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LETTER FROM WASHINGTON

WHY LITIGATION IS A POOR ANSWER TO RRG DISPUTES

By Robert H. Myers, Jr.

The Liability Risk Retention Act ("LRRA"), 15 U.S.C. § 3901 *et. seq.*, authorizes risk retention groups ("RRGs") to charter in one state and to then, after a specified filing, operate in any other state. The authority of the chartering states is not limited in any respect by the federal law; however, the regulatory authority of a non-domiciliary state is limited. 15 U.S.C. § 3902(a)(1).

This regulatory structure, sometimes referred to as "lead state" regulation, has resulted in friction with the laws of some of the non-domiciliary states. The LRRA does not establish oversight authority in any federal agency. Nonetheless, it envisions there may be conflicts and assumes litigation may ensue. The LRRA authorizes states to "make use of any of its powers to enforce the laws of such State with respect to which a risk retention group is not exempt under this chapter." 15 U.S.C. § 3902(f)(1). However, if a state seeks an injunction (which would include a cease and desist order), ". . . such injunction must be obtained from a Federal or State court of competent jurisdiction." 15 U.S.C. § 3902(f)(2).

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CAN IRAs INVEST IN LIFE SETTLEMENTS?

By James W. Maxson

Life settlements are life insurance policies purchased in the secondary market from seniors who no longer want or need the policies. An investor purchases the policy for a lump sum cash payment, assumes the obligation to pay on-going premiums and collects the death benefit when the policy matures.

As an asset class, life settlements grew rapidly from the late 1990s through 2008. While the life settlement market experienced significant contraction during the financial crisis of the last three years, it is firmly established as a viable alternative asset class with little or no correlation to the capital markets.

The attractive characteristics of life settlements have led some with self-directed individual retirement accounts ("IRA") to wonder if they can allocate IRA funds to the asset class; and, indeed, there are third parties in the market who offer to assist in such allocations. There is, however, a question as to whether it is permissible to invest IRA funds in this manner.

Section 408(a)(3) of the Internal Revenue Code provides that "no part of the trust funds [in an IRA] will be invested in life insurance contracts." On its face, this section appears to prohibit the use of IRA funds to invest in life settlements. On the other hand, life settlements did not exist when § 408(a)(3) was added to the Code, and it is more likely that the provision was intended to address the purchase of life insurance on one's own life, not the investment in a policy on an unrelated third party.

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REGULATORY STANDARDS FOR THE USE OF SOCIAL MEDIA IN INSURANCE

By Joseph T. Holahan

The use of social media such as Facebook, Twitter and LinkedIn in the business of insurance is becoming widespread. Insurers and producers now use social media for a variety of purposes, including building brand awareness and trust, customer service and agent recruitment.

As the use of social media has grown, regulators have begun to apply existing regulatory standards to this new technology and evaluate where additional guidance and standards are needed. The Financial Industry Regulatory Authority ("FINRA") has been at the forefront of these efforts with guidance issued in 2010 and again this year addressing the application of its rules to the use of social media by broker-dealers and their registered representatives.

State insurance regulators also have become more active in this area. Several state insurance departments now address the use of social media in market conduct examinations. Last year, the NAIC Market Regulation & Consumer Affairs (D) Committee formed the Social Media Working Group, which was charged with producing a white paper to guide state regulators as they consider social media use. The working group has published two drafts of the white paper to date.

Courts also have begun to address issues relating to the business use of social media. Last March, for example, a federal court in California held that messages sent by Facebook users to their Facebook friends' walls, news feeds or home pages are "electronic mail messages" under the CAN-SPAM Act. *Facebook, Inc. v. Maxbounty, Inc.,* 274 F.R.D. 279 (N.D. Calif. 2011).

This article reviews the guidance issued by FINRA on social media, which applies to broker-dealers and registered representatives dealing with variable life and annuity products. Because the FINRA guidance is the starting point for the white paper being developed by the NAIC, it deserves the attention of producers and insurers regardless of their market. In addition, this article examines the draft NAIC white paper in its present form and reviews general considerations important to any insurer or producer in developing a compliance program for social media.[1]

FINRA Guidance

In January 2010, FINRA issued Regulatory Notice 10-06, providing guidance on the use of blogs and social networking sites. This guidance and more recent guidance in the same area, Regulatory Notice 11-39, issued by FINRA in August 2011, are important for producers who deal with variable products.

