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LIABILITY ISSUES IN THE SALE OF LIFE INSURANCE

Douglas R. Richmond

This article provides a comprehensive discussion of liability issues facing insurers, agents, and brokers in connection with the sale of life insurance, especially cash value life insurance.

INTRODUCTION

In recent years, there has been considerable litigation involving life insurance sales.[1] Scholars have described the life insurance industry as being "under siege."[2] To the extent that description is fair, the siege is being laid by policyholders alleging that they were corruptly persuaded to purchase "cash value" or "permanent" life insurance that was too expensive, was unnecessary in light of other policies that they held at the time of purchase, was unsuitable for their needs, or was in some other way financially detrimental. "Cash value" or "permanent" life insurance combines a death benefit with a savings or investment component.[3] Common forms include whole life, universal life, variable life, and variable universal life.

1. Eileen B. Eglin & Joan M. Gilbride, *Agents' and Brokers' Liability: Understanding Their Integral Roles*, *in* INSURANCE LAW 1999: UNDERSTANDING THE ABC's, at 477, 515 (PLI Litig. & Admin. Practice Course, Handbook Series No. H0-005F, 1999).
2. Daniel R. Fischel & Robert S. Stillman, *The Law and Economics of Vanishing Premium Life Insurance*, 22 DEL. J. CORP. L. 1, 1 (1997).
3. "Cash value" life insurance is an apt term because the extent to which premium payments exceed the cost of insurance associated with the policy, combined with dividends or interest credited by the insurer, creates cash value that the policyholder can borrow against while the policy stays in force, that the policyholder can use to fund future premium payments, that the policyholder can convert into an annuity if insurance protection is discontinued, or that the policyholder is entitled to receive upon surrender of the policy. "Permanent" life insurance is also an appropriate term because unlike "term" life insurance, which provides coverage only for a specified term, it provides coverage for a policyholder's entire life (usually to age 100), provided that the policyholder keeps the policy in force.

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This rash of life insurance litigation has several root causes. First, although the existence of unscrupulous insurance sales professionals and predatory insurers cannot be denied,[4] a more serious problem is the failure of agents and brokers to appreciate that cash value life insurance can be confusing, even for those who are financially sophisticated.[5] Although much of this confusion could be eliminated if insureds would read their policies or accompanying prospectuses, carefully review policy illustrations, or question their agents or brokers about key aspects of policies, many do not. Their ultimate disappointment with their policies leads to anger and blame and thus to litigation against the insurers and intermediaries whom they consider responsible for their alleged predicaments. Second, in their zeal to make sales, some agents and brokers provide customers with optimistic illustrations of policy performance that, while perhaps permissible under insurers' compliance standards, unreasonably raise customers' expectations and lead to litigation when those expectations are not met.[6] Third, many plaintiffs' lawyers do not understand the cash value life insurance products that they are suing over, or they ascribe sinister explanations to events beyond insurers' and intermediaries' control, such as declines in interest rates that lower policy values.[7]

It is against this backdrop that we examine the liability of insurers and intermediaries in the sale of life insurance, and especially cash value life insurance. Section I describes key aspects and features of common forms of life insurance. Section II examines agency law in the context of life insurance intermediaries, and related liability principles. Finally, Section III discusses common litigation theories, causes of action, and controversies.

I. LIFE INSURANCE POLICIES

The most basic form of life insurance available is "term" life insurance. Term life insurance is pure insurance; the insured purchases coverage for a specified term and the beneficiary collects under the policy only if the insured dies within that term.[8] Assuming that the insured does not die, at

4. *See, e.g.*, Emily Heller, *Stolen Premiums Yield Billion-Dollar Verdict*, NAT'L L.J., Feb. 21, 2005, at S6 (reporting $1.62 billion verdict in fraud case against dishonest agent and life insurance company for whom he worked).

5. *See* Fischel & Stillman, *supra* note 2, at 3.

6. Policy illustrations show key policy information and values; they show how a cash value life insurance policy is structured and how it might perform in the future based on certain assumptions. Assumptions underlying or supporting illustrations can be varied to address particular customers' interests or concerns. KENNETH BLACK, JR. & HAROLD D. SKIPPER, JR., LIFE & HEALTH INSURANCE 279 (13th ed. 2000).

7. *See* Fischel & Stillman, *supra* note 2, at 32 (explaining that in the case of "vanishing premium" life insurance policies, declining interest rates, not deceptive sales practices, caused policyholders' alleged damages).

8. ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW 36 (3d ed. 2002).

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the end of the term, the policy expires with no maturity value. Term life insurance does not include a savings component.[9]

Most term life insurance policies provide for a level death benefit over the policy term.[10] Premiums for these policies either remain level or increase with the insured's age. If the premiums remain level, the amount of coverage may decline with the insured's age because the insured's risk of death increases with age.[11] If a term insurance policy is "renewable" (as many are), the policyholder has the option of renewing the policy at expiration for a limited number of additional periods regardless of the policyholder's insurability at the time of renewal.[12] The premiums for a renewable term policy, although level for a particular term, increase with each renewal and are based on the insured's attained age at renewal.[13]

The desirability of term life insurance versus cash value life insurance is constantly debated, but, in any event, term life insurance spawns little sales practices litigation. The chief reason for this is that term life policy prices are more easily compared than are the prices of cash value life insurance policies, such that consumers suffer none of the confusion that attends the purchase and maintenance of cash value policies.[14]

"Whole life" is the most basic form of cash value life insurance. A whole life policy includes a death benefit and a savings component.[15] The insurer fixes the death benefit and the premium at the time the policy is purchased; the premiums remain level over time.[16] Consumers who purchase a whole life policy pay higher premiums in the early years of the policy than they would for an equivalent amount of term insurance, but in later years pay premiums that are lower than what they would pay for the same amount of term insurance.

A whole life policy has no specified term; it can be kept in force indefinitely.[17] Hence the name "whole life." If the policyholder lives to the age on which the policy is priced, typically to 100, the insurer will pay the policy's face amount.[18]

Whole life policies are distinguished from term life policies by their savings component. Basically, a portion of the premium paid by the insured

9. *Id.* at 36–37.
10. Black & Skipper, *supra* note 6, at 82.
11. Jerry, *supra* note 8, at 37.
12. Black & Skipper, *supra* note 6, at 78.
13. *Id.*
14. *See id.* at 77 (explaining that term policies are "structurally simpler" than cash value policies, and that because term policies have no cash values, they can be compared on the basis of premiums).
15. Jerry, *supra* note 8, at 37.
16. Steve Kurylo, *Choosing the Most Appropriate Insurance Policy and Company*, 23 Estate Planning 366, 367 (1996).
17. Black & Skipper, *supra* note 6, at 90.
18. *Id.* at 91.

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goes to cover the policy's mortality expense and the insurer's other costs and charges associated with the policy, referred to as "loads," and the remainder goes into the savings component of the product. As with other types of cash value life insurance, the policy's mortality expense and loads combined are referred to as the "cost of insurance," or "COI." The extent to which the value of the policy's savings component exceeds the COI is the policy's "cash value."[19] Although cash values in whole life policies are low in early years because of high front-end sales loads, they increase with time.[20] A policy's cash value typically reaches its face amount at age 100. When the insured dies, the insurer pays the policy's face amount, not the face amount plus the cash value.

The cash value of a whole life policy grows tax deferred.[21] This growth is not just a function of premium dollars exceeding the policy's COI; if the policy is "nonparticipating," the insurer also credits the insured with interest at some contractually agreed rate. If the policy is "participating," as most are, the insurer credits the policyholder with dividends at some minimum guaranteed rate.[22] Dividend amounts are a function of the performance of the company's investment portfolio and the mortality and administrative expenses that the company incurs.[23] Whole life dividends may best be explained as follows:

> Thus, if an insurer had calculated its premiums and reserves using an assumed interest rate of 3 percent and it actually earned 7 percent on its investments backing policy reserves, the insurer could pay some or all of the 4 percent additional investment return to policy-owners through dividends.[24]

In other words, the insured is guaranteed some minimum rate of return, usually between three and four percent, but may earn slightly more if the company does well on its investments and otherwise operates profitably.

An insured may use dividends to purchase fully paid-up additional insurance, so that he can at some point stop paying premiums out of pocket.[25] The insurer also pays dividends on the paid-up additions and these paid-up additions increase the policy's cash value.

A policyholder does not have to wait until age 100 to benefit from the cash value of a whole life policy. For example, a policyholder can surrender (cancel) her policy at any time and receive the cash value, perhaps less some surrender charge. A policyholder can borrow against her whole life policy

19. Fischel & Stillman, *supra* note 2, at 4.
20. *Id.*
21. Kurylo, *supra* note 16, at 366.
22. *See* Roger C. Henderson & Robert H. Jerry, II, Insurance Law: Cases and Materials App. G, at APP-94 (3d ed. 2001) (providing sample whole life policy).
23. *See* Vos v. Farm Bureau Life Ins. Co., 667 N.W.2d 36, 43 (Iowa 2003).
24. Black & Skipper, *supra* note 6, at 39–40.
25. *See* Henderson & Jerry, *supra* note 22, at APP-94 (providing sample policy).

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up to some high percentage of the cash value. The insurer charges interest on this loan and the loan is deducted from the cash value if the insured surrenders the policy, or is deducted from the death benefit if the insured dies before the loan is repaid. Policy loans may, but need not, be repaid.[26]

Whole life policies began falling out of favor with consumers in the late 1970s and early 1980s when interest rates soared.[27] Because insurers' investment portfolios typically were conservative, consisting of fixed-rate securities such as bonds and real estate mortgages, the dividends paid on the savings component of whole life policies were seen by consumers as unattractive in light of market alternatives offering higher returns.[28] Thus, new life insurance customers tended to purchase term policies rather than whole life, and existing whole life customers converted to term coverage, in either event directing money that otherwise would have gone to pay whole life premiums into more rewarding alternative investments.[29] Of course, insureds who converted to term life from whole life surrendered their whole life policies, meaning that insurers were also paying out policies' cash values, in addition to seeing their premium income decline.[30] Moreover, the high interest rates also gave whole life policyholders incentive to borrow against the cash value in their policies because most of these policies provided the insured with the option of borrowing at below-market rates.[31] Insurers responded to these competitive pressures by marketing "universal life" insurance.

