colorado, Delaware, Hawaii, Illinois, Nevada, Oregon, and Wisconsin. See Human Rights Campaign Marriage Center, available at <http://www.hrc.org/marriage-center> (last accessed March 21, 2013); See National Conference of State Legislatures, Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws (last updated March 2013), available at <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx>.

<sup>193</sup> See National Conference of State Legislatures, Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws (last updated March 2013), available at <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last accessed March 20, 2013); and Human Rights Campaign Marriage Center, available at <http://www.hrc.org/marriage-center> (last accessed March 20, 2013).

<sup>194</sup> Cal. Const. art. I, § 7.5.

<sup>195</sup> *Perry v. Brown*, 671 F.3d 1052, 1067 (9th Cir. 2012) cert. granted, 133 S. Ct. 786 (2012).

<sup>196</sup> PL 104-199, 110 Stat. 2419 (primarily codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

<sup>197</sup> 1 U.S.C. § 7.

Court is presently considering whether that provision violates the Equal Protection Clause. Another section of DOMA provides that a State cannot be required to recognize the same-sex marriages of another State.<sup>198</sup> While that provision appears to be enforceable, one regrettable consequence for life insurance companies is that it may make it more difficult for them to identify the appropriate beneficiary of life insurance benefits when an insured fails to designate a beneficiary. Both DOMA provisions are discussed in further detail below.

### **B. Conflicting State Laws Concerning Same-Sex Relationships Will Likely Complicate Beneficiary Determinations For Life Insurance Policies**

The patchwork of conflicting state laws concerning same-sex marriages, civil unions, and domestic partnerships has caused courts in states where those relationships are not recognized to disregard them in disputes ranging from adoption,<sup>199</sup> child custody and visitation matters,<sup>200</sup> wrongful death actions,<sup>201</sup> to actions for divorce<sup>202</sup> or for dissolution of civil unions.<sup>203</sup> Those decisions show that the state-law conflicts have the potential to affect all manner of legal rights a same-sex couple might otherwise enjoy anytime they are involved in a legal dispute governed by the law of a state that does not recognize their relationship. In the life insurance context, policies frequently designate default categories of beneficiaries based on their legal relationships to an insured. For instance, where an insured dies without having designated a beneficiary to receive his benefits, or the designated beneficiary predeceases the insured, a policy may identify categories of eligible beneficiaries based on their relationships to the insured (*e.g.*, spouse and children) and the order of precedence for each category of beneficiary. There is every reason to

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<sup>198</sup> 28 U.S.C. § 1738C.

<sup>199</sup> *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002).

<sup>200</sup> *Burns v. Burns*, 560 S.E.2d 47 (Ga. App. 2002); *Gestl v. Frederick*, 754 A.2d 1087 (Md. Ct. Spec. App. 2000).

<sup>201</sup> *Langan v. St. Vincent's Hosp. of N.Y.*, 765 N.Y.S. 2d 411 (N.Y. Sup. Ct. 2003).

<sup>202</sup> *Port v. Cowan*, 426 Md. 435, 44 A. 3d 970 (Md. Ct. App. 2012); *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007).

<sup>203</sup> *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A. 2d 170 (Conn. Ct. App. 2002).

believe the variety of state laws will give rise to disputes over the proper beneficiaries of life insurance benefits. Consider, for instance, the following hypotheticals:

- S1 and S2 are married in State A. S1 has a child C from a previous marriage. S1 and S2 move to State B, which does not recognize their same-sex marriage, and S1 purchases a life insurance policy on her life. S1 dies without having designated a beneficiary for the life insurance benefit. The policy provides that benefits will be paid first to the insured's "spouse," which is not defined, and then to any children. C argues S2 cannot be considered a "spouse" because State B does not recognize same-sex marriages.
- S1 and S2 are married in State A where S1 purchases a life insurance policy on her life. S1 has a child C from a previous marriage. S1 and S2 move to State B, which does not recognize their same-sex marriage. S1 and S2 later seek to divorce and have complied with all of State B's prerequisites for divorce. The court in State B, however, denies the divorce petition because State B's family law statutes only permit divorce of "married" couples, which state law defines to exclude same-sex marriages. It is not clear whether a divorce can be obtained from State A since neither S1 or S2 live there. Both States A and B have statutes that automatically revoke spousal beneficiary designations upon divorce. Before it can be determined whether State A will grant a divorce, S1 dies without having designated a beneficiary. In the absence of a beneficiary designation, the policy pays benefits first to a "spouse" and then to a child. C argues the life insurance benefits must be paid to him because S1 and S2 had done everything possible to divorce prior to S1's death and it was her clear intent that S2 not receive the benefits.
- S1 and S2 enter into a civil union in State A, which permits adoption by same-sex couples. S1 and S2 adopt child C and all three move to State B, which does not permit same-sex adoptions. S1 purchases a life insurance policy on her life and names S2 the beneficiary. S1 dies and S2 had predeceased her. In the absence of a beneficiary designation, the policy provides that benefits will be paid first to the insured's spouse, then to her child, then to her siblings. S1's siblings argue the benefits must be paid to them because State B does not recognize same-sex adoptions and, therefore, C cannot be S1's child under the laws of State B.