The regulatory notices issued by FINRA cover a variety of topics including, among other things, the difference in regulation of "static" versus "interactive" content, firm supervision of social media activities, the treatment of third-party posts, the posting of third-party links, third-party data feeds and recordkeeping.

1 This article focuses on social media used for promotional purposes. The use of social media in claims and fraud investigations is not addressed.

Announcements

Jessica Pardi and **Michael Cochenour** won a motion to dismiss a six-count lawsuit filed against a large, national insurer domiciled in Georgia.

The Nevada Captive Insurance Association awarded its 2011 Person of the Year Award to **Skip Myers**. The award was presented by former Commissioner Alice Molasky-Arman, who cited Skip's contributions to the captive insurance industry and, in particular, his legal counsel in the case of *ANI v. Barratt*.

Lew Hassett, **Larry Kunin** and **Ben Vitale** obtained full summary judgment in favor of an automobile insurer and related agency in a class action lawsuit attacking the sale of ancillary insurance products. The appeal period expired without appeal.

Jim Maxson and **Tony Roehl** attended the 17th Annual Fall & Compliance Conferences, October 3-5, in Atlanta. Jim spoke on privacy concerns in the life settlement industry and tertiary market compliance issues.

Lew Hassett, **Larry Kunin**, **Ben Vitale** and **Cindy Chang** are representing a national automobile insurer and agency in a class action lawsuit in Florida alleging the unlawful sale of surplus lines insurance.

Skip Myers spoke on the changing regulatory environment for captive insurers at the Captive Insurance Council of the District of Columbia Annual Conference on October 24.

Lew Hassett and **Seslee Mattson** have been retained by an insurer to represent a defendant in a multi-claim product liability action involving infant formula.

Skip Myers has been elected to the board of directors of the International Center for Captive Insurance Education (ICCIE). ICCIE is affiliated with the University of Vermont. It offers courses on captive insurance accounting, law, management and ethics.

Lew Hassett participated in the semi-annual meeting of State Law Resources in Portland, Oregon, on September 23 and 24.

FINRA draws an important distinction between static and interactive content in the context of social media. According to FINRA, content is static if it remains posted until it is changed by the firm or individual who established the social media account. Examples of static content include blogs and, for sites like Facebook, profile, background or wall information. FINRA considers static content to be an "advertisement" under its rules if a broker-dealer or its registered representative sponsors the blog or social networking page on which the content appears. Thus, such static content must be approved by a registered principal before it is posted.

In contrast to static content, interactive content is composed of real-time communications, such as interactive posts on Twitter or Facebook. Such communications are considered to take place in an "interactive electronic forum" and therefore do not require prior approval by a registered principal. Interactive content, however, is subject to certain supervisory standards.

While approval by a registered principal is not required for interactive content, firms must supervise such communications in a manner reasonably designed to ensure they do not violate the content requirements of FINRA's communications rules. Generally, broker-dealers may employ risk-based principles to determine the extent to which the review of interactive content is necessary for the proper supervision of their business. Certain interactive content, however, is subject to special supervisory rules—for example, communications relating to complaints.

In addition, broker-dealers must adopt policies and procedures reasonably designed to ensure associated persons who participate in social media sites for business purposes are supervised appropriately, have the necessary training and background to engage in such activities and do not present undue risks to investors. Firms must have a general policy prohibiting any associated person from engaging in business communications on a social media site that is not subject to the firm's supervision. As part of this responsibility, a registered principal must review any social media site an associated person intends to use for a business purpose prior to its use.

FINRA typically does not treat content posted by customers or other third parties on a social media site sponsored by a firm as a communication by the firm with the public. Thus, generally speaking, such communications are not subject to prior approval by a registered principal or FINRA content and filing requirements.

Under some circumstances, however, third-party posts may become attributable to a firm. This may occur where the firm has: (1) involved itself in the preparation of the content, which is known as "entanglement" or (2) explicitly or implicitly endorsed or approved the content, which is known as "adoption."

Whether a firm has adopted content by implicitly endorsing or approving it is a fact-based inquiry. A prominent disclaimer on a site stating that a firm does not approve or endorse third-party posts is one factor FINRA may weigh in making such a determination. Other measures firms may take to help avoid implicit adoption include establishing appropriate usage guidelines for third parties who post to a sponsored site and establishing procedures for screening third-party posts. The fact that a firm blocks or deletes certain postings as inappropriate does not mean the firm implicitly has adopted posts that are left on a site.