Universal life insurance is like whole life in that it provides a death benefit and accumulates cash value on a tax-deferred basis, and the insured may borrow against the cash value. With universal life, however, the insurer pays interest at a rate competitive with other investments, such as Treasury bills. There are actually two kinds of universal life policies. One option provides a level death benefit, while the second provides for an increasing death benefit linked to increases in the policy's cash value.[32] The second option is more expensive because the insurer's own obligation, i.e., the pure insurance component of the policy, does not diminish as the policy's cash value increases.[33]

Unlike whole life, with universal life the policyholder may vary the death benefit, may vary the premium and the timing of premium payments, and may make partial withdrawals from the cash value. This flexibility can be important to policyholders with fluctuating or irregular incomes.[34]

26. Black & Skipper, *supra* note 6, at 91.
27. Fischel & Stillman, *supra* note 2, at 5.
28. *Id.* at 4–5.
29. *Id.* at 5.
30. Black & Skipper, *supra* note 6, at 111.
31. Fischel & Stillman, *supra* note 2, at 5.
32. Black & Skipper, *supra* note 6, at 117.
33. *Id.* at 118.
34. Kurylo, *supra* note 16, at 367.

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After universal life came "variable life" and "variable universal life" insurance. Again, these policies accumulate cash value on a tax-deferred basis that the insured can borrow against. The insured is able to invest the premiums, less the COI, in investment accounts offered by the insurer.[35] These investment accounts operate like mutual funds. They have different investment characteristics, just like any family of mutual funds, allowing the insured to increase the level of investment risk and thus the amount of the return. The downside for insureds is that they also risk poor performance of the funds that they select. Because a variable life insurer does not guarantee the insured's account value or a minimum rate of return on the insured's investments, stock market plunges can temporarily rob these policies of investment value—just as insureds can experience other investment losses and declines in the value of retirement plans in a bear market.[36] The basic assumption on which variable life policies are premised, of course, is that in the long run the stock market will consistently outperform alternative investments.[37]

The death benefit afforded by a variable life policy consists of two parts. The first is a minimum guaranteed death benefit that is unaffected by the performance of the individual investment accounts. No matter how badly the policyholder's selected investments perform, the minimum death benefit is guaranteed.[38] The second part of the death benefit is variable and is linked to the performance of the insured's investment accounts.[39]

As the name suggests, a "variable universal life" or a "VUL policy" combines the features of universal life and variable life insurance. VUL policies thus offer flexible premiums, adjustable death benefits, investment choices, and the ability to borrow against the account value. The insurer does not guarantee either a minimum rate of return or the principal in the investment accounts, unless the insured selects a guaranteed account.[40] Like variable life, variable universal life also carries with it investment risk. If an insured's investment accounts perform poorly, the policy's account value can be reduced substantially. Unlike variable life policies, many VUL policies do not guarantee a minimum death benefit,[41] although insurers now offer VUL policies with minimum guaranteed death benefits at additional cost to the insured.

35. *Id.* at 368.
36. Many insurers offer policyholders as an option an investment account that pays a guaranteed rate of return. Of course, the guaranteed rate of return is lower than the returns potentially offered by alternative accounts carrying a higher level of investment risk.
37. JERRY, *supra* note 8, at 40.
38. BLACK & SKIPPER, *supra* note 6, at 102.
39. *Id.*
40. *See supra* note 36.
41. BLACK & SKIPPER, *supra* note 6, at 128.

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Variable life and VUL policies typically appeal to insureds with a high tolerance for investment risk. Both variable life and VUL policies are securities, and are therefore sold by prospectus.[42] Insurers selling these policies are subject to federal securities regulation in addition to state insurance regulation. Insurance agents and brokers selling these policies must hold both insurance and securities licenses.

A few final points about universal life, variable life, and VUL policies deserve mention. First, these policies are sold with illustrations showing hypothetical cash values, premiums, dividends, interest rates, death benefits, etc., over time. In the case of variable life and VUL policies, illustrations show hypothetical alternative interest rates for the separate investment accounts, so that a customer can see illustrated benefits at, say, zero, four, six, and eight percent rates of return. In any event, illustrations are neither guarantees nor projections of policy performance; they are exactly what they purport to be—illustrations.[43] They show how policy values could develop if certain assumptions bear out. Indeed, it is almost certain that actual policy values will differ from illustrated values for policies with nonguaranteed components, and that while financial markets have historically favored investors, no one really knows whether those differences will benefit policyholders.[44] Actual cash values and death benefits can be less than those illustrated at the time a policy is purchased.[45]

Second, where with term life the premium amount is a valid means of comparing policies, the same is not true for cash value policies. One cash value policy may have higher premiums than another, yet be actually less expensive because of other characteristics.[46] Other aspects of product design may make a cash value policy sold at a higher premium a better value than a policy for which a competing insurer charges less.

Third, and in a similar vein, insureds often sue the intermediaries who sell variable life and VUL policies and the insurers who issue them, asserting that policies were not "suitable" given the insured's financial objectives. "Suitability" is a securities law concept that may be broadly defined as imposing a duty on an intermediary to recommend to a customer only securities that are suitable to that individual's investment objectives and peculiar needs.[47] One allegation in this regard is that a policy's COI is unreasonably high as compared to a policy offered by a competing insurer,

42. *See* Herndon v. Equitable Variable Life Ins. Co., 325 F.3d 1252, 1253–54 (11th Cir. 2003) (holding that a variable life policy is a security within the meaning of the Securities Litigation Uniform Standards Act and mentioning policy prospectus).

43. Kurylo, *supra* note 16, at 371.

44. Black & Skipper, *supra* note 6, at 279.

45. Kurylo, *supra* note 16, at 372.

46. Black & Skipper, *supra* note 6, at 93.

47. Lewis D. Lowenfels & Alan R. Bromberg, *Suitability in Securities Transactions*, 54 Bus. Law. 1557, 1557 (1999).

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thus lessening the subject policy's investment value. Although these claims may often be baseless, they highlight the need to explain COI in this context.

When universal life, variable life, and VUL policies were developed, insurers intended them to be transparent, in the sense that the insured could see all of the costs within the policy.[48] Unlike whole life policies, in which key pricing elements are lumped together, in universal life, variable life, and VUL policies these components are separately identified for policyholders. When competitive pressure forced insurers to massage policy pricing, these components became a means of influencing values to suit customers' desires. For example, a VUL policy sold with the intention of maximizing retirement benefits may be designed to have a high initial COI and a much lower COI in the retirement years. In short, a policy's COI must be evaluated over the length of the contract, and in light of the policy objectives and characteristics. A simplistic snapshot of a particular period and the associated COI is no basis to allege that a variable life or VUL policy is unsuitable.

Because of problems posed by simplistic cash value policy comparisons such as those focused on COI, or speculative comparisons based on illustrations alone, some commentators urge that "the focus of comparison shopping should shift more to the performance characteristics of the insurers themselves."[49] For example, consumers might consider competing companies' treatment of existing policyholders, historical performances, and experience in the marketplace.[50] In fact, cash value policies are not easily compared; whether one policy is more desirable than another may turn on any number of factors, including the insured's objectives, the objectives that the policy was designed to meet, and the characteristics of the competing insurers. Merely because a policy's performance does not ultimately meet the insured's expectations does not mean that the insured was misled or that the policy was unsuitable. Consumers, lawyers, and courts must remember that cash value life insurance policies are life insurance policies, not investment vehicles. Just because cash value policies include investment features that make them valuable beyond their death benefit does not change their dominant purpose: to financially support the insured's beneficiaries upon the insured's death.[51]

II. LIFE INSURANCE INTERMEDIARIES AND AGENCY LAW

Individuals purchasing life insurance of any kind typically deal with intermediaries.[52] Insurance intermediaries fall into two broad categories: agents

48. *See* Kurylo, *supra* note 16, at 367–68 (describing this as one advantage of universal life insurance policies).

49. Black & Skipper, *supra* note 6, at 126–27 (discussing universal life illustrations).

50. Kurylo, *supra* note 16, at 372–73.

51. *See* Vos v. Farm Bureau Life Ins. Co., 667 N.W.2d 36, 50 (Iowa 2003) (discussing cash value life insurance and the reasonable expectations doctrine).

52. Eglin & Gilbride, *supra* note 1, at 479.

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and brokers. It is important to understand, however, that an intermediary is always an agent for *some* party to the insurance purchase. Whether an intermediary is an agent for the insurer or for the insured depends on the facts of the case.[53] Classifying an intermediary as an agent for the insurer or the insured determines to whom the intermediary may owe duties.[54] This inquiry also is important when evaluating insurers' potential liability in disputes stemming from intermediaries' conduct, because insurers are vicariously liable only for the tortious acts of their agents acting within the course and scope of their agency.[55] Similarly, an insurer is charged with its agent's knowledge even when the agent does not share her knowledge with it.[56] If an intermediary is functioning as the insured's agent, on the other hand, his actions cannot be imputed to the insurance company.[57] An insurer is not charged with the knowledge held by an agent for the insured.[58]

A. *Life Insurance Agents and Agency*

An insurance agent, as that term is commonly understood, refers either to an insurance company employee[59] or to a person who sells exclusively one insurance company's products and who, although an independent contractor compensated through commissions paid by the insurer, is identified and treated as an agent of the insurer he represents.[60] Agents of this latter kind are identified as "captive agents" or "exclusive agents." The relationship between insurers and their agents is controlled by agency law principles.[61]

53. Foisy v. Royal Maccabees Life Ins. Co., 356 F.3d 141, 150 (1st Cir. 2004) (applying Massachusetts law); Bird v. Metro. Life Ins. Co., 705 So. 2d 363, 368 (Ala. 1997); State Sec. Ins. Co. v. Frank B. Hall & Co., 630 N.E.2d 940, 946 (Ill. App. Ct. 1994); Bichelmeyer Meats v. Atl. Ins. Co., 42 P.3d 1191, 1195 (Kan. Ct. App. 2001); Legros v. Great Am. Ins. Co., 865 So. 2d 786, 790 (La. Ct. App. 2003); County Forest Prods., Inc. v. Green Mountain Agency, Inc., 758 A.2d 59, 65 (Me. 2000); Frank v. Winter, 528 N.W.2d 910, 914 (Minn. Ct. App. 1995) (quoting Eddy v. Republic Nat'l Life Ins., 290 N.W.2d 174, 176 (Minn. 1980)); Graue v. Mo. Prop. Ins. Placement Facility, 847 S.W.2d 779, 783 (Mo. 1993); Moore v. Hartford Fire Ins. Co., 481 N.W.2d 196, 198 (Neb. 1992); van der Heyde v. First Colony Life Ins. Co., 845 P.2d 275, 280 n.8 (Utah Ct. App. 1993).

54. Young v. Allstate Ins. Co., 812 N.E.2d 741, 752 (Ill. App. Ct. 2004).

55. Employers Mut. Cas. Co. v. Wendland & Utz, Ltd., 351 F.3d 890, 896 (8th Cir. 2003) (applying Minnesota law); Simmons v. Ins. Co. of N. Am., 17 P.3d 56, 64 (Alaska 2001).

