JOURNAL OF
ASSET PROTECTION

September/October 1996 Volume 2, Number 1

Managing Attorney and Trustee Liability for Life Insurance Contracts
Patrick J. Collins and Kristor J. Lawson

RIA GROUP

Managing Attorney and Trustee Liability for Life Insurance Contracts

Patrick J. Collins and Kristor J. Lawson

With life insurance as an integral part of many asset protection plans, counsel must be careful to provide accurate guidance on insurance contracts in order to avoid attorney liability.

Asset protection strategies often use life insurance to fund estate tax obligations. Larger, illiquid estates find that life insurance protects beneficiaries from the risk of forced sale of assets upon the death of the insured. Premium payments, because life insurance entitles beneficiaries to large sums at the insured's death, can be substantial. Parties in interest to the insurance contract thus have significant financial incentives to question, retroactively, the rationale behind decisions about selection of carriers, types of policies, and the amount of insurance purchased.

From the attorney's point of view, advising clients on life insurance issues in the course of asset protection planning may be complicated by a number of considerations:

- The attorney's primary duty of loyalty to the client;
- Potential conflicts of interest between the attorney, the insurance agent, and the client;
- The attorney's competence to act as a professional advisor for insurance contracts;
- Client expectations that the attorney will perform a due diligence review of the insurance product, and will monitor the transaction to assure that the client's interests are protected;
- Issues relating to malpractice insurance coverage.

Additionally, an attorney may either explicitly endorse or tacitly approve an agent's recommendations, or even provide personal guidance on the selection of the insurance carrier and policy. If such counsel arises out of the performance of "professional services for others in the...capacity as a lawyer,"[1] the attorney may be liable for future carrier insolvency or contract underperformance.

As noted at the 1994 annual meeting of the American Bar Association:

> if an attorney renders advice about the selection of an insurance product and the product does not live up to the client's expectations, the client may elect to sue the attorney for any damages incurred...The claimed damages may be with respect to the carrier becoming insolvent after the policy purchase, payment of additional premiums beyond a "promised" maximum time period, or loss of more favorable contract terms available under the non-selected policy, inter alia.[2]

Patrick J. Collins Ph.D., CLU, PFP, and Kristor J. Lawson, CFP, are partners at Schultz Collins Lawson Young & Chambers, Inc. an independent investment counseling firm in San Francisco.

"The problem is greatly exacerbated when other members of the planning team derive their income from commissions."

How Liability May Develop

Depending on the nature of the estate planning engagement, there are a variety of ways in which liability may emerge.

Direct Client Inquiries. Clients may explicitly ask for the attorney's assistance with insurance decisions. In such cases, the attorney may be asked to provide:

- An opinion on the amount of coverage required;
- An evaluation of the merits of a proposed insurance product;
- A judgment regarding the current and projected financial strength of the carrier; or
- An assessment of proposed policy designs.

Implicitly Assumed Suitability Review. Liability for insurance-related problems may arise during estate planning, trust design and administration, or document preparation. Advising a client regarding appropriate beneficiary designations, the tax consequences of premium financing arrangements, or ownership elections, may implicitly impose on the attorney a duty to become familiar with the client's existing or proposed insurance contracts and to make assumptions regarding future contract performance. Because insurance is often integral to estate plans, the client may reasonably assume that the scope of the attorney's legal duties encompasses a judgment—either explicit or implied—regarding the merits of the agent's insurance planning recommendations.[3] Because such recommendations often involve abstruse legal issues (for example, Section 1035 exchanges often constitute sources of premium dollars for newly issued policies), the client may expect that his or her interests will be protected because an attorney is involved in the planning process.

Implicit Provider Endorsement. Liability may also emerge through a relationship with other members of the planning team. Over time, team members may have helped each other build their respective careers through client referrals. Eventually, the list of joint clients may be extensive. If such referral arrangements are not initially disclosed to the client, and later come to light when problems with the carrier or policy arise, clients may question whether their interests were the attorney's primary consideration.