Links posted on a sponsored site require careful handling. FINRA states that a firm may post a link to the site of an independent third party without assuming responsibility for the content of the linked site if: (1) the firm does not adopt or become entangled in site's content; and (2) the firm does not know or have reason to know the site contains false or misleading information. These standards suggest that a certain amount of due diligence should be conducted before linking to any site. Any such due diligence would need to be repeated periodically, as the content of a linked site may change. In addition, firms may not want to link to a third-party site unless an agreement is executed requiring the third party to follow appropriate standards and assume responsibility for any failure to do so. Finally, a disclaimer relating to links and clear evidence to the user that a link leads to a new website are advisable to help avoid implicit adoption of linked content.

Every firm that communicates, or permits associated persons to communicate, through social media must ensure it can maintain records of all such communications that constitute business communications as required by SEC and FINRA rules. These recordkeeping requirements are the same for both static and interactive content and extend to third-party posts received by a firm or associated person that relate to their business activities.

NAIC Guidance

On July 29, 2011, the NAIC Social Media Working Group released a first draft of a white paper entitled "The Use of Social Media in Insurance." This initial draft was met with sharp criticism by members and representatives of the regulated community. A revised draft of the white paper was released on September 29, 2011. The white paper is an evolving document but worth considering for the direction it points to in the treatment of social media by state regulators.

Like FINRA's guidance, the white paper distinguishes between static and interactive content, which are defined along the same lines as in FINRA's regulatory notices. The white paper treats static content in the same way as more traditional communications by insurers and producers. Thus, the white paper considers static content to be subject to existing state marketing and advertising regulations. This undoubtedly is the case.

The white paper's treatment of interactive content is less clear. In its present form, the white paper clearly considers third-party posts to be interactive content and therefore, absent entanglement or adoption, not subject to regulation as marketing or advertising. In addition, the white paper generally does not consider insurers or producers responsible for the content of such posts so long as they do not become entangled with or explicitly or implicitly adopt the content.

The white paper is vague in its treatment of real-time posts and other interactive content generated by an insurer or producer, as opposed to a third party. It explicitly does not carve out such communications from regulation as marketing or advertising. How the final white paper will treat such communications remains to be seen. It is likely, however, that such communications are subject to state advertising and marketing

regulations notwithstanding their interactive nature. Indeed, at least three states—Massachusetts, New York and Virginia—have clarified that social media is subject to their regulations governing marketing and advertising.[2] These state standards draw no distinction between static and interactive content. Regulators in other states are likely to take the same position.

This does not mean that all social media communications will be deemed to constitute marketing or advertising. Rather, the same standards for determining whether a communication is marketing or advertising that apply to traditional communications likely apply to communications generated by an insurer or producer through social media.

The white paper's general standards for entanglement and adoption are taken directly from FINRA's 2010 guidance on social media. Although the white paper's guidance in this area lacks some of the detail provided by FINRA, the FINRA guidance is a useful indicator of how state regulators may apply these principles to insurers and producers.

In addition, the white paper states that "an insurer is responsible for its appointed producers' posts, provided such posts may be directly related to the appointing insurer or the insurer's products or services." The white paper also states that insurers are encouraged to train appointed producers who wish to use social media before permitting its use. Given the uncertainty of regulators' attitudes and the law in this area, insurers may want to take a cautious approach to the use of social media by appointed producers.

The white paper encourages insurers and producers to adopt policies and procedures reasonably designed to ensure that insurer and "insurer-attributed" social media communications are accurate and timely. Like FINRA's guidance, the white paper states that insurers should employ risk-based principles to determine the extent to which the review of social media communications is necessary for proper supervision of their business. Procedures for such review may require pre-approval of some or all interactive content or, where appropriate, retrospective review—for example, through sampling or lexicon-based screening.

With respect to recordkeeping, the white paper takes the position that state insurance recordkeeping requirements apply to social media in the same way they do to other forms of written communications. According to the white paper, "when an insurer and/or producer is responsible for the content of a specific social media communication, then the insurer and/or producer is also responsible for complying with state record retention regulations relative to the subject communication."