56. Duong v. Salas, 877 So. 2d 269, 272–73 (La. Ct. App. 2004); Blanchet v. Assurance Co. of Am., 766 A.2d 71, 74 (Me. 2001); Cordero Mining Co. v. U.S. Fid. & Guar. Co., 67 P.3d 616, 625 (Wyo. 2003).

57. *See, e.g.*, Carolina Cas. Ins. Co. v. Miss Deanna's Child Care-Med Net, L.L.C., 869 So. 2d 1169, 1175 (Ala. Civ. App. 2003); Rios v. Scottsdale Ins. Co., 15 Cal. Rptr. 3d 18, 22–24 (Cal. Ct. App. 2004); Struve Enters., Inc. v. Travelers Ins. Co., 500 N.W.2d 580, 584 (Neb. 1993); Peerless Ins. Co. v. Young, 749 N.Y.S.2d 29, 30 (App. Div. 2002).

58. Frank X. Neuner & Robert E. Torian, *Basics of Insurance Agents' and Brokers' Liability*, *in* INSURANCE AGENT AND BROKER LIABILITY 7, 15 (Am. Bar Ass'n 1990).

59. *See, e.g.*, Miller v. Mill Creek Homes, Inc., 97 P.3d 687, 689 (Or. Ct. App. 2004).

60. *See* Hope G. Nightingale, *Liability of Agents and Brokers—The Principal Issues*, COVERAGE (Sept./Oct. 1997), at 1, 11.

61. Harts v. Farmers Ins. Exch., 597 N.W.2d 47, 50 (Mich. 1999); Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co., 150 S.W.3d 718, 730 (Tex. App. 2004).

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An insurance company is bound by the acts of its agent when the agent is acting pursuant to the company's grant of "actual" authority, regardless of whether the company knows of the agent's actions.[62] Actual authority depends on the principal's consenting to the agent acting on its behalf. In basing a principal's liability on an agent's actual authority, it is not necessary for the plaintiff to prove that he knew of the agent's authority.[63]

Actual authority may be either express or implied. "Express authority" is that authority explicitly granted by a principal to an agent.[64] In the insurance context, this form of actual authority typically is established through the insurance company's contract with the agent whose actions are at issue. Courts tend to broadly construe contracts establishing agents' actual authority unless the language employed clearly indicates a contrary intention.[65]

"Implied authority" is actual authority based on the premise that whenever certain business is entrusted to an agent, such authority further implies authority to do collateral acts that are the "'natural and ordinary incidents of the main act or business authorized.'"[66] Implied authority is sometimes described as "incidental authority," because it refers to the agent's authority to do those things incidental to his express authority. Insurers impliedly authorize agents to do what is usual, proper, and necessary in the transaction of their business.[67]

An insurer also is liable for the actions of its agent taken with the insurer's "apparent authority."[68] As with actual authority, the insurer need not know of the agent's acts to be bound by them if they fall within the agent's apparent authority.[69] An agent's apparent authority is determined by the insurer's acts or conduct.[70] "Apparent authority exists when an insurer affirmatively holds an agent out as possessing the authority, or the insurer knowingly and voluntarily permits the agent to act in an unauthorized manner."[71] The key to apparent authority is action by the insurer; an agent's actions or representations to a third party cannot be the basis for apparent authority.[72] For an insurer to be liable on an apparent authority

62. Branscum v. Am. Cmty. Mut. Ins. Co., 984 P.2d 675, 680 (Colo. Ct. App. 1999).
63. William A. Gregory, The Law of Agency and Partnership 37 (3d ed. 2001).
64. Nelson v. Anderson Lumber Co., 99 P.3d 1092, 1098 (Idaho Ct. App. 2004).
65. Cordero Mining Co. v. U.S. Fid. & Guar. Co., 67 P.3d 616, 625 (Wyo. 2003).
66. Bodell Constr. Co. v. Stewart Title Guar. Corp., 945 P.2d 119, 124 (Utah Ct. App. 1997) (quoting Zions First Nat'l Bank v. Clark Clinic Corp., 762 P.2d 1090 (Utah 1988)); *see also Nelson*, 99 P.3d at 1098 (quoting Bailey v. Ness, 708 P.2d 900 (Idaho 1985)).
67. Neuner & Torian, *supra* note 58, at 16.
68. Ellingwood v. N.N. Inv. Life Ins. Co., 805 P.2d 70, 75 (N.M. 1991); Wynn v. Avemco Ins. Co., 963 P.2d 572, 574 (Okla. 1998).
69. Branscum v. Am. Cmty. Mut. Ins. Co., 984 P.2d 675, 680 (Colo. Ct. App. 1999).
70. Premium Cigars Int'l, Ltd. v. Farmer-Butler-Leavitt Ins. Agency, 96 P.3d 555, 565 (Ariz. Ct. App. 2004) (quoting Curran v. Indus. Comm'n, 752 P.2d 523 (Ariz. Ct. App. 1988)); Wayne Duddlesten, Inc. v. Highland Ins. Co., 110 S.W.3d 85, 92 (Tex. App. 2003).
71. *Wayne Duddlesten, Inc.*, 110 S.W.3d at 92.
72. *See, e.g.*, Bodell Constr. Co. v. Stewart Title Guar. Corp., 945 P.2d 119, 124 (Utah Ct. App. 1997).

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theory, the plaintiff must prove that it detrimentally relied on the agent's apparent authority.[73] The plaintiff must also prove that its reliance was justifiable or reasonable.[74]

Actual and apparent authority may overlap.[75] Again, actual authority exists where the principal manifests its consent to the agency relationship to the agent, while apparent authority depends on the principal manifesting assent to a third party. An agent generally has both actual and apparent authority because the principal has manifested its assent to the agent and to third parties. For example, an insurance company may have a contract with an agent conferring actual authority, while also allowing the agent to use preprinted application forms bearing the company's name or allowing the agent to advertise his affiliation with it, thus creating apparent authority.[76] Actual and apparent authority are equally effective in binding a principal.[77]

Finally, an insurance company may be bound by an agent's unauthorized acts if it ratifies them. "Ratification" occurs where an insurance company knows of an agent's unauthorized actions but fails to repudiate them.[78] In other words, once an insurer learns of its agent's unauthorized acts, it cannot sit back and enjoy resulting benefits without accepting associated liability. An insurer must, however, know all of the material facts surrounding an agent's unauthorized acts, and have the opportunity to either accept or reject the benefits of the transaction, before it can be deemed to have ratified the agent's actions.[79]

Insurers often attempt to limit their agents' authority, as is their right.[80] For any limitation on an agent's authority to be effective, however, it must be communicated to those with whom the agent deals.[81] Thus, many insurers seek to limit their agents' authority by including limiting language in their applications for insurance.[82] Life insurers routinely state in their policies that agents are not authorized to modify policy terms.[83] For example:

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73. Amstar Ins. Co. v. Cadet, 862 So. 2d 736 (Fla. Dist. Ct. App. 2003).

74. D.S.A. Fin. Corp. v. County of Cook, 801 N.E.2d 1075, 1081–83 (Ill. App. Ct. 2003) (referring to "justifiable" reliance); Am. Income Life Ins. Co. v. Hollins, 830 So. 2d 1230, 1237 (Miss. 2002) (referring to "reasonable" reliance).

75. Gregory, *supra* note 63, at 36.

76. *See, e.g.*, Nat'l Indem. Co. of the S. v. Consol. Ins. Servs., 778 So. 2d 404, 407 (Fla. Dist. Ct. App. 2001) (recognizing apparent authority where insurer provides intermediary with "blank forms, blank applications, promotional materials, or other supplies used to solicit, negotiate, and effectuate contracts of insurance"); Jefferson Pilot Fin. Ins. Co. v. Marsh USA Inc., 582 S.E.2d 701, 706 (N.C. Ct. App. 2003) (finding apparent authority where, among other things, intermediary issued binders and other documents on insurer's behalf).

77. Gregory, *supra* note 63, at 36.

78. *See, e.g.*, Nat'l Inspection & Repair, Inc. v. Valley Forge Life Ins. Co., 56 P.3d 807, 822–23 (Kan. 2002).

79. Sphere Drake Ins. Ltd. v. Am. Gen. Life Ins. Co., 376 F.3d 664, 677 (7th Cir. 2004) (quoting Amcore Bank, N.A. v. Hahanaman-Albrecht, Inc., 759 N.E.2d 174 (Ill. App. Ct. 2001)).

80. *See* Maville v. Peerless Ins. Co., 686 A.2d 1165, 1167 (N.H. 1996).

81. *Id.*

82. *See, e.g.*, Kuebler v. Equitable Life Assurance Soc'y of the U.S., 555 N.W.2d 496, 499

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> No one can change any part of this policy except the owner and one of our officers. Both must agree to a change, and it must be in writing. No agent may change this policy or waive any of its provisions.[84]

Alternatively, a policy might simply provide: "Only an officer of the company is authorized to alter this policy or to waive any of the company's rights or requirements."[85]

Courts occasionally disregard policy language limiting agents' apparent authority.[86] These cases depend, however, on the agent's misrepresentations occurring before the insured receives the policy, or before the insured receives other documents notifying her of limits on the agent's authority or of policy terms contrary to those misrepresented by the agent.[87]

B. *The Agent's Liability*

An insured that sues an insurer based on its agent's alleged misconduct usually sues the agent as well. "An insurance agent who acts in an authorized, nontortious manner is not personally liable to the insured for his or her acts or for any contracts which he or she makes on behalf of the disclosed principal."[88] But what of the situation where the agent is found to have committed a tort? In that case, the insurer and the agent may be jointly and severally liable.[89] An insurer's vicarious liability attributable to its agent's tortious conduct does not insulate the agent from liability. As a Wisconsin court explained:

> Agency law ... does not insulate an agent from liability for the agent's torts .... It has long been the rule that an insured whose insurer denies him benefits that he has requested his agent to secure may bring a tort action against his insurance agent for failing to procure the requested coverage .... Therefore, even when an insured has settled with and released the insurer for payment of less than would have resulted if the sought-after insurance had been provided, the agent may remain personally liable in tort to the insured for failing to procure the insurance that was requested, as the agent's liability is not depen-

(Mich. Ct. App. 1996) (quoting application providing that "[n]o agent ... has authority to modify this Agreement or the Temporary Insurance Agreement, nor to waive any of The Equitable's rights or requirements").

83. *See, e.g.*, Vos v. Farm Bureau Life Ins. Co., 667 N.W.2d 36, 42 (Iowa 2003).

84. *Id.* (quoting Farm Bureau policy); *see also* Bergeron v. Pan Am. Assurance Co., 731 So. 2d 1037, 1044 (La. Ct. App. 1999) (quoting similar policy language).