The first step for determining who is entitled to the life insurance benefits in the foregoing examples is to check the terms of the policies. Assuming they contain no controlling terms, the policies will be interpreted consistent with state law. In most instances, the law of the state in which the policies were issued will govern. The analysis is complicated, however, by the

common-law doctrine of comity and the Constitution's Full Faith and Credit Clause that, in some instances, require the forum state to recognize and apply the laws of another state. Unfortunately, as we explain below, comity and the Full Faith and Credit Clause are more easily described than applied. As a result, there are not likely to be clear answers to the beneficiary issues like those posed in the foregoing examples. We predict, therefore, that until the common law in these areas is more developed, insurance companies will need to resort to interpleader actions to resolve these types of beneficiary disputes.

**1. It is not clear whether states that prohibit same-sex relationships would recognize them for limited purposes under the common-law doctrine of comity**

“Comity” is “[a] practice among political entities (as nations, states, or courts of different jurisdictions), involving ... mutual recognition of legislative, executive, and judicial acts.”<sup>204</sup>

The United States Supreme Court long ago described comity as a doctrine requiring consideration of a foreign sovereign's interests, born out of due respect for other sovereign entities, balanced against the principles and priorities of the forum's sovereign.

Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.<sup>205</sup>

Comity permits litigants to use the forum state to enforce rights arising under the laws of another state, unless doing so would be repugnant to the public policy of the forum state.<sup>206</sup> The circumstances under which a forum court will rely on comity to permit a litigant to exercise

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<sup>204</sup> BLACK'S LAW DICTIONARY, 9<sup>th</sup> ed. 2009.

<sup>205</sup> *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct. 139, 143 (1895).

<sup>206</sup> See, e.g., *Port v. Cowan*, 426 Md. 435, 444, 44 A. 3d 970, 976 (Md. Ct. App. 2012); *Christiansen v. Christiansen*, 253 P. 3d 153, 156 (Wyo. 2011).

rights unknown to the forum are highly fact-specific, turning on the specific actions and rights at issue and the public policies of the forum state as described by the state’s constitution, statutes, and common law. For example, Pennsylvania, Rhode Island, and Texas have declined to recognize same-sex marriages on comity grounds, even for the limited purpose of obtaining a divorce.<sup>207</sup> At the same time, however, Maryland and Wyoming, both of which prohibit same-sex marriage, recognized those marriages when couples domiciled in those states wanted to divorce.<sup>208</sup> In its comity analysis, the Wyoming Supreme Court reasoned that comity permitted the court to “recognize[e] a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding [because doing so] does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages.”<sup>209</sup>

The lesson to be drawn from the foregoing decisions is that unless there is governing precedent in a forum state that directly addresses the comity issues before the court, it is extremely difficult to predict whether comity will allow a state that does not recognize same-sex marriages, civil unions, or domestic partnerships to vindicate the legal rights a sister state accords persons who have entered into those relationships.<sup>210</sup>

## **2. The Full Faith and Credit Clause requires states to recognize adoptions by same-sex couples but not marriages, civil unions, or domestic partnerships**

The Full Faith and Credit Clause can avoid some of the confusion and uncertainty created by the patchwork of laws concerning same-sex relationships and rights. In particular, the Clause

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<sup>207</sup> *Chambers v. Ormiston*, 935 A. 2d 956 (R.I. 2007); *In re J.B.*, 326 S.W. 2d 654 (Tex. App. 2010); *Kern v. Taney*, 11 Pa. D. & C. 5<sup>th</sup> 558 (Pa. C.P. Ct. 2010).

<sup>208</sup> *Port v. Cowan*, 426 Md. 435, 444, 44 A. 3d 970, 976 (Md. 2012); *Christiansen v. Christiansen*, 253 P. 3d 153, 156 (Wyo. 2011).