General Considerations

Insurers and producers who engage in social media should consider establishing policies and procedures governing the appropriate use of such technologies. In doing so, it is important to recognize that many existing regulatory standards likely apply to social media in the same way they do to other forms of communication by the regulated community.

Threshold issues to consider include who may generate content or post links on sponsored sites or feeds, what content is appropriate for a particular site or feed, procedures and approvals necessary to create new content or links and procedures to review posted content and links for accuracy and appropriateness. For example, insurers may want to establish controls to ensure posts by non-licensed personnel do not stray into the realm of communications requiring a producer's license. In addition, all types of content should be screened to ensure they do not violate standards concerning inappropriate inducements, endorsements or unlawful rebates.

Other important issues to consider are how third-party posts will be monitored and what standards should be applied to responses. For example, it is important to direct complaints to personnel who can respond in a manner consistent with applicable regulatory requirements and internal guidelines. Complaints received through social media likely are subject to the same regulatory requirements, including recordkeeping, as complaints received in any other fashion. The same holds true of communications relating to claims that are received through social media.

Links to third-party sites and public responses to third-party posts should be handled so as to avoid explicit or implicit adoption, which may attach responsibility for the post to the insurer or producer sponsoring a site. Additionally, insurers and producers engaging in social media may want to screen third-party posts for inappropriate content such as defamatory or indecent remarks or content that could give rise to trademark or copyright infringement.

Other matters to consider include procedures for safeguarding the privacy of personal information. Sponsors of social media may want to adopt policies and procedures to discourage the posting of personal information—for example, by informing users they should not share personal information and by following up on complaints and claims communications received through social media through private channels. Any notice directing users not to provide personal information should also inform users that any such information they may share in a public posting will not be private. Contracts with social media providers and other vendors should be clear about the permitted uses of information collected on the site and the data security standards for such information.

Record retention policies also are an important consideration for social media platforms. FINRA's guidance explicitly extends record retention requirements to third-party posts. The draft NAIC white paper suggests that, absent adoption or entanglement, third-party posts might not be subject to record retention requirements. However, many state regulators may disagree with this position. Insurers and producers may want to apply their record retention policies equally to their own content and content generated by others, to the extent that this is technologically practicable.

The regulation of social media will continue to evolve as the uses of and technologies associated with social media change. Well-thought-out controls regarding the use of social media can help mitigate regulatory risk. Perhaps more important, such controls also can help mitigate reputational risk, which is a critical consideration for social media given its inherent visibility and "viral" potential. In the end, of course, social media is valuable only to the extent it maintains and enhances the sponsor's reputation. ❑

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2 *See* 14 VAC 5-21-20; 211 CMR 152.02; New York DOI Gen. Cnsl. Op. 10-11-07 (Nov. 22, 2010).

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Over the past 25 years, there have been more than a dozen reported cases dealing with RRGs. Although the holdings of such cases generally have been favorable to RRGs, there is good reason why RRGs are reluctant to go to court. First, litigation is extremely expensive. Second, some states prefer to ignore the holdings of cases brought in federal courts sitting in other states. In fact, some states prefer not to be bound by dispositive precedent in their own U.S. Circuit Court of Appeals.

Such was the case in *Alliance of Nonprofits for Insurance, Risk Retention Group v. Brett J. Barratt*, Nev. Case No. 2:10-CV-1749 (July 22, 2011). In brief, Alliance of Nonprofits for Insurance ("ANI") is an RRG domiciled in Vermont and registered in numerous other states, including Nevada. ANI issues affordable commercial auto policies to non-profit organizations and has done so since 2001. ANI is rated A- (excellent) by A.M. Best.

On September 13, 2010, the Nevada Division of Insurance ("NV DOI") issued a cease and desist order to ANI for writing "first dollar" automobile liability. ANI filed an action in the federal district court of Nevada in Las Vegas. The gravamen of the complaint was that the NV DOI's order clearly violated the LRRA prohibition against a non-domiciliary state directly or indirectly regulating the operations of an RRG or discriminating against RRGs. U.S.C. §§ 3902(a), 3905(d).