85. Henderson & Jerry, *supra* note 22, App. G, at APP-92 (quoting specimen policy).

86. *See, e.g.*, Am. Income Life Ins. Co. v. Hollis, 830 So. 2d 1230, 1237 (Miss. 2002).

87. *See id.* at 1237–38.

88. New West Fed. Sav. & Loan Ass'n v. Guardian Title Co. of Utah, 818 P.2d 585, 588 (Utah Ct. App. 1991).

89. *See, e.g.*, Pressley v. Travelers Prop. & Cas. Corp., 817 A.2d 1131, 1138–39 (Pa. Super. Ct. 2003).

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dent on his relationship to the principal but is attributable to the agent's own misconduct.[90]

That an agent is acting within the course and scope of his employment is no defense unless he is acting to protect the insurer's interests.[91] Merely because an agent is acting for an insurer does not absolve the agent of liability for misrepresentations to third parties.[92] In most jurisdictions, agency status is a defense to misrepresentation only where the agent joins in a transaction characterized by a misrepresentation by the principal and the agent has no reason to know of the misrepresentation. In that case, the agent escapes liability because the principal's misrepresentation cannot be imputed to the agent.

C. *Agents Versus Brokers*

Unlike an insurance agent, an insurance broker is not employed by or contractually bound to work for any particular insurance company. Brokers have relationships with several insurers and are compensated through commissions or fees paid by the insurers whose policies they sell. Brokers are generally seen as the insured's agent.[93] If a broker is functioning as the insured's agent, his acts and knowledge cannot be imputed to the insurer.[94]

Courts sometimes conflate agents' and brokers' roles, reasoning that agents and brokers owe the same duties to insureds.[95] Although it is true that agents and brokers alike owe insureds a duty of honesty and a duty to procure the coverage they are clearly instructed to procure if possible, it is wrong to say that their duties generally match.[96] For example, an insurance agent's duty is to sell the products offered by the company for which he works.[97] A broker, on the other hand, is obliged to shop the market on the insured's behalf to obtain the coverage requested. While brokers may share a fiduciary relationship with insureds by virtue of the broker's agency,[98]

90. Schurmann v. Neau, 624 N.W.2d 157, 161 (Wis. Ct. App. 2000).

91. Gregory, *supra* note 63, at 214–15.

92. *See, e.g.*, McNeill v. State Farm Life Ins. Co., 10 Cal. Rptr. 3d 675, 679 (Ct. App. 2004) (stating that insurance agent could be personally liable for fraud).

93. Douglas R. Richmond, *Insurance Agent and Broker Liability*, 40 Tort Trial & Ins. Prac. L.J. 1, 5 & n.29 (2004) (collecting cases).

94. *See, e.g.*, *In re* Jackson Nat'l Life Ins. Co. Premium Litig., 107 F. Supp. 2d 841, 863 (W.D. Mich. 2000) (refusing to impute broker's conduct in vanishing premium case to insurer and stating that if broker breached duty to insured, then broker, not insurer, was liable).

95. *See, e.g.*, President v. Jenkins, 853 A.2d 247, 257 (N.J. 2004) ("Brokers and agents generally owe the same duties to an insured.").

96. It is correct to say, however, that the duties agents and brokers *do not* owe insureds are generally the same. For example, neither agents nor brokers have a duty to advise insureds about the adequacy of coverage they purchase, about optional coverage that might be available, or about the terms of other policies they hold. Richmond, *supra* note 93, at 24–25.

97. Weisblatt v. Minn. Mut. Life Ins. Co., 4 F. Supp. 2d 371, 382 (E.D. Pa. 1998).

98. Perelman v. Fisher, 700 N.E.2d 189, 192 (Ill. App. Ct. 1998); A.G. Edwards & Sons, Inc. v. Drew, 978 S.W.2d 386, 395 (Mo. Ct. App. 1998).

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that is not the case with insurance agents.[99] Absent exceptional circumstances, there is no fiduciary relationship between an insurer or its agents and an insured.[100]

III. CASES AND CONTROVERSIES

Life insurance provides ample litigation opportunities, but the real action arises out of alleged dishonesty in the sale of cash value policies. This section examines prevalent controversies, claims, and theories.

A. *Churning*

"Churning" is a common claim against life insurance agents and brokers. Plaintiffs also allege that insurance companies orchestrate churning schemes.[101] In the life insurance context, "churning" refers to the process of persuading an insured to replace an existing policy with a new one, thus generating new or increased commissions for the agent or broker, without informing the insured that the transaction is or is likely to be financially detrimental to the insured.[102] Churning is also referred to as "twisting" or "piggybacking."[103]

Any number of schemes may qualify as churning. For example, an agent might persuade an insured holding a cash value policy to purchase another cash value policy from the same company.[104] In *Rose v. MONY Life Insurance Co.*,[105] the agent persuaded the plaintiffs to purchase twenty-three life insurance policies and annuities from the same insurer over a twenty-year period.[106] Alternatively, an agent might persuade an insured to replace a cash value policy issued by one company with a cash value policy from another company.[107] In yet another variation, an agent might persuade a policyholder to surrender a cash value policy and replace it with term in-

99. Seckinger-Lee Co. v. Allstate Ins. Co., 32 F. Supp. 2d 1348, 1354 (N.D. Ga. 1998) (discussing Georgia law); Moore v. Johnson County Farm Bureau, 798 N.E.2d 790, 793 (Ill. App. Ct. 2003); Farmers Ins. Co. v. McCarthy, 871 S.W.2d 82, 86–87 (Mo. Ct. App. 1994); Pitts v. Jackson Nat'l Life Ins. Co., 574 S.E.2d 502, 508 (S.C. Ct. App. 2002); E.R. Dupuis Concrete Co. v. Penn Mut. Life Ins. Co., 137 S.W.3d 311, 318 (Tex. App. 2004).

100. Nash v. Ohio Nat'l Life Ins. Co., 597 S.E.2d 512, 518 (Ga. Ct. App. 2004) (quoting Fowler v. Prudential Prop. & Cas. Ins. Co., 449 S.E.2d 157 (Ga. Ct. App. 1994)).

101. *See, e.g.*, Rothwell v. Chubb Life Ins. Co. of Am., 191 F.R.D. 25, 28 (D.N.H. 1998).

102. *See* Sherman v. Kaiser, 664 A.2d 221, 223 (Pa. Commw. Ct. 1995).

103. *See, e.g.*, Patterman v. Travelers, 510 S.E.2d 307, 308 (Ga. Ct. App. 1998), *aff'd*, 527 S.E.2d 187 (Ga. 2000) (giving "twisting" as a synonym for "churning"); State *ex rel.* Metro. Life Ins. Co. v. Starcher, 474 S.E.2d 186, 188 n.1 (W. Va. 1996) (referring to "piggybacking").

104. *See* Wilner v. Sunset Life Ins. Co., 93 Cal. Rptr. 2d 413, 418–19 (Ct. App. 2000) (quoting plaintiffs' allegations).

105. No. 99 C 4279, 2000 WL 1898474 (N.D. Ill. Dec. 21, 2000).

106. *Id.* at *1.

107. *See Wilner*, 93 Cal. Rptr. 2d at 418 (quoting plaintiffs' allegations).

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surance and mutual funds offered by other companies.[108] Although churning claims typically involve multiple transactions, they may be based on a single transaction.[109]

The potential harms to insureds from churning are many. In a common churning scheme, an agent or broker persuades a policyholder to remove the cash value from an existing policy, either by loan or surrender, and to use those monies to purchase a new cash value policy, either from the same company or from another company. The reasons offered to the policyholder vary, but typically include representations that the new policy affords a better death benefit or that it contains a better investment component because of higher interest rates, more attractive individual investment accounts, and so on.[110] Alternatively, the agent or broker may identify a policyholder who has accumulated significant cash value in her policy, offer to conduct a "policy review," and thereafter represent that the policyholder can obtain additional coverage at no additional expense.[111] The intermediary fails to mention, however, that the new policy will be financed by a loan against the cash value of the existing policy, and likewise omits mention of other policy considerations or the commissions that he stands to earn.[112]

Regardless, the new policy seldom benefits the insured. With a new policy the insured again incurs front-end loads, the premiums for the new policy are often higher than those charged for the first policy because the insured is in a less favorable underwriting class, and the insured risks the incorporation of incontestability or suicide clauses in the new policy.[113] The insured also may incur surrender charges against the original policy.[114] If the purchase of the new policy is funded with a loan against the cash value of the original policy and the insured wants to maintain both policies, probably because she was led to believe that the second policy provided additional coverage at no additional cost, she will at some point be forced to start making premium payments on the first policy or risk its lapse. Or, if the original policy's cash value is insufficient to cover the premiums charged for the second policy, the insured will eventually be forced to start making premium payments on the new policy or risk its lapse.[115]

108. *See, e.g.*, *Patterman*, 510 S.E.2d at 308 (reciting plaintiffs' allegations).

109. Stephenson v. Hartford Life & Annuity Ins. Co., No. 02 C 3917, 2004 WL 2260616, at *10 (N.D. Ill. Oct. 1, 2004).

110. *See Wilner*, 93 Cal. Rptr. 2d at 419 (representing "significantly higher death benefits"); Eglin & Gilbride, *supra* note 1, at 515 (discussing interest claims).

111. *See, e.g.*, Force v. ITT Hartford Life & Annuity Ins. Co., 4 F. Supp. 2d 843, 847 (D. Minn. 1998) (alleging this scheme).

112. *Id.* (reciting allegations in plaintiffs' complaint).

113. *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 261 F.3d 355, 358 n.2 (3d Cir. 2001) (quoting *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 474–75 & nn. 11 & 12 (E.D. Pa. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998).

114. *See* Rothwell v. Chubb Life Ins. Co. of Am., 191 F.R.D. 25, 32 (D.N.H. 1998).

115. *See id.* at 28; *Wilner*, 93 Cal. Rptr. 2d at 419.

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An insured also may suffer if she surrenders or borrows against a cash value policy to purchase a term life insurance policy and invest in mutual funds. Again, the insured may become subject to the term policy's incontestability and suicide clauses, and she may be charged high premiums because of her age or underwriting classification. As for the mutual funds, although they are like the individual investment accounts she may have had in her variable life or VUL policy, for example, the income that the mutual funds produce is not tax deferred, while the cash value buildup in her variable life or VUL policy was.