This problem is greatly exacerbated when other members of the planning team derive their income from commissions. Sale of high commission policies, when lower commission products are available from the same company, or placement of policies with the agent's primary company (particularly when such policies carry substantial premium surcharges because of adverse health history or avocational difficulties) may result in thousands of dollars of unnecessary premiums.[4]

Rescue of In-Force Policies. Attorneys may receive inquiries from clients who purchased life insurance some years ago, and whose policies are now in danger of lapsing due to chronic underperformance. In a typical case, the client has received notice from the carrier that a large (and unanticipated) premium is necessary to maintain an existing policy in force. In an attempt to ameliorate this situation and pacify the client, the carrier may make a settlement offer, or an agent may recommend policy revisions. In such cases, clients often turn to the attorney for advice regarding the merits of these offers. Indeed, attorneys are sometimes asked to conduct rescue negotiations with the carriers involved.

Does Legal Malpractice Insurance Cover Insurance Contracts?

Malpractice coverage for advice on insurance is a key issue facing the legal community. Most malpractice policies only cover claims arising from the practice of law, in contrast to advisory services based on general knowledge. There are numerous cases of litigation arising from *investment* advice given to clients by attorneys. As liability law evolves, it is reasonable to anticipate similar developments regarding insurance advice. The trade press is already discussing liability for improper evaluation of policy sales illustrations. Two questions of immediate importance are:

- Given that insurance contracts can affect extremely large sums, is it not reasonable to seek such protection for your advisory services as is available through your malpractice insurance policy?
- If such protection is sought, what is the best way to achieve it?

If an attorney is asked for advice relating to an insurance contract in his capacity as an attorney, how can the quality of advice be documented? How does the attorney demonstrate the integrity of the decision making process? If he is asked an extra-legal insurance question, should he attempt to respond, even though malpractice coverage may not exist?

Insurance as a Trust Asset: The Uniform Prudent Investor Act

Exhibit 1 lists the states that have recently adopted the Uniform Prudent Investor Act (UPIA), which mandates that all trustees employ procedurally prudent standards for any trust investment decision. Trustees are now subject to general standards of prudent investment which not only require "the exercise of reasonable care, skill, and caution," but require:

- Conformity to fundamental fiduciary duties of loyalty and impartiality;
- Prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and
- Incursion of only those costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship.[5]

EXHIBIT 1
Jurisdictions Adopting the Uniform Prudent Investor Act (UPIA)

Jurisdiction	Statutory Citation
California	West's Ann. Cal. Probate Code, §§ 16045–16054
Colorado	West's CRSA §§ 15-1.1-101–15-1.1-115
Florida	West's FSA §§ 518.11–518.112
Illinois	SHA 760 ILCS 5/5. 5/5.1.
New Mexico	NMSA 1978, §§ 45-7-601–45-7-612
New York	McKinney's EPTL 11-2.3.
Oklahoma	60 Okla. St. Ann. §§ 175.60–175.72
Utah	UCA 1953, 75-7-302
Virginia	Code 1950, § 26-45.1
Washington	West's RCWA 11.100.010 et. seq.

Numerous recent articles advance the position that life insurance in a trust requires the same level of due diligence, both at the time of purchase and periodically thereafter, as any other investment.[6] For law firms either acting directly as trustee or providing counsel to clients serving as trustees, the new prudent investor law mandates higher standards of prudence in product acquisition, performance monitoring, and client disclosure.

Depending on an insurance salesperson for assurance that a policy is (or remains) prudent and suitable for the client affords little or no relief for the legal practitioner:

"Improved oversight of in-force insurance may uncover unsuspected problems soon enough that corrective action can be taken before a lawsuit threatens."

> The state of the law is such that in most jurisdictions, most producers are not held to a professional standard of care because the marketing of life insurance is not deemed to be a profession....absent a special relationship between the insured and the producer, there are many actions which are not duties. Examples of these are:
>
> 1. There is no duty to advise an insured as to the adequacy or suitability of his insurance.
> 2. There is no duty to advise a client on the provisions of policies previously purchased from another insurer.
> 3. There is no duty to investigate the solvency of an insurer that is authorized or licensed to do business in the applicable jurisdiction.
> 4. After a sale, there is no duty to monitor the continuing solvency of the issuing carrier.
> 5. Once a policy has been issued, there is no continuing duty to determine that the coverage remains appropriate.[7]

Passage of the UPIA offers legal practitioners and trustees a window of opportunity to implement and document reasonable oversight procedures. Such measures may mitigate their liability exposure for problems in portfolios of in-force contracts. At a minimum, improved oversight of in-force insurance may well uncover unsuspected problems soon enough that corrective action can be taken before a lawsuit threatens.