The parties agreed the issues could be resolved by cross motions for summary judgment. In its court papers, ANI asserted that the Court of Appeals for the Ninth Circuit (which includes Nevada) already had established binding precedent on this issue in *National Warranty Insurance Company RRG v. Greenfield*, 214 F.3d 1073 (9th Cir. 2000), *cert. denied* 531 U.S. 1104 (2001). In *Greenfield*, the Court of Appeals affirmed the district court decision and held that the LRRA preempted those provisions of the Oregon Service Contract Act which unlawfully discriminated against RRGs by requiring automobile dealers to obtain liability insurance from a member of the Oregon Insurance Guaranty Association. Because RRGs are prohibited by the LRRA from becoming members of state guaranty associations, the court held this effectively excluded RRGs from providing liability insurance to automobile dealers. The court held that a state "may exclude coverage from a particular [risk retention group] if it can show that a particular [risk retention group] is financially unsound or otherwise dangerous to those who rely on insurance purchased pursuant to the Oregon Service Contract Act, but it may not categorically exclude coverage from all [risk retention groups]." *Greenfield*, 214 F.3d at 1082.

In its pleadings, NV DOI argued that *Greenfield* was not binding because RRGs were not, in fact, discriminated against under Nevada law. First, it argued that ANI could redomesticate from its domicile (Vermont) to Nevada and become "licensed," in which case it could offer first dollar coverage in Nevada. Nevada law permits RRGs domiciled in Nevada to offer such coverage without belonging to the state guaranty fund. Of course, this was no remedy at all because, in order to employ it, ANI would have to redomesticate to each state in which its out-of-state status was challenged. Second, NV DOI argued that each member (i.e., each non-profit) could become "self insured" and utilize ANI for reinsurance. Again, this was no remedy because the non-profits served by ANI did not meet the net worth and other requirements for "self insured" status.

The case was heard before Judge James C. Mahan on July 21, 2011. Judge Mahan ruled from the bench in favor of ANI on all matters and incorporated his ruling into a written order dated July 22, 2011. The order mandated the phrase "authorized insurer" be interpreted under Nevada law to include a registered RRG; it permanently enjoined NV DOI from enforcing the existing Nevada statute against ANI; and it awarded ANI its attorneys' fees under 42 U.S.C. § 1983.

All of the above was reasonably predictable (except the far fetched arguments that ANI was not discriminated against because it could redomesticate to Nevada or its members could become "self insureds"). However, the response of NV DOI and the Office of the Attorney General was not. Rather than acknowledging defeat from a highly respected federal judge, it appealed. It also contested the award of attorneys' fees.

The presumed purpose of these post judgment actions is simply to run up costs for the RRG. In at least two prior cases, this tactic had resulted in such increased costs that the RRGs elected not to continue litigation. In *Auto Dealers, RRG v. Poizner*, Case No. 07-2666 (E.D. Cal. Mar. 7, 2008) (order granting preliminary injunction), the RRG had received a very favorable preliminary injunction against the California Insurance Commissioner. Because the Insurance Commissioner contended material facts were in dispute (though there were none), the RRG was forced to proceed with discovery. Auto Dealers decided the cost of continuing discovery and litigation was too great. In the case of *Attorneys' Liability Assurance Society, Inc. v. Fitzgerald*, 174 F.Supp. 2d 619 (W.D. Mich. 2001), the court awarded attorneys' fees to the plaintiff RRGs. The state regulator appealed, and the parties settled the case under undisclosed terms.

Congress stated that the purpose of the LRRA was to allow the operation of RRGs across state lines *unfettered by duplicative and overlapping state regulation*. H.R. Rep. No. 99-865, at 12 (1986). The appeal by NV DOI in *ANI* simply is inconsistent with Congressional intent. It demonstrates there is a need for Congress to amend the LRRA to create a more efficient dispute resolution process. ❑

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CAN IRAs INVEST IN LIFE SETTLEMENTS?

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Several private letter rulings issued by the IRS have addressed whether IRA funds can be used, even indirectly, to purchase life insurance. The answer is definitively no. While it does not appear the IRS has directly addressed the issue of using IRA funds to invest in life settlements, there is a risk that IRA investments in an entity designed to invest in life settlements, or a direct investment by an IRA in life settlements, would violate § 408(a)(3) and result in disqualification of the IRA.