The insurance industry has paid dearly for churning. Churning and other deceptive sales practices allegations reportedly cost Prudential Insurance over $35 million in fines and roughly a billion in settlements.[116] Other insurance companies have also paid large settlements, and churning allegations have exposed agents and brokers to personal liability.[117]

B. *Vanishing Premium Litigation*

When universal life and new forms of whole life policies came on the market, insurers offered them with a variety of premium payment plans. Among these was a "vanishing premium plan," in which the insured paid high premiums for several years with the expectation that after some period the policy's cash value would accumulate to the point that all future premiums could be paid out of that accumulation. In other words, the insured would no longer have to pay premiums out of pocket; the premiums would "vanish." Insureds were shown illustrations indicating that their premiums would vanish in as few as five to ten years.[118]

Unfortunately, vanishing premium policies have not worked as they were intended. Many policies were sold when interest rates were quite high. When interest rates dropped, insurers' dividends and interest credits paid to policyholders also dropped, and policies' cash values did not accumulate as illustrated.[119] Insureds were thus forced to pay premiums beyond the time they expected them to vanish, or let their policies lapse or accept lower death benefits. This should have surprised no one, for vanishing premium plans depend on robust future interest rates, and the illustrations accompanying policies typically caution that future policy values are not guaranteed and can vary.[120] That customers who purchase vanishing premium policies do not expect to always pay premiums out of pocket does not mean

116. Fastenberg v. Prudential Ins. Co. of Am., 707 A.2d 209, 210–11 (N.J. Super. Ct. App. Div. 1998).

117. Eglin & Gilbride, *supra* note 1, at 516.

118. Jerry, *supra* note 8, at 274.

119. Fischel & Stillman, *supra* note 2, at 7.

120. *See* Cooper v. Berkshire Life Ins. Co., 810 A.2d 1045, 1057 (Md. Ct. Spec. App. 2002) (quoting cautionary language on policy illustration).

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that their premium payments stop. Nonetheless, insurers were soon inundated with complaints from policyholders that they were misled. Then came litigation—first, individual suits and, soon thereafter, class actions.

Vanishing premium suits have met with mixed success.[121] Many class actions fail at the class certification stage because the claims alleged turn on individual plaintiffs' reliance on statements made by intermediaries or in insurers' marketing materials, such that the named plaintiffs cannot satisfy the class certification requirement that common questions of law or fact predominate over any questions affecting only individual class members.[122] Plaintiffs often see their claims barred by statutes of limitation.[123]

Issues commonly seen in vanishing premium cases are likely to arise in cases in which plaintiffs allege that variable life or VUL policies are unsuitable. In *Cooper v. Berkshire Life Insurance Co.*,[124] for example, the court held that the insured's reliance on the agents' alleged representations that his premiums were guaranteed to vanish after ten years was not reasonable in light of information in his policy illustration.[125] This principle applies to other misrepresentation claims or allegations of poor policy performance,[126] such as where an insured alleges that the individual investment accounts in his VUL did not perform as he anticipated and that the policy is therefore unsuitable, yet he was given illustrations showing varying rates of return and bearing disclaimers about future account values. In *Gaidon v. Guardian Life Insurance Co. of America*,[127] the court held that the defendant's disclaimers that the illustrated dividend and interest rates were not

121. Jerry, *supra* note 8, at 275.

122. *See, e.g.*, Adams v. Kan. City Life Ins. Co., 192 F.R.D. 274, 277–79 (W.D. Mo. 2000) (discussing problems associated with various causes of action); Keyes v. Guardian Life Ins. of Am., 194 F.R.D. 253, 257 (S.D. Miss. 2000) (denying class certification); Cohn v. Mass. Mut. Life Ins. Co., 189 F.R.D. 209, 212–18 (D. Conn. 1999) (noting further that plaintiffs could not meet the Fed. R. Civ. P. 23(b)(3) superiority requirement); Parkhill v. Minn. Mut. Life Ins. Co., 188 F.R.D. 332, 340–45 (D. Minn. 1999) (denying class certification), *aff'd*, 286 F.3d 1051 (8th Cir. 2002) (holding that plaintiff failed to preserve denial of class certification as an issue on appeal); *In re* Jackson Nat'l Life Ins. Co. Premium Litig., 183 F.R.D. 217, 220–23 (W.D. Mich. 1998) (denying class certification); Rothwell v. Chubb Life Ins. Co. of Am., 191 F.R.D. 25, 30–33 (D.N.H. 1998) (denying certification of churning and vanishing premium subclasses); Vos v. Farm Bureau Life Ins. Co., 667 N.W.2d 36, 48–55 (Iowa 2003) (affirming trial court's order denying class certification).

123. *See, e.g.*, Franze v. Equitable Assurance, 296 F.3d 1250, 1252–55 (11th Cir. 2002) (reversing class certification order where class representatives' claims were barred by statute of limitations); Stephens v. Equitable Life Assurance Soc'y of the U.S., 850 So. 2d 78, 82–85 (Miss. 2003) (rejecting plaintiffs' argument that fraudulent concealment tolled statute of limitations).

124. 810 A.2d 1045 (Md. Ct. Spec. App. 2002).

125. *Id.* at 1056–58.

126. *See, e.g.*, Berardino v. Ochlan, 770 N.Y.S.2d 75, 77 (App. Div. 2003) (rejecting fraud and negligent misrepresentation claims against agent where illustrations accompanying new policy showed that cash value would be less than old policy as a result of exchange).

127. 725 N.E.2d 598 (N.Y. 1999).

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guaranteed and that actual rates might be higher or lower than predicted were sufficient to defeat the plaintiffs' fraud claim.[128] Again, that holding should extend to all cash value policies sold with accurate illustrations.

In *Vos v. Farm Bureau Life Insurance Co.*,[129] the Iowa Supreme Court addressed a number of issues in a vanishing premium class action. Unfortunately for the plaintiffs, it resolved them all in the insurance company's favor. The *Vos* plaintiffs first alleged the Farm Bureau had breached its contracts with them. They predicated their claim not on the company's sales practices, on its agents' use of illustrations, or on the theory that those illustrations became part of their contract. Rather, their breach of contract claim was based:

> [S]olely on the issue of whether the defendants knowingly created the "reasonable expectation" in connection with the policies purchased by the plaintiffs and the class that premiums would "vanish" and/or the policy would be "fully paid up" and/or that no additional costs would be incurred in excess of the specified number or amount of payments or years.[130]

The court rejected this theory, noting that the reasonable expectations doctrine is narrowly applied, and is typically limited to cases in which the insurance coverage actually provided eviscerates terms to which the parties explicitly agreed, or is manifestly inconsistent with the purpose for which the policy was purchased.[131] The issue was not whether coverage existed under the plaintiffs' policies, but whether their premium and dividend provisions met their expectations. The court was unwilling to so expand the reasonable expectations doctrine.[132] Furthermore, there was no evidence that the plaintiffs' policies contained bizarre or oppressive language, that they eviscerated some agreed term, "or that the dominant purpose of the policies—to provide monetary relief to the beneficiary of the deceased insured—was somehow eliminated."[133]

The *Vos* court reached the correct result.[134] This was not a case in which an exclusion unfairly deprived the plaintiffs of coverage. The plaintiffs' policies were not ambiguous.[135] Had any of the plaintiffs died, Farm Bureau presumably would have paid their beneficiaries the death benefits that they

128. *Id.* at 607–08.

129. 667 N.W.2d 36 (Iowa 2003).

130. *Id.* at 49.

131. *Id.* at 50 (quoting Monroe County v. Int'l Ins. Co., 609 N.W.2d 522 (Iowa 2000)).

132. *Id.*

133. *Id.*

134. *See generally* Fischel & Stillman, *supra* note 2, at 12–13 (arguing against the application of the reasonable expectations doctrine in vanishing premium cases).

135. *See In re* Jackson Nat'l Life Ins. Co. Premium Litig., 107 F. Supp. 2d 841, 851 (W.D. Mich. 2000) (rejecting insured's reasonable expectations claim under California law because he did not identify an ambiguity in the express terms of his vanishing premium policy).

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were owed. It is not unconscionable to make insureds pay for coverage. Although the plaintiffs expected that their premiums would at some point be paid out of their policies' cash values rather than out of their pockets, they surely knew that premiums still had to be paid.

The plaintiffs next argued that Farm Bureau had breached its duty of good faith and fair dealing when it failed to allocate sufficient surplus to their policies, such that their premiums did not vanish as expected.[136] Iowa, like most jurisdictions, recognizes that all insurance policies contain an implied covenant of good faith and fair dealing, enforceable in tort should an insurer unreasonably refuse to pay benefits under a first-party policy, or unreasonably fail to settle a claim within a liability insurance policy's limits. Neither situation having been presented, the *Vos* court succinctly rejected the plaintiffs' argument.[137]

Again *Vos* was right. The implied covenant of good faith and fair dealing fundamentally requires that insurers do nothing to injure insureds' right to receive the benefits they are due under their policies.[138] The plaintiffs were due death benefits if they kept their policies in force. There being no allegation that Farm Bureau had unreasonably declined to pay any claims in whole or in part, the plaintiffs' bad faith theory was a nonstarter.

Courts have generally been reluctant to decide premium disputes on a bad faith theory. In *Jonathan Neil & Associates, Inc. v. Jones*,[139] for example, the California Supreme Court held that a trucking company could not assert a bad faith claim against the California Automobile Assigned Risk Plan for charging an allegedly excessive retroactive premium.[140] In so holding, the court noted that the billing dispute "did not, by itself, deny the insured the benefits of the insurance policy—the security against losses and third party liability."[141]

The plaintiffs in *Smoot v. Physicians Life Insurance Co.*[142] purchased modal premium life insurance policies, meaning that if they paid premiums other than annually, those premiums together would cost more than an annual premium paid in a single lump sum.[143] The plaintiffs alleged that the insurer concealed this fact, even though the policies clearly stated that premiums could be paid annually ($177.65), semiannually ($90.44), quarterly ($46.84), and monthly ($16.15), and that policyholders could change their

136. *Vos*, 667 N.W.2d at 51.
137. *Id.*
138. *Id.* (quoting Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30 (Iowa 1982)); *see also* Edwards v. Prudential Prop. & Cas. Co., 814 A.2d 1115, 1119 (N.J. Super. Ct. App. Div. 2003); Smoot v. Physicians Life Ins. Co., 87 P.3d 545, 548 (N.M. Ct. App. 2003).
139. 94 P.3d 1055 (Cal. 2004).
140. *Id.* at 1071.
141. *Id.* at 1069.
142. 87 P.3d 545 (N.M. Ct. App. 2003).
143. *See id.* at 547.