Care should be taken, however, that implementation of such measures does not increase liability exposure, as would likely occur unless the trustees or their legal advisors were themselves insurance experts.

> If a trustee undertakes an investment program for which the trustee lacks the necessary skill and experience, the failure to delegate execution of such a program to a qualified expert may constitute a breach of trust.[8]

Managing Malpractice Liability: General Issues

For the reasons illustrated previously, it is essential to exercise care for every life insurance contract with which the law firm is involved. The attorney's efforts should address liability management on several levels in order to:

- Ensure an atmosphere of complete disclosure and openness so that both the attorney and his client can be satisfied that potential conflicts of interest have been successfully addressed. Such conflicts of interest arise because of the inherent bias created by the commission-based system of insurance distribution.
- Delineate clearly the firm's role with respect to the insurance contract. It is important to outline the exact nature and scope of your professional services, eliminating the possibility that the client will bring unrealistic expectations into your discussions.
- Document the attorney's efforts to control the quality and consistency of information received by both you and your client. This is especially true in situations where a law firm recommends a short list of insurance agents, or where the client defers judgment to the attorney in the expectation that his comments on the insurance programs that are under consideration carry the weight of expert advice.
- Clarify the level of oversight of the insurance-related discussions. Although supervision of the insurance agent may be beyond the practical capacity of an attorney, a passive abdication to the recommendations of the agent is not prudent;
- Demonstrate that the attorney has alerted the client to the importance of taking all reasonable steps to ensure that the final cost of the life insurance program is determined by technically proficient underwriting in the areas of medical, financial, and avocational risk evaluation. Underwriting mistakes can cost a client thousands of

dollars of extra premiums, or, worse, can inadvertently destroy the ability to obtain insurance coverage at any price.

Managing Liability: A Review of Methods

Disclaimer Statements and Exculpatory Trust Document Language. Attorneys often try to mitigate liability through the use of written disclaimer letters to clients. Customarily, such disclaimers provide clients with information regarding:

- Potential conflicts of interest;
- Dependence of the final outcome for certain issues on input from other advisors; and, most important,
- Limitations in the scope of services performed, or constraints on the applicability of advice rendered by legal counsel.

Likewise, attorneys may try to limit liability (especially if they also serve as trustees) by drafting the trust document in such a way that the trustee is exonerated from liabilities arising from carrier selection or contract performance evaluation. One purpose of such drafting techniques is, presumably, to facilitate a directed trustee defense in the event of future litigation.

The regulatory environment following adoption of the UPIA calls such methods into question. At least three issues must be considered:

- The Third Restatement makes clear the existence of *nondelegable* duties for which the trustee may be held personally liable in the event of a breach of trust. The commentary to the restatement uses the term "principles of prudence" and specifies that:

  > risk and return are so directly related that trustees have a duty to analyze and make conscious decisions concerning the levels of risk appropriate to the purposes, distribution requirements, and other circumstances of the trusts they administer; [and] the trustee's duties apply not only in making investments but also in monitoring and reviewing investments, which is to be done in a manner that is reasonable and appropriate.[9]

- It is difficult to see how exculpatory trust language can be drafted in such a way that the trustee can disclaim basic fiduciary responsibilities. This is especially the case for insurance arrangements which require the trustee to make periodic premium payments. Each such payment represents an implicit determination by the trustee that the payment is prudent and suitable, and that it will enhance the income producing ability of the trust property.
- Extensive use of disclaimers and exculpatory language may provide an opportunity for the Internal Revenue Service to argue for inclusion of death benefits in the estate of the grantor. To the extent that there is written confirmation that trust assets were selected by the grantor, monitored and supervised by the grantor, or modified by the grantor, the excludibility of the trust corpus from the taxable estate becomes less certain. The disclaimer and directed trustee defenses, if successful, may provide the raw material for litigation contending that estate planning failed ab initio to draft viable estate bypass trusts.[10]