This potential risk is recognized in statements released by several state securities departments. In virtually identical releases, the securities departments of Arkansas, Kentucky and Oregon state "Internal Revenue Code Section 408(a)(3) requires that 'no part of trust [IRA] funds will be invested in life insurance contracts.' This means that the Internal Revenue Service may not allow you the tax benefits of an IRA if you invest in a life settlement contract."[1]

If the IRS or the courts conclude that an IRA's purchase and ownership of life settlements is substantially equivalent to the IRA's purchase and ownership of a life insurance policy in violation of § 408(a)(3), the resulting income tax consequences may be materially adverse to both the IRA and its owner. Specifically, the IRA's tax-deferred status could be terminated immediately and the entire balance of the IRA deemed immediately distributed to the IRA owner. This deemed distribution of the account balance may be fully taxable as ordinary income to the IRA owner and, if the IRA owner is not at least 59 ½ years of age at the time of such deemed distribution, may be subject to an early withdrawal penalty equal to ten percent (10%) of the entire account balance. As a result, any IRA owner interested in allocating any portion of their IRA assets into life settlements should consult a tax advisor, and possibly seek a ruling from the IRS as to its permissibility, prior to making any such investment. ❑

1 http://www.kfi.ky.gov/NR/rdonlyres/EAA9C45B-8F8F-4201-9102-E6AD9252541E/0/Form410AJuly2011versionLifeSettlementDisclosureA.doc; http://www.securities.arkansas.gov/!userfiles/Life%20Settlement%20Disclosure%20Document%20I.pdf; http://dfcs.oregon.gov/faqs/faq_pages/viatical.html

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CREDIT LIFE INSURER DENIED ARBITRATION BASED UPON ARBITRATION PROVISION IN A LOAN AGREEMENT

By Brian J. Levy

A federal appellate court recently held, under Georgia law, that a credit life insurer could not compel arbitration based upon an arbitration provision in a loan agreement to which it was not a party. The majority opinion in *Lawson v. Life of the South Ins. Co.,* 648 F.3d 1166 (11th Cir. 2011), held the facts did not support the insurer's attempt to compel arbitration under the loan agreement as a third-party beneficiary or based upon equitable estoppel. Of particular note is the concurring opinion by Judge Pryor which endorsed *dicta* from the Georgia Supreme Court's opinion in *Love v. Money Tree, Inc.,* 614 S.E.2d 47 (Ga. 2004), over an express reading of O.C.G.A. § 9-9-2(c)(3), to declare all "insurance disputes" off limits for arbitration.

The Lawsons financed the purchase of a vehicle through a loan from the dealership. The loan agreement between the Lawsons and the dealership ("Loan Agreement") contained an arbitration provision which stated, in part, "[i]f any Dispute arises, either you or we may choose to have the Dispute resolved by binding arbitration."

The Loan Agreement gave the Lawsons the option to purchase credit life insurance through a one-time, up-front payment included in the total amount financed under the Loan Agreement. The Lawsons checked a box on the Loan Agreement to purchase the optional credit life insurance and obtained a separate credit life insurance policy with Life of the South Insurance Company ("Policy"). The Policy did not contain an arbitration provision.

The Policy stated that if the Lawsons paid off the loan early, they would be eligible for a refund of any remaining unearned premium paid for the credit life insurance. The Lawsons paid off the loan two-and-a-half years early, but Life of the South failed to refund the unearned amount of the premium paid by the Lawsons.

As a result of Life of the South's failure to pay the Lawsons the unearned premium, the Lawsons filed a nationwide class action against Life of the South, seeking contract and tort damages and injunctive relief. In response, Life of the South moved to compel arbitration based upon the arbitration provision in the Loan Agreement. The U.S. District Court for the Middle District of Georgia denied Life of the South's motion to compel arbitration on the ground that Georgia law prohibits arbitration of "insurance disputes." *Lawson v. Life of the South Ins. Co.,* 2010 WL 1416551, at *4-6 (M.D. Ga. Mar. 31, 2010) (citing O.C.G.A. § 9-9-2(c)(3)).

The U.S. Court of Appeals for the Eleventh Circuit affirmed the order denying arbitration but for a different reason than the district court. The majority opinion concluded that Life of the South, as a non-signatory to the Loan Agreement, could not enforce the arbitration provision under any of the exceptions to the "rule of contract law . . . that one who is not a party to an agreement cannot enforce its terms against one who is a party." In a concurring opinion, Judge Pryor expressed his "doubt" over

the majority's conclusion and stated he would deny arbitration based upon the same ground as the district court. The majority opinion can be reconciled with the facts of the case, but Judge Pryor's concurring opinion, and the reasoning of the district court, is flawed.