<sup>209</sup> *Christiansen*, 253 P. 3d at 156.

<sup>210</sup> See, e.g., *Cote-Whitacre v. Dept. of Public Health*, 446 Mass. 350, 403, 844 N.E. 2d 623, 665-66 (Mass. 2006) (“[N]o one can accurately predict the circumstances in which another jurisdiction may elect to give effect to an incident of a same-sex marriage performed [in Massachusetts].”) (Ireland, J., dissenting).

brings clarity concerning the circumstances under which a same-sex couple's adoption of a child will be honored by another state.

The Full Faith and Credit Clause "is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent sovereign States into a nation."<sup>211</sup> The Clause provides:<sup>212</sup>

Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Notably, the Clause "does not mean that States must adopt the practices of other States regarding the time, manner, and mechanism for enforcing judgments."<sup>213</sup> The manner of enforcing a judgment, in other words, does not "travel with the sister state judgment;" rather, the means of enforcement "remain[] subject to the even-handed control of forum law."<sup>214</sup>

In *Finstuen v. Crutcher*, The Tenth Circuit held that the Full Faith and Credit Clause required Oklahoma to issue a supplemental birth certificate to a same-sex couple who adopted a child born in Oklahoma.<sup>215</sup> The couple lived in California and adopted the child pursuant to California law. The adoption was adjudicated and memorialized by order of a California court, and that order was the basis for the couple's request for a supplemental birth certificate that would identify the couple as the child's parents.<sup>216</sup> Although Oklahoma had a statute that permitted it to issue supplemental birth certificates reflecting an adoption, it refused the couple's petition, citing another statute barring the State from "recogniz[ing] an adoption by more than

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<sup>211</sup> *Finstuen v. Crutcher*, 496 F.3d 1139, 1152 (2007) (citing *Sherrer v. Sherrer*, 334 U.S. 343, 355, 68 S.Ct. 1087 (1948)).

<sup>212</sup> U.S. Const. art. 4, § 1.

<sup>213</sup> *Finstuen*, 496 F.3d at 1152 (citing *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233, 118 S.Ct. 657 (1998)).

<sup>214</sup> *Id.* (citing *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233, 118 S.Ct. 657 (1998)).

<sup>215</sup> *Id.* at 1154.

<sup>216</sup> *Id.*

one individual of the same sex from any other state or foreign jurisdiction.”<sup>217</sup> The court held that the California adoption was conclusive and that the Full Faith and Credit Clause meant Oklahoma could not refuse to recognize that fact.<sup>218</sup> Moreover, because Oklahoma had a mechanism for issuing supplemental birth certificates, the couple was entitled to insist on the “even-handed enforcement” of Oklahoma law to obtain such a certificate.<sup>219</sup>

Importantly, if Oklahoma did not have a mechanism for enforcing adoption judgments through the issuance of supplemental birth certificates, it could not have been compelled by the Full Faith and Credit Clause to issue one.<sup>220</sup> In *Adar v. Smith*,<sup>221</sup> for instance, the Fifth Circuit rejected a same-sex couple’s request for a revised birth certificate following their adoption under New York law of a child born in Louisiana. Among the reasons the Fifth Circuit rejected the couple’s Full Faith and Credit Clause argument was that “Louisiana does not permit *any* unmarried couples – whether adopting out-of-state or in-state – to obtain revised birth certificates with both parents’ names on them.”<sup>222</sup>

Under the holdings in *Finstuen* and *Adar*, an out-of-state adoption by a same-sex couple will be honored by another state, even one that would not otherwise recognize the adoption, so long as the state would honor a similar out-of-state adoption by heterosexual couple. That is good news for a life insurance company that needs to determine whether, under a policy’s beneficiary succession provisions, it can pay life insurance benefits to an individual whose adoption by the insured and his/her same-sex partner might be subject to attack under the

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<sup>217</sup> *Id.* at 1142.

<sup>218</sup> *Id.* at 1154.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* (“If Oklahoma had no statute providing for the issuance of supplementary birth certificates for adopted children, the [plaintiffs] could not invoke the Full Faith and Credit Clause in asking Oklahoma for a new birth certificate.”).

<sup>221</sup> *Adar v. Smith*, 639 F.3d 146, 161 (5th Cir. 2011).

<sup>222</sup> *Id.* (emphasis added).

forum's laws.

While the Full Faith and Credit Clause may be used to ensure some of the incidents of formalized same-sex relationships such as adoption are recognized by states where those rights would not otherwise be available to same-sex couples, the Clause is of no help when it comes to recognizing same-sex marriages. Section 2 of DOMA bars any argument that the Full Faith and Credit Clause requires a State to recognize a civil union or same-sex marriage.