Delegating Management Responsibilities to Beneficiaries. Some legal advisors and trustees have tried to escape liability by convening a committee of trust beneficiaries or other family members, who are specifically responsible for making all insurance decisions for the trust. The difficulty with this strategy lies in the imprudence of delegating investment responsibilities to those unqualified to meet them. The highly technical nature of insurance questions makes it unlikely that trust beneficiaries will possess even as much insurance expertise as

"Underwriting mistakes can inadvertently destroy the ability to obtain insurance coverage at any price."

"The difficulty with this strategy lies in the imprudence of delegating investment responsibilities to those unqualified to meet them."

the corporate trustee, who is at least a financial professional. Such delegation may constitute a breach of trust.[11]

Traditional Due Diligence. A substantial body of scholarly material focuses on the necessity for "due diligence" or "due care" when considering purchase of an insurance contract. The implicit, and perhaps unwarranted, assumption in much of the literature is that the client's interest is reasonably protected by the attorney who performs the due diligence research himself, or who scrutinizes the research provided by the insurance agent. The literature suggests that it is important to consider the independent rating of the carrier, the carrier's performance track record, and the extent to which the assumptions underlying the computer-generated illustration of the proposed contract are realistic.[12]

Even though this literature is helpful, much of it is not on point with respect to evaluation of trust-owned life insurance programs. There are two reasons. First, the standards of due diligence it proposes are similar to the generalized good faith standards that characterize judicial decisions rendered under former trust law. The standards and duties imposed under the newly restated Prudent Investor Rule, however,

> are supported by a large and growing body of literature that is in turn supported by empirical research, well documented and essentially compelling. Much but not all of this criticism is found in writings that have collectively and loosely come to be called modern portfolio theory.[13]

Ironically, most of the techniques now commonly in use for measuring the quantitative and qualitative risk posed by insurance instruments fall far short of the standards of asset risk measurement found in college-level investment texts.

Second, and particularly disturbing for trustees and their legal counsel, virtually all due diligence information is provided by product vendors or their agents, who have an obvious stake in shaping it.

For example, consider a 1991 article by a then-vice-president of a major mutual life insurance company.[14] Undoubtedly, the two main points of the article—that insurance policies should be compared according to quantitative measurement standards, and that the quality of the insurance carrier is important—are reasonable. However, it is instructive to consider the author's advice to those who are charged with finding prudent and suitable insurance programs:

> there are two tools available to estate planners that help put clients' choices into some kind of order. The first tool has been used for some time by estate planners and other analysts of survivorship life plans. It is commonly referred to as the "Death Benefit Internal Rate of Return" (IRR)...The IRR is valuable to the estate planner for two key reasons. First, it measures what's really important about a survivorship life policy: the ability of the plan to produce the required death benefit, and to do so at the lowest cost. Although survivorship plans do have cash values, these values are seldom a factor in a survivorship life purchase. The IRR sensibly ignores them.

Next, the author implies that the level of risk in a plan can be ascertained by looking at a company's dividend track record and past financial performance. According to the author, "This can be done by finding out the company's actual investment performance over time."

The trustee who follows this advice may find himself in an indefensible position. Five years before the article's publication, Appendix B of the Yield Index Advisory Committee Report to the National Association of Insurance Commissioners warned that among the performance measurements that are misleading to the consumer are:

- The death benefit internal rate of return; and

- The linkage between the performance risks of an individual product line and the carrier's rate of return on its general investment portfolio.[15]

Many owners of life insurance contracts (especially, perhaps, those who were sold "vanishing premium" scenarios) would not agree that internal rate of return to death benefit is a good measure of cost because it "sensibly" ignores policy cash values.

The trustee's position is defensible only when due diligence is based, not on information from the insurance industry, but rather on sound, objective evaluation criteria. Unfortunately, most due diligence efforts are woefully inadequate in this respect.