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payment plans at any time.[144] Of course, anyone could, by reading the policy, figure out that twelve monthly payments of $16.15 equaled $193.80, and that it was cheaper to pay a single annual premium ($177.65).[145]

The plaintiffs asserted that the insurer's failure to expressly disclose that paying monthly would cost more than paying annually breached its duty of good faith and fair dealing. The *Smoot* court rejected this argument on two grounds. First, because the policy stated the amount of each fractional premium, the implied covenant of good faith and fair dealing could not override the contract to establish a duty to disclose the modal premium charges.[146] Second, the plaintiffs did not allege that the defendant had unreasonably refused to pay any claims, or that it had unreasonably refused to allow them to change their payment frequencies. They had not shown that the defendant injured their rights to receive the benefits of their agreements.[147]

Furthermore, plaintiffs cannot premise bad faith claims on alleged misrepresentations or nondisclosures by insurance companies or agents occurring before the plaintiffs purchased their policies.[148] An insurer's implied promise of good faith and fair dealing "depends upon the existence of an underlying contractual relationship."[149] Thus, if an insurer's presale activities are actionable, a bad faith claim must be based some other theory.

In light of all of this, consider a case in which a plaintiff alleges that a VUL policy is unsuitable, and that by selling an unsuitable policy the insurer breached its duty of good faith and fair dealing. If the plaintiff premises her claim on an agent's conduct allegedly inducing her to purchase the policy, the claim must fail because at the time no contract yet existed. The same is true if the insurer's marketing materials or policy illustrations given to the insured presale are at issue. Assuming that the policyholder is alive, the claim must fail because the insurer cannot have unreasonably refused to pay the death benefits due under the policy. The claim must also fail because the insured's desire for better investment results cannot overcome the cautionary language in the policy prospectus or application, or the language of the policy itself.

Returning to *Vos*, plaintiffs there also alleged that Farm Bureau had breached its fiduciary duty to them.[150] The trial court rejected this argument on the grounds that the relationship between insurance agents and customers is not fiduciary in nature, and that because the relationship be-

144. *Id.* at 548.
145. *Id.*
146. *Id.*
147. *Id.* at 548–49.
148. Azar v. Prudential Ins. Co. of Am., 68 P.3d 909, 924–25 (N.M. Ct. App. 2003).
149. *Id.* at 925.
150. Vos v. Farm Bureau Life Ins. Co., 667 N.W.2d 36, 51 (Iowa 2003).

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tween an insurer and its insureds is not necessarily fiduciary, fact questions particular to each plaintiff would defeat the predominance requirement for class certification.[151]

Under Iowa law, the existence of a fiduciary relationship depends on the facts and circumstances of each individual case.[152] The *Vos* court thus affirmed the trial court on the predominance issue alone; the court did not discuss the existence of a fiduciary relationship between insurance agents and insureds, or between insurance companies and insureds. Had it done so, it still should have found for Farm Bureau. The purchase of insurance from an agent is an arm's-length transaction, and applicants and insureds generally have no reasonable basis to repose special trust and confidence in the insurance agents with whom they deal.[153]

Finally, the *Vos* court took up the plaintiffs' negligent misrepresentation, fraud, and fraudulent inducement claims, all of which required the plaintiffs to prove their justifiable reliance on Farm Bureau marketing materials or on representations made by Farm Bureau agents.[154] The court refused to presume the plaintiffs' reliance and, accordingly, agreed with the trial court that individual fact questions predominated over common questions, such that class certification was inappropriate.[155] As it did with the plaintiffs' fiduciary duty claim, the court avoided the merits of the plaintiffs' misrepresentation-based theories.

Reasonable reliance is a critical issue in most life insurance sales practice cases. Even more fundamental is the question of whether there was a misrepresentation. Plaintiffs in vanishing premium cases routinely allege that insurers sold vanishing premium policies when interest rates were unusually high, knowing that rates would fall in the future, a claim that scholars have branded "ludicrous on its face."[156] For one thing, the use of an assumed future interest rate is not false for purposes of fraud and misrepresentation claims.[157] For another thing, no rational insurer markets a product that it knows will disappoint customers and, worse, spawn litigation. Competitive pressures prevent such irrational behavior.[158]

Moving outside the vanishing premium realm, consider a case in which an agent selling a VUL policy illustrates the future performance of the

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151. *Id.*

152. *Id.* at 52 (quoting Kurth v. Van Horn, 380 N.W.2d 693, 696 (Iowa 1986)).

153. *See* Weisblatt v. Minn. Mut. Life Ins. Co., 4 F. Supp. 2d 371, 382 (E.D. Pa. 1998) (explaining that an insurance agent acts in his employer's interest and out of self-interest when selling insurance, but does not act in the insured's interests).

154. *Vos*, 667 N.W.2d at 52–53.

155. *Id.* at 54–55.

156. Fischel & Stillman, *supra* note 2, at 14.

157. *Id.*

158. *See generally* Gary Schuman, *Post-Claim Underwriting: A Life and Health Insurer's Boon or Bane*, 55 FED'N DEF. & CORP. COUNS. Q. 43, 43 (2004) (observing that life insurers function in an "extremely competitive environment").

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investment accounts at eight percent over the length of the contract. Unfortunately, the stock market does not perform for some period of time as it has historically, and the investment accounts actually lose money. Rather than waiting for the market to rebound and his account value to do the same, the insured sues the agent and the insurer for fraud and negligent misrepresentation, alleging that when they sold the policy they knew or reasonably should have known that future interest rates might be lower than eight percent. This claim is also ludicrous. If the agent's representation is actionable,[159] the projection of an assumed future interest rate cannot be a misrepresentation where, as here, the rate of return illustrated was eight percent, and U.S. stock market average annual returns were roughly eleven percent for the period 1926–1999.[160] Again, the insurer has no reason to sell a knowingly undesirable product in a competitive marketplace.

Of course, the principle that projections of hypothetical future interest cannot constitute misrepresentations rests on two obvious assumptions. The first is that the illustrated rates are contextually reasonable. If an insurer uses illustrations that purport to be based on actual experience, for example, they must honestly reflect that experience.[161] Likewise, intermediaries cannot illustrate future rates of return that they know the insurer cannot achieve.[162] The second is that the illustrations are mathematically accurate. Even if one of these assumptions proves to be wrong, however, that does not mean that liability for fraud or negligent misrepresentation automatically follows. A plaintiff still must prove the remaining elements of his cause of action.

C. *The Paper Chase and Recurring Issues*

Life insurers sued over sales practices typically ground their defenses on the documents that plaintiffs receive when purchasing cash value policies. Applications state limits on agents' authority, illustrations and prospectuses contain disclaimers, and insurance policies contain integration clauses. Nowhere do cash value policies guarantee future interest or investment returns, nor do they guarantee that premiums will vanish at a particular time. Because insureds have a duty to read their policies or are chargeable with

159. Fraud claims cannot be based on "[m]ere statements of opinion, expectations, and predictions for the future." Trotter's Corp. v. Ringleader Restaurants, Inc., 929 S.W.2d 935, 940 (Mo. Ct. App. 1996).

160. *See Historical Stocks/Shares Performance Returns*, *at* http://www.finfacts.com.

161. *See, e.g.*, Cooper v. Berkshire Life Ins. Co., 810 A.2d 1045, 1058–59 (Md. Ct. Spec. App. 2002) (holding that insurer was not entitled to summary judgment on fraudulent and negligent misrepresentation claims where plaintiffs alleged that insurer used inaccurate illustrations that contradicted its own internal estimates, analyses, and forecasts).

162. *See, e.g.*, Hunter v. Guardian Life Ins. Co. of Am., 593 S.E.2d 595, 599 (N.C. Ct. App. 2004) (holding that trial court should not have dismissed plaintiffs' fraud claim where they alleged that the insurer used knowingly false data in its illustrations).

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knowledge of their contents, insurers argue, plaintiffs' fraud and misrepresentation claims are doomed at the outset.

Insureds typically wish to avoid the language of their policies, preferring to argue that agents or brokers misled them, or that agents' oral statements modify their policies or provide grounds to reform them. This leads back to disclaimers of agents' authority and the integration clauses that are standard in life insurance policies, and the parol evidence rule.

Life insurance policies typically include an integration clause stating that the policy and any attached applications and riders constitute the entire contract.[163] Thus, insurers argue, their policies are fully integrated, and the parol evidence rule bars any evidence of agents' alleged statements that contradict the policy terms.[164] But plaintiffs may circumvent this argument by alleging that agents' statements or representations in insurers' marketing materials go to show fraud in the inducement.[165] For this reason, it is often the case that statements in policies and applications affect plaintiffs' claims in ways beyond contract interpretation, such as defeating allegations of reasonable reliance on agents' and insurers' alleged misrepresentations.[166] An interesting recent case involving the language of a variable life policy and a host of other recurring issues is *E.R. Dupuis Concrete Co. v. Penn Mutual Life Insurance Co.*[167]

In *Dupuis*, two Penn Mutual agents, Lewis and Robertson, sold a variable life policy to E.R. Dupuis Concrete Co. insuring the life of its president, Elwood Dupuis ("Dupuis"). The policy had a $3 million face amount. Dupuis Concrete paid a $211,000 premium the first year of the policy, of which $186,308 was invested in the policy's investment account and the remainder going to pay for the insurance and other front-end loads. Eventually, the agents received commissions of roughly $72,000, which was deducted from the policy's investment account,[168] and the investment account otherwise declined in value to $28,000.[169] Dupuis Concrete then sued Lewis and Robertson and their agency, and Penn Mutual.

163. *See, e.g., In re* Jackson Nat'l Life Ins. Co. Premium Litig., 107 F. Supp. 2d 841, 849 (W.D. Mich. 2000) (quoting policy).

164. The parol evidence rule is a rule of substantive law "that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence that adds to, varies, or contradicts the writing." BLACK'S LAW DICTIONARY 1139 (7th ed. 1999).

165. *See In re Jackson Nat'l*, 107 F. Supp. 2d at 858–60 (discussing different states' approaches to parol evidence and fraud in the inducement claims).

166. *See* Drs. Bethea, Moustoukas & Weaver LLC v. St. Paul Guardian Ins. Co., 376 F.3d 399, 404 (5th Cir. 2004) (noting that "many courts have found a plaintiff's reliance to be unreasonable as a matter of law when the parties have a valid contract defining their rights and limiting the ways in which the contract may be modified"); *see also, e.g.*, Liberty Nat'l Life Ins. Co. v. Ingram, 887 So. 2d 222 (Ala. 2004) (involving a so-called interest rate-sensitive whole life policy); Alfa Life Ins. Corp. v. Green, 881 So. 2d 987 (Ala. 2003) (same).

167. 137 S.W.3d 311 (Tex. App. 2004).

168. *Id.* at 317.

169. *Id.* at 315.