No State, territory or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession or tribe, or a right or claim arising from such relationship.<sup>223</sup>

To date, only one court has directly addressed the constitutionality of Section 2 as an exercise of Congress' power, and it concluded the Section was a valid exercise of Congress' express right under the Clause "to prescribe the Manner in which ... Acts, Records and Proceedings shall be provided, and the Effect thereof."<sup>224</sup> Thus, litigants seeking legal recognition of their civil union or same-sex marriage by a State that recognizes neither arrangement must argue "comity" requires the State to recognize their joint civil status.

### **3. DOMA's definition of "marriage" and "spouse" for purposes of federal law may be unconstitutional**

Some insurance policies will be governed by federal law, rather than by state law. Where that is the case and a policy does not provide definitions for "marriage" or "spouse," DOMA's definitions of those terms would likely apply and, thus, preclude an insurance company's finding that an insured's same-sex partner is his "spouse" or that he and his partner were "married" for

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<sup>223</sup> 28 U.S.C. § 1738C.

<sup>224</sup> *Wilson v. Ake*, 354 F.Supp. 2d 1298, 1303-04 (M.D. Fla. 2005).

purposes of the policy.<sup>225</sup> The Servicemen’s Group Life Insurance Act, for example, is a federal program that provides life insurance coverage to members of the Nation’s uniformed services and their dependents.<sup>226</sup> The Act identifies by order of precedence and category of relationship to the member the beneficiaries eligible to receive the life insurance benefits provided under the program where the member did not designate a beneficiary or the designated beneficiary predeceased the member.<sup>227</sup> The first category of beneficiary is the widow or widower of the member.<sup>228</sup> Under Section 3 of DOMA, an individual in a same-sex marriage would not be considered the member’s “spouse” and, thus, would not be his/her widow or widower. For life insurance companies, the bright line that Section 3 provides concerning who can and cannot be married or a spouse is helpful when it comes to determining who qualifies as a beneficiary. The constitutionality of Section 3, however, is in doubt.

The Second Circuit recently concluded the section violates the Equal Protection Clause and therefore is unconstitutional. *Windsor v. U.S.*,<sup>229</sup> In *Windsor*, a same-sex couple was married in Canada and lived in New York. When the plaintiff’s spouse died, she sought – and was denied solely on the basis of Section 3’s definitions of “marriage” and “spouse” – the benefit of the spousal deduction for federal estate taxes under 26 U.S.C. § 2056(A).<sup>230</sup> The plaintiff argued Section 3 of DOMA violated the Equal Protection Clause and sought a refund of taxes paid in the amount of \$363,053.<sup>231</sup>

The Second Circuit reviewed Section 3 under the “intermediate scrutiny” standard of

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<sup>225</sup> See, e.g., *Prudential Ins. Co. of America v. Athmer*, 178 F.3d 473, 475 (7th Cir. 1999) (discussing life insurance policy issued under Servicemen’s Group Life Insurance Act of 1965, 38 U.S.C. §§ 1965, *et seq.*).

<sup>226</sup> 38 U.S.C. § 1967(a).

<sup>227</sup> 38 U.S.C. § 1970(a).

<sup>228</sup> *Id.*

<sup>229</sup> 699 F.3d 169, 188 (2nd Cir. 2012) *cert. granted*, 133 S. Ct. 786, 184 L. Ed. 2d 527 (U.S. 2012).

<sup>230</sup> *Id.* at 175.

<sup>231</sup> *Id.*

review, meaning Section 3’s classifications of individuals as either “married” or “spouses” for purposes of federal law would only be upheld if classifications were “substantially related to an important government interest.”<sup>232</sup> Proponents of Section 3 argued the statute was substantially related to four important government interests: (i) maintaining a uniform definition of marriage; (ii) protecting the federal fisc; (iii) preserving a traditional understanding of marriage; and (iv) encouraging responsible procreation.<sup>233</sup> The court rejected the first argument observing that Section 3 did not promote a uniform definition of marriage as it “defined only a single aspect of domestic relations law, [leaving] standing all other inconsistencies in the laws of the states, such as minimum age, consanguinity, divorce, and paternity.”<sup>234</sup> The court also rejected the argument that Section 3 served to protect the public fisc: “DOMA is so broad, touching more than a thousand federal laws, that it is not substantially related to fiscal matters.”<sup>235</sup> Even assuming for the sake of argument that “preserving tradition were in itself an important goal,” the court concluded Section 3 was not substantially related to that interest: “[B]ecause the decision of whether same-sex couples can marry is left to the states, DOMA does not, strictly speaking, ‘preserve’ the institution of marriage as one between a man and a woman.”<sup>236</sup> Finally, the court found that Section 3 does not “advance[] the goals of ‘responsible childrearing.’”<sup>237</sup> Because “DOMA does not provide any incremental reason for opposite-sex couples to engage in ‘responsible procreation,’” the statute is “not substantially related to the important government interest of encouraging procreation.”<sup>238</sup>