The Eleventh Circuit held that Life of the South was not a third-party beneficiary of the arbitration provision, which expressly limited the right to enforce it to "you" (the Lawsons) and "we" (the car dealership and assignees of its rights under the Loan Agreement). The court remarked, "Life of the South is neither a 'you' or a 'we.' Instead, in pronoun terms, Life of the South is an unmentioned 'it,' and the face of the arbitration clause does not show an intent to give 'it' the right to compel arbitration."

Life of the South argued in the alternative that equitable estoppel permitted it to enforce the arbitration provision in the Loan Agreement because the "Lawsons' claims arising from their credit life insurance policy agreement with it 'make reference to' and 'presume the existence of' the loan agreement containing the arbitration clause." The court recognized the Lawsons' complaint referred to the Loan Agreement several times and their claims depended on the existence of the Loan Agreement "because without it, and the Lawsons' obligation under it to pay off the loan, there would be no credit life insurance policy with Life of the South and no premium refund due because the loan was paid off early."

The Eleventh Circuit held that Life of the South's equitable estoppel argument was "not a bad argument, but . . . not a good enough one to prevail" because the Loan Agreement was "not the legal basis for the Lawsons' claims against Life of the South." Rather, the Lawsons' claims were based upon the provision in the Policy that required Life of the South to refund the unearned premium amount. As the court concluded, "the fact that the Lawsons' complaint makes reference to and presumes the existence of the loan agreement does not mean that the Lawsons' loan agreement with the dealership, or their obligations under that agreement, are the legal basis for their claims." Accordingly, the court held Life of the South could not enforce the arbitration provision in the Loan Agreement based upon equitable estoppel.

The majority opinion is in accord with the precedent on which it relies. In each of the cases cited by the majority, the legal basis for the plaintiffs' claims were the documents containing the arbitration provision. For instance, in *AutoNation Fin. Svcs. Corp. v. Arain*, 592 S.E.2d 96, 101 (Ga. App. 2003) (physical precedent only), a car buyer and the dealership entered into an installment contract containing an arbitration clause, through which the buyer financed a theft protection program with defendant AutoNation. Subsequently, the car buyer sued the dealership and AutoNation seeking to recover the finance charges paid under the installment contract for the theft protection program. The court granted the defendants' motion to compel arbitration based upon the arbitration provision in the installment contract because the "legal basis" for the buyer's claims was the installment agreement. In contrast, the "legal basis" for the Lawsons' claims were their rights under the Policy.

In his concurring opinion, Judge Pryor stated he would have denied arbitration based on the reasoning of the district court, which was that Georgia law precludes the arbitration of "disputes involving insurance." Georgia Code § 9-9-2(c)(3) states that an arbitration provision in "any contract of insurance" is unenforceable. In *Love*, 614 S.E.2d at 49-50, the Supreme Court of Georgia held that § 9-9-2(c)(3) was not preempted by the Federal Arbitration Act due to the McCarran-Ferguson Act. Although § 9-9-2(c)(3) precludes arbitration of "any contract of insurance," not "disputes involving insurance," the Court stated the McCarran-Ferguson Act "precludes the FAA from requiring the arbitration of disputes involving insurance."

Love, like *Lawson*, involved an insurer seeking to compel arbitration based upon an arbitration provision in a loan agreement executed as part of a transaction involving a separate insurance policy. But the decision in *Love* did not examine whether the arbitration provision in the loan agreement constituted an arbitration provision in a "contract of insurance." Instead, without any explanation, the Court ignored the express language of § 9-9-2(c)(3) and stated "disputes involving insurance" are not subject to arbitration. Thus, the statement that Georgia law precludes "arbitration of disputes involving insurance" is *dicta*. Judge Pryor and the district court improperly endorsed the *dicta* of *Love* over the express language of § 9-9-2(c)(3). ❑

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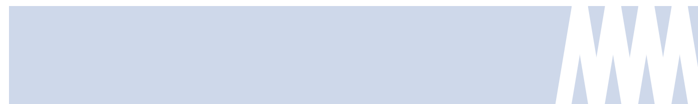

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