Beyond Due Diligence: Price, Policy Performance, and Carrier Solvency

Trustee or legal counsel liability does not end with documenting the procedural prudence of policy selection. It also emerges in underwriting, delivery, and future monitoring (or lack thereof).

Underwriting Considerations. Only an underwriter can determine the final availability and pricing of insurance coverage. Thus, a critical element in obtaining fair value for the client lies in control of the underwriting process. When an insurance company receives an application (including medical history), the underwriting department determines the amount of risk to be retained by the company. The balance of the risk is ceded to a reinsurance firm, which often spreads the risk among a number of other companies in a reinsurance syndicate ("retrocession of risk"). The reinsurer pays a commission to the retail insurer for the right to a share of the stream of premiums. Reinsurance treaties allow individual insurance companies to capitalize their accounts receivable, thus obtaining surplus relief, and to spread risk among larger syndicate organizations.

Among the major international reinsurance syndicates that provide the risk sharing mechanisms necessary for market stability, specific underwriting criteria are unique to each reinsurance group. One group may provide a favorable set of acceptance guidelines for applicants with high blood pressure; another may have developed long-term expertise in underwriting diabetic clients; a third may diversify its risk by accepting large numbers of heart bypass applications.

The underwriting process for larger cases thus operates on two levels. The case is subject to both the in-house standards of the retail insurance carrier with whom the agent works, and those of the reinsurance group who will eventually assume a portion of the risk. Indeed, the underwriting process can become quite complex in large cases if two or three reinsurance syndicates are asked to divide the risk among themselves.

Locking in Reinsurance. For an insurance company to assure that its underwriting efforts succeed, one of the very first tasks must be to secure the reinsurance necessary to issue the case. After a preliminary review of the applicant's medical history, the retail insurer presents the case to the reinsurance syndicate deemed most likely to give the application a favorable response. Once a reinsurance company receives the application from the retail carrier whom the agent represents, by treaty it cannot enter into negotiations with respect to the case with any other carriers.

Perhaps without realizing it, the insurance agent has just locked in, at the retail carrier, the most favorable reinsurance syndicate for his client, with the result that the ultimate premium is calculated solely by that retail carrier. The locked-in resinsurance syndicate will be prevented by treaty from bidding on the same client's application submitted by any other retail carrier. Any possibility that the client could bring his application to an open market in which many retail companies could bid for the business is irretrievably lost.

"A critical element in obtaining fair value for the client lies in control of the underwriting process."

"Unnoticed underperformance of contracts constitutes a primary source of liability for trustees and their professional advisors."

How Locking in Harms the Client. At this point things can quickly turn sour. When the agent searches out the best retail deal, or gives his primary company first crack at the case, the client's application may be placed with the most favorable reinsurance group (the good news), but must then pass muster with the retail underwriting department. If the retail company must, by treaty, retain a portion of the risk, they may approve the case only on a rated basis—or not at all. Receiving this bad news from his primary company, the agent often tries to rescue the case by submitting applications to other retail carriers with a reputation for more liberal underwriting in the area of difficulty.

Unfortunately, these carriers will find that the first retail company has locked in the most favorable reinsurance syndicate. They will be forced to shop the case among less-favorable reinsurance syndicates. Each rescue attempt closes off more of the reinsurance market. Hours of time are lost, planning solutions dependent on the availability of reasonably priced insurance are no longer viable, and frustration for all parties increases dramatically.

Avoiding the Reinsurance Trap. Often, clients are forced to accept insurance programs on a standard rather than preferred premium basis, or on a rated rather than standard basis (not to mention declined rather than rated), simply because their agent managed the underwriting process so as to foreclose effective negotiation for the client's interests. Although there is no absolute rule that requires an attorney to secure the most advantageous financial result for a client, the general duty of loyalty to a client, coupled with the attorney's obligation to exercise due diligence, suggest that you should recommend that your client carefully scrutinize reinsurance issues and their potential effect on pricing.

Monitoring and Surveillance of Existing Insurance Contracts. Testimony before the U.S. Senate indicates that less than 10% of the life insurance policies sold in the 1980s will perform as illustrated. Computer-generated sales projections based on current levels of mortality and investment results are not promises, and are never guaranteed. Declining profit margins for insurance companies are causing many carriers to raise the internal expense charges on their contracts to preserve their capital and surplus positions.