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<sup>232</sup> *Id.* at 185.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 186.

<sup>235</sup> *Id.* at 187.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 188.

The Supreme Court granted *certiorari* on the Second Circuit's holding and heard arguments at the end of March 2013. A decision in the case is expected sometime in June 2013.

#### 4. What can insurers do?

Insurers can proactively guard against the confusion caused by the patchwork of laws concerning same-sex relationships by spelling out clearly in their policies how the terms “marriage,” “spouse,” “child,” and “domestic partner” are to be defined. Although issued in a state that does not recognize same-sex marriage, a policy might nevertheless define “marriage” and “spouse” according to the law of the state in which the marriage was celebrated. Even though the Full Faith and Credit Clause likely compels states to recognize adoption proceedings in other states, a policy could pre-empt any confusion by declaring that the definition of “child” will include any children validly adopted according to the laws of the state in which the adoption occurred.

A Sixth Circuit decision provides one example, albeit in the context of an opposite-sex domestic partnership, of the benefits of clearly defining the terms used to describe an insured's relationships. In *Union Sec. Ins. Co. v. Blakely*,<sup>239</sup> the insurer filed an interpleader action, for the court to determine the correct beneficiary of an ERISA-governed life insurance policy. The insured – who was not married and never selected a beneficiary for the policy - died, leaving “behind three children [and] a cohabitant and purported fiancée ....” The policy stated that when no beneficiary was named, benefits were to be distributed in the following order: “[f]irst to the insured's spouse, then to his domestic partner, his children (or his domestic partner's children), his living parents, or his estate.” The District Court, finding no definition of “domestic partner” in the “general definition” section of the ERISA plan, turned to federal common law. Using the

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<sup>239</sup> 636 F.3d 275 (6th Cir. 2011).

definition it found, the District Court concluded that the insured's fiancée was his domestic partner, and therefore entitled to the life insurance benefits. On appeal, the Sixth Circuit held that the ERISA plan in fact did provide a framework, if not an express definition, for deciding whether the fiancée qualified as a domestic partner under the plan.<sup>240</sup> Because consideration of those factors could be determinative, the court vacated the judgment and remanded the case for consideration of those issues.

The laws defining interpersonal relationships are in a state of transition. When the recipient of life insurance benefits is defined by the relationship he/she has with an insured, determining the beneficiary can be like trying to hit a moving target. Insurance companies can take some steps to mitigate the challenges those transitions create but, ultimately, they have to be patient and wait for a fuller development of the law surrounding these issues.

#### IV. CONCLUSION

Many of the laws and judicial doctrines affecting life insurance litigation are in a state of flux. Insurance companies need be aware of the ongoing changes to ensure the issues are

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<sup>240</sup> The Sixth Circuit noted that the plan listed "criteria to help pinpoint a true 'domestic partner' whose life is also insurable under the plan[:]"

- (1) You and your domestic partner have had a committed relationship of mutual caring which has existed for at least 6 months, or meet the requirements and have registered as domestic partners, if the controlling governmental authority provides for such registration;
- (2) You and your domestic partner are each age 18 or more and mentally competent to consent to contract;
- (3) Neither you nor your domestic partner are married to someone else, and your relationship is mutually exclusive;
- (4) Your and your domestic partner are not related by blood any closer than would prohibit legal marriage;
- (5) You and your domestic partner are financially interdependent;
- (6) You and your domestic partner each have power of attorney for each other; *and*
- (7) At least 6 months have elapsed since similar coverage was terminated on a previously insured domestic partner, if any, unless the previous domestic partner has died.

*Id.* at 277.

properly addressed. In some instances, companies can take action to pro-actively guard against the negative consequences of the changes or at least guard against the uncertainty the changes cause. In other cases, insurance companies have little choice but to await further development of the law – which, for clarity’s sake, will hopefully move at more than the glacial pace commonly associated with life insurance litigation.