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The plaintiff alleged that the defendants induced it to purchase the policy through estate planning for Dupuis, that they falsely represented that the policy would provide investment returns of ten to twenty-four percent, that they unilaterally allocated money in the investment account to risky investments, and that they falsely represented that the investment returns would cover the cost of future premiums.[170] The plaintiff alleged eight causes of action, including breach of fiduciary duty; breach of the implied covenant of good faith and fair dealing; several species of negligence, fraud, deceptive trade practices, breach of contract, conversion; and unjust enrichment.[171]

In granting summary judgment for the defendants, the trial court premised its ruling on Dupuis's admission that he did not read the entire policy. The policy contained a disclaimer on the first page that was printed in all capital letters and that advised the purchaser that the death benefit and duration of coverage could increase or decrease depending upon the performance of the investment account; that the policy's cash value in the separate account could increase or decrease, depending upon the account's performance; and that the policy's value was not guaranteed.[172] The first page of the policy also conspicuously cautioned the purchaser to read the policy carefully.[173] Furthermore, in the application process, Dupuis signed a document on which he checked spaces indicating his understanding that the policy's death benefit might increase or decrease depending on investment experience, that the policy's cash value might increase or decrease with investment experience, and that the policy would lapse if the cash surrender value became insufficient to cover policy charges.[174] The policy contained an integration clause providing that the policy and the application for it constituted the entire contract, and that no agent was authorized to modify the contract or to promise future dividends or interest.[175]

The plaintiff made Dupuis's failure to read the policy its first issue on appeal, calling it "a red herring."[176] More particularly:

> Dupuis Concrete was unable to assess the riskiness of the product because the [defendants] failed to disclose that $72,000 of the $211,000 invested went to the agents' commissions. By failing to disclose the payment of commissions . . . the [defendants] misrepresented [the product's] level of risk. [Dupuis Concrete] also contends that the policy was so difficult to understand that it did not matter whether Elwood Dupuis read the policy, and the [defendants]

170. *Id.* at 314–15.
171. *Id.* at 315.
172. *Id.*
173. *Id.*
174. *Id.* at 320.
175. *Id.*
176. *Id.* at 316.

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should not be able to escape liability with a warning on the front of the policy.[177]

The court regarded this argument as having two prongs: a fact-based attack on the defendants' alleged failure to disclose agents' commissions and a philosophical attack on the enforceability of complex insurance policies. The court found neither approach persuasive.

Dupuis had his estate plan, including all of the life insurance documents, reviewed by his accountant. The papers that he shared with his accountant included a transaction summary showing the $186,308 investment in the policy's sub-accounts, and Dupuis and his accountant understood that Penn Mutual charged premiums. The policy described the premiums, premium calculation, monthly deductions from cash value, cost of insurance, and obligation to pay premiums to keep the policy in force. Even if the defendants failed to disclose that they would earn commissions paid out of premiums, the policy disclosed the entire premium to be paid.[178]

The *Dupuis* court observed that a party to a contract is obligated to protect himself by reading the document and his failure to do so is not excused by "mere confidence in the honesty and integrity of the other party."[179] Thus, the plaintiff could not claim that Dupuis believed that the terms of the policy were different from those printed there, or that he did not understand the language used.[180]

Dupuis Concrete argued that the policy was so difficult to understand that an insured should not be charged with knowledge of its contents, supporting its argument with copies of newspaper and magazine articles discussing the confusing nature of variable life insurance.[181] Dupuis Concrete offered no legal authority to support its argument, however, nor did it argue that the policy was ambiguous.[182] Furthermore, an accountant and several lawyers assisted Dupuis with his estate planning, including the purchase of the policy.[183] Stating that "[c]omplexity in and of itself, in the absence of fraud or other tortious conduct, does not excuse a party from reading a contract," the *Dupuis* court overruled the plaintiff's first issue.[184]

The plaintiff next argued that the trial court erred in granting summary judgment on its breach of fiduciary duty claim. The court began its analysis from the perspective that a fiduciary duty "is an extraordinary duty that is not lightly created," and that "there is no general fiduciary duty between

177. *Id.* at 317.
178. *Id.*
179. *Id.*
180. *Id.* (quoting *In re* Media Arts Group, Inc., 116 S.W.3d 900 (Tex. App. 2003)).
181. *Id.*
182. *Id.*
183. *Id.* at 318.
184. *Id.*

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an insurer and its insured."[185] To prove its claim, the plaintiff needed to show that Dupuis shared a special relationship of trust and confidence with Lewis and Robertson "'prior to, and apart from,'" the purchase of the policy.[186] This it could not do.

The plaintiff asserted that a fiduciary relationship existed because Robertson and Lewis gave Dupuis legal advice and drafted legal documents for him. But as the court explained:

> The "legal documents" to which the [plaintiff] refers are an estate planning portfolio and revocable living trust kit, and the drafting is . . . filling in blanks on forms in a trust kit. Dupuis Concrete refers the court to a document titled "Estate Planning Portfolio and Revocable Living Trust." The only blanks on the document in the record are signature lines and blank property schedules. In his deposition, Lewis testified that the trust was prepared by an Arizona trust company. He denied engaging in discussions about a trust. The [plaintiff's] CPA understood that the trust was prepared by an attorney in New Jersey. The CPA also testified that he met with two local attorneys about the trust, and questions about the trust were directed to . . . "an attorney at American Trust." Elwood Dupuis's will was drafted by a local attorney, as were other documents associated with estate planning.[187]

There was simply no evidence that either Lewis or Robertson drafted legal documents.

There was also no evidence that Dupuis or anyone acting on the plaintiff's behalf ever believed that Lewis or Robertson were lawyers.[188] Dupuis did not recall Robertson telling him that he was a lawyer, and he suspected that Robertson was not a lawyer. Retreating from the practice of law to accountancy as a basis for a fiduciary relationship, the plaintiff argued that Dupuis thought that Robertson might be a CPA because Robertson told him that most CPAs did not possess his professional knowledge.[189] This argument failed as well, the court reasoning that "[n]ot knowing that someone is, in fact, not a lawyer or an accountant is not the same thing as believing that [he is]."[190] Furthermore, the plaintiff's accountant knew that Lewis and Robertson were neither lawyers nor accountants.[191]

Retreating further still, the plaintiff asserted that Dupuis had a confidential relationship with Lewis because they attended the same church and with Robertson because he once prayed with Dupuis during a social visit

185. *Id.*
186. *Id.* (quoting Wayne Duddlesten, Inc. v. Highland Ins. Co., 110 S.W.3d 85, 96 (Tex. App. 2003)).
187. *Id.*
188. *Id.* at 318–19.
189. *Id.*
190. *Id.* at 319.
191. *See id.*

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in Lewis's home.[192] The court disagreed, citing a lack of authority for the proposition that "praying together creates a confidential relationship to which a fiduciary duty will attach in future business transactions," and seeing no indication that the prior spiritual relationship between Lewis and Dupuis "involved a high degree of trust and confidence over a long period of time."[193]

For its third argument, the plaintiff contended that it was not bound by a contract procured through fraud.[194] To prove fraudulent inducement under Texas law, a plaintiff must establish that (1) a material representation was made; (2) the representation was false; (3) when the representation was made the speaker knew that it was false, or made it recklessly without knowing of its truth and as a positive assertion; (4) the speaker intended the other party to act on the representation; (5) the party relied on the representation; and (6) the party was thereby injured.[195] The defendants argued that the fifth element, reliance, was defeated by the disclaimers on the first page of the policy and the policy's integration clause, which pulled in the cautionary language in the application documents.[196] The court agreed.

The plaintiff's basic thrust was that Lewis and Robertson misrepresented the future performance of the policy's investment accounts, but the policy specified that agents were not authorized to modify its terms or to make any promise about the future payment of dividends or interest. Although the growth rate of the investment accounts was lower than anticipated, there was no evidence that it was lower than claimed by Robertson and Lewis.[197] Ultimately, the court concluded, the challenged representations were either predictions of future performance that were not known to be false when made or alleged failures to disclose information that was readily apparent from reading the policy. As a matter of law, Dupuis Concrete could not rely upon agents' representations that the policy warned were not authorized.[198]

The plaintiff next disputed the trial court's grant of summary judgment on its negligent misrepresentation claim, arguing that the defendants misrepresented the level of risk associated with the policy because they did not reveal that the money paid to the agents in commissions would be unavailable for investing.[199] Again the court disagreed. Because the policy stated the formula for calculating the cost of insurance and monthly de-

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192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* (citing Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 47 (Tex. 1998)).
196. *Id.* at 319–20.
197. *Id.* at 321.
198. *Id.*
199. *Id.*

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ductions, the defendants had disclosed that the entire amount of Dupuis's initial investment would not remain in the policy's investment account.[200]

In its fifth point, the plaintiff argued that genuine issues of material fact precluded summary judgment on its claim under a section of the Texas Insurance Code prohibiting the misrepresentation of policy terms. The plaintiff alleged that the agents misrepresented the policy's benefits by asserting that the growth rate of the investment account was normally twenty-four percent, but never would drop below twelve percent; by only providing illustrations at twelve and twenty-four percent rates of return; and by stating that the policy's cash value growth would be sufficient to cover future premiums.[201] Once again, the misrepresentations were exactly the type that the policy warned agents were not authorized to make.[202] The policy warned that its value was not guaranteed and that the value of its investment account could decrease. The *Dupuis* court thus concluded that the plaintiff could not prove reliance as it was required to do under the applicable section of the Texas Insurance Code.[203]

The court next turned to the plaintiff's claim under the Texas Deceptive Trade Practices Act ("DTPA"). The defendants prevailed in the trial court by attacking the reliance element of a DTPA cause of action. Reliance was again the issue on appeal.

The plaintiff's DTPA claim turned on illustrations that Lewis showed Dupuis and his accountant. One illustration bore a statement that read: "I have received a copy of this illustration and understand that any nonguaranteed elements illustrated are subject to change and could be either higher or lower."[204] Another illustration stated: "I have made no statements that are inconsistent with this illustration—or with the illustration."[205] The signature lines on the illustrations were blank. The plaintiff contended that because the illustrations were unsigned despite the fact that they bore signature lines, there existed a genuine issue of material fact precluding summary judgment. The court made short work of this argument:

> Had the illustrations in question been signed, Penn Mutual could have used them to conclusively establish that the information contained in them was provided to the insured. But the lack of a signature, in and of itself, does not raise a fact issue of the opposite proposition that the information was not disclosed.[206]

200. *Id.* at 321–22.
201. *Id.* at 322.
202. *Id.*
203. *Id.*
204. *Id.* at 323.
205. *Id.*
206. *Id.*

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Dupuis Concrete next contended that fact issues precluded summary judgment on its claim of unconscionability. A Texas statute prohibits "unconscionable action" or an unconscionable course of action, defined as "'an act or practice which to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.'"[207] The plaintiff rested this claim on Lewis attending the same church as Dupuis, Robertson and Lewis obtaining Dupuis's trust by showing him how much money he could save through estate planning, Dupuis's lack of financial sophistication, and Dupuis's reliance on Robertson to select the policy sub-accounts in which to invest.[208]

The *Dupuis* court dispatched this claim by referring to the disclaimers and cautionary language in the policy. It further noted that the plaintiff did not attempt to explain how Robertson's selection of the investment sub-accounts was unconscionable.[209]

The plaintiff's negligent hiring or supervision claim was up next. In Texas, "[a] claim for negligent hiring, retention, or supervision requires proof that the employer hired an incompetent or unfit employee whom it knew, or by the exercise of reasonable care should have known, was incompetent or unfit, thereby creating an unreasonable risk of harm to others."[210] Through this claim the plaintiff sought to hold Penn Mutual and the agency for which Lewis and Robertson worked directly liable rather than vicariously liable. Specifically:

> Dupuis Concrete contends Penn Mutual knew Robertson had surreptitiously sold estate planning documents against the directions of a previous employer, but hired Robertson without prohibiting the sale of estate planning documents. Lewis, [Dupuis Concrete] argues, was a pipefitter by trade. It was foreseeable, [Dupuis Concrete] argues, that Robertson would use estate planning documents to gain [Dupuis Concrete's] trust and that Lewis would not understand the product being sold.[211]

Unfortunately, the plaintiff could not identify any danger to the insurance-buying public that was foreseeable as a result of Robertson's and Lewis's alleged deficiencies, nor could it establish any tortious act by Robertson or Lewis on which to base proximate cause. The court thus concluded that summary judgment was proper on this claim as well.[212]

Finally, the court denied Dupuis Concrete's claim for breach of the implied duty of good faith and fair dealing. The court reasoned that this claim

207. *Id.* (quoting statute).
208. *Id.*
209. *Id.*
210. *Id.* at 324.
211. *Id.* (footnote omitted).
212. *Id.*

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depended upon the existence of a fiduciary relationship between Dupuis and the defendants, and, such a relationship having been previously disposed of, nothing more need be said.[213]

Thus, the court of appeals affirmed the grant of summary judgment on every theory.[214] Dupuis paid a steep price for not reading his policy and accompanying documents.

The *Dupuis* court reached the correct result. It is unreasonable for a plaintiff to try to escape cautionary language in a policy or application by claiming that he did not read the documents, or that he did not understand them.[215] How else is an insurance company supposed to communicate warnings and limitations on its agents' authority to prospective insureds? Even if an insured does not understand investments, he must understand statements that policy values are not guaranteed, and that an agent lacks the authority to make promises that contradict the policy. For these reasons, the general rule that a plaintiff cannot prove reasonable reliance on an agent's or broker's alleged misrepresentations when those misrepresentations would be revealed by reading the subject insurance policy or related documents is sound.[216]

Dupuis also illustrates the common scenario in which the purchaser of a cash value life insurance policy has the policy and related documents reviewed by a knowledgeable third party, generally an accountant, lawyer, financial planner, or investment advisor. The use of an expert of some sort to check an agent's or broker's representations, or to independently evaluate a policy, is compelling evidence that the insured is *not* relying on the agent or broker in making his purchase or investment decision.[217] The professional's or expert's involvement alone may defeat reliance.[218] At a bare minimum, the plaintiff's burden of proving reasonable or justifiable reliance "increases significantly."[219] Moreover, the plaintiff can no longer

213. *Id.* at 324–25.

214. *Id.* at 325.

215. *See, e.g.*, Liberty Nat'l Life Ins. Co. v. Ingram, 887 So. 2d 222 (Ala. 2004) (finding for insurer that sold "excess-interest whole-life" policy and rejecting the plaintiff's argument that if he would have read the policy he would not have understood it).

216. *See id.* at 229 (finding no reliance where agent's alleged misrepresentations would have been revealed by reading the policy or related yearly reports); Branscum v. Am. Cmty. Mut. Ins. Co., 984 P.2d 675, 680 (Colo. Ct. App. 1999) (holding that plaintiffs could not have reasonably relied on agent's alleged representations contradicting language in rider to health insurance policy).

217. *See* Davis v. Consol. Oil & Gas, Inc., 802 P.2d 840, 851 (Wyo. 1990) ("The investigative activities of appellants belie any reliance on the statements or the existence of any belief in their truth.").

218. *See* Strate v. Cambridge Tel. Co., 795 P.2d 319, 324 (Idaho Ct. App. 1990) (stating that plaintiff could not establish reliance on sellers' representations in sale of business where it had the business's accounts examined by a certified public accountant).

219. Burroughs v. Jackson Nat'l Life Ins. Co., 618 So. 2d 1329, 1332 (Ala. 1993).

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claim a lack of sophistication or an inability to understand the subject policy because the expert's knowledge and understanding are imputed to him.[220]

Another point in *Dupuis* worth mentioning is the court's rejection of the plaintiff's breach of fiduciary duty claim, which was grounded on Lewis and Dupuis attending the same church, and Robertson once praying with Dupuis during a social visit.[221] Sales and financial services professionals often participate in civic and charitable activities with the intention of meeting people who may become clients. Friendships often spawn business relationships. The fact that an insured considers his insurance agent to be a friend and therefore trusts him is not enough to create a fiduciary relationship.[222] "Friend" and "fiduciary" are not synonyms.

That said, many life insurance agents double as financial planners and investment advisors.[223] In that capacity they may develop relationships of trust and confidence with their customers that are deemed to be fiduciary.[224] In short, because life insurance agents may assume roles those agents selling other lines of insurance do not and because the existence of a fiduciary relationship often turns on the facts of the case, breach of fiduciary duty claims vex life insurance agents. Well-pleaded claims of this sort seldom can be resolved at the motion to dismiss stage and must instead wait for summary judgment.

D. *Breach of Contract*

A policyholder who is dissatisfied with her cash value life insurance policy may sue her insurer for breach of contract.[225] Plaintiffs may view breach of contract claims as being more desirable than misrepresentation-based theories because with breach of contract there is no need to prove reasonable reliance, among other thorny elements. If a cash value policy is ambiguous, a court will, of course, construe it against the insurer. A breach of contract claim arising out of an agent's sales pitch is unlikely to succeed in the absence of fraud, however, because of the parol evidence rule.[226] But that does not necessarily mean that breach of contract has no place in life insurance sales practices litigation arising out of intermediaries' conduct. It is generally the case that agents and brokers can breach contracts to procure insurance, whether by failing to procure any insurance or by failing

220. *Id.*

221. E.R. Dupuis Concrete Co. v. Penn Mut. Life Ins. Co., 137 S.W.3d 311, 319 (Tex. App. 2004).

222. Fraioli v. Lemcke, 328 F. Supp. 2d 250, 267 (D.R.I. 2004).

223. Black & Skipper, *supra* note 6, at 248.

224. *See, e.g., Fraioli*, 328 F. Supp. 2d at 267 (describing relationship).

225. *See, e.g.*, Adams v. Kan. City Life Ins. Co., 192 F.R.D. 274, 280–82 (W.D. Mo. 2000) (involving vanishing premium policy).

226. *See, e.g.*, Bergeron v. Pan Am. Assurance Co., 731 So. 2d 1037, 1043–45 (La. Ct. App. 1999) (rejecting plaintiffs' breach of contract claim where fraud claim was time barred).

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to procure the proper coverage.[227] In the cash value life insurance context, it seems most likely that an insured would allege that an intermediary failed to procure a suitable policy, whatever that may be.

A contract to procure insurance exists when the agent or broker "has definite directions from the insured to consummate a final contract; when the scope, subject matter, duration and other elements can be found by implication; and when the insured gives the agent [or broker] authority to ascertain some of the essential facts."[228] The advantages to alleging a breach of contract to a plaintiff are the longer statutes of limitations for contract claims than for tort claims, and the lack of need to prove reliance or scienter attending an alleged misrepresentation. An insured may still be done in, however, by policy documents. For example, an insured will struggle to prove that an agent breached his contract to procure a whole life policy, instead procuring a variable life policy, where an insured has signed documents disclosing the variable life policy's investment risk, selecting investment accounts, and so on.

Moreover, it is generally the rule that an insured has a duty to examine her policy to ensure that it affords the terms desired and, if it does not, to promptly reject it.[229] This is because the insured's application for insurance is a contract offer and if the insurer sends a policy different than that requested it has made a counteroffer.[230] If the insured keeps the policy for an unreasonable length of time, she accepts the insurer's counteroffer.[231] It would therefore seem difficult for a plaintiff in a cash value life insurance case to successfully establish that an agent or broker procured the wrong policy.

CONCLUSION

Cash value life insurance can be confusing. Indeed, much of the litigation arising out of cash value life insurance transactions probably can be attributed to confusion on the part of insureds and a lack of understanding on the part of policyholders' counsel. To be sure, there are unscrupulous and reckless agents and brokers and unscrupulous or reckless employees at insurance companies and brokerages may fail to educate or police their sales forces. Overzealous agents and brokers are another problem. But these problems are dwarfed by the lack of understanding that characterizes life

227. *See* Capital Site Mgmt. Assocs. v. Inland Underwriters Ins. Agency, Ltd., 806 N.E.2d 959, 962 (Mass. App. Ct. 2004) (discussing breach of contract by broker); Harris v. Albrecht, 86 P.3d 728, 730–35 (Utah 2004) (discussing alleged breach of contract by agent).

228. *Harris*, 86 P.3d at 734–35.

229. Jenkad Enters., Inc. v. Transp. Ins. Co., 18 S.W.3d 34, 38 (Mo. Ct. App. 2000).

230. Jerry, *supra* note 8, at 222.

231. *See, e.g.*, *Jenkad Enters.*, 18 S.W.3d at 38.

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insurance and that unfortunately leads to unwise, unprofitable, and unworthy litigation.

Consumers should carefully select agents or brokers. The proper selection of an intermediary depends as much on the intermediary's qualifications as it does on subjective factors. For example, is the intermediary a Chartered Life Underwriter or does he hold the Chartered Financial Consultant designation? How long has he been in the life insurance business? Furthermore, prospective policyholders must analyze prospectuses that they are given and illustrations that they are shown. No harm can come from getting a second opinion on the suitability of a particular insurance product; for financially unsophisticated insureds, such caution may be advisable. Finally, state insurance departments and securities regulators may be sources of information for insureds who are concerned about their life insurance purchase.

From insurers' vantage, they must employ ethical agents and terminate their relationships with those who they suspect are not. Insurers cannot afford to employ or contract with rogues. They must make sure that their sales forces are knowledgeable and that agents are dispensing correct information and advice to customers.

Finally, consumers, courts, and lawyers alike must understand that cash value life insurance policies are just that—life insurance. They are not investment vehicles. That they may have features that make them desirable for reasons beyond their death benefits does not eliminate or diminish their dominant purpose, which is to provide a death benefit to the policyholder's beneficiaries.

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