Although such changes go unnoticed by the average policyholder, they can severely erode contract values. Unnoticed underperformance of contracts constitutes a primary source of liability for trustees and their professional advisors.

Monitoring and Surveillance of Insurance Company Solvency. An important part of ongoing liability management is a review of financial developments that may affect an insurance company's solvency or its ability to deliver future values to contract holders. For the first time, on April 11, 1991, a major U.S. insurance company was declared insolvent and seized by regulators. Following the debacle at Executive Life, several other prominent companies failed.

The public usually becomes aware of these dramatic failures through headlines. The failed companies often enjoyed top ratings at the time their policyholders purchased coverage. Thus, the recent history of the insurance industry clearly demonstrates that the financial condition of an insurer must be periodically reviewed in order to determine whether a policy remains prudent and suitable.

The Charter of Insurance Procedure: A Liability Management Tool

The Charter of Insurance Procedure is a written document, developed in consultation with the client, that acts as a guide to prudence in the selection and funding of insurance contracts. It is similar to the

Investment Policy Statements employed by knowledgeable investors to establish clear, objective, written criteria for making investment decisions, systems for monitoring investment results, and procedures for replacement of underperforming securities or managers. The Charter is not intended to guarantee future results; rather, it codifies and evidences the care, skill, and caution brought to bear on a client's insurance contracts.

The Charter of Insurance Procedure sets standards and procedures for members of the estate or business planning team. It consists of three parts: a Chart of Mandates, a Statement of Policy and Objectives, and a Procedural Guide.

The Chart of Mandates. The Chart of Mandates specifies the members of the planning team and defines relationships among the client and team members. Effective implementation of planning objectives requires clear understanding of the roles of the client, the advisors, and any agents who may be charged with policy implementation and future performance review. The Chart of Mandates clarifies the expectations and responsibilities of each member of the planning team. Thus, it may help the attorney work with any agents assisting with the process. Most important, it helps the client understand the attorney's role in the insurance discussions, and the issues that counsel *will* and *will not* address in its professional capacity.

The Statement of Policy and Objectives. The Statement of Policy and Objectives lays out the various purposes for which insurance is owned, and establishes the economic and legal rationale for the general principles of investment and risk management the Charter will use to build and maintain the insurance portfolio. For example, the client may elect to spread coverage among various carriers, so as to reduce exposure to company risk by diversification. On the other hand, underwriting concerns might outweigh considerations of carrier financial condition. The Statement of Policy and Objectives would recognize such trade-offs explicitly.

The Statement of Policy and Objectives serves at least two important purposes:

1. It provides a context for planning decisions that can be periodically revisited, both to account for changes in the client's situation or the insurance marketplace, and to remind the client of his original purposes and thinking, so as to stay on track.
2. It can control client expectations in the most effective possible way, by making clear the limitations on the foresight of all team members. Prudence is only useful when the future is uncertain. By setting forth the standards of prudence to which all team members, and the client, will adhere, the Statement of Policy and Objectives explicitly disclaims any responsibility for accurately predicting the future performance of a policy or insurer.

The Procedural Guide. The Procedural Guide outlines a methodology for maintaining a prudent and effective insurance program. It documents criteria for the selection of specific carriers, establishes guidelines for case underwriting, and provides a procedure for periodically determining suitability of carriers and policies. It sets forth standards of client disclosure for advisors, insurers, and agents, and specifies the amount and kind of information that will be gathered in support of a periodic review of in-force contracts. Finally, it specifies a process that, in the event that circumstances change or policies become unsuitable, should effect the necessary adjustments at minimum expense.

Documenting Client Preferences and the Integrity of Decisions. The Charter of Insurance Procedure sets forth specific procedures for documenting the objectivity and prudence of an insurance-related

"The Chart of Mandates clarifies the expectations and responsibilities of each member of the planning team."

"The purpose of the Charter is not to guarantee that a client receives the best deal in the marketplace."

decision. The procedures embody client and advisor preferences in the areas of:

- Disclosing possible conflicts of interest arising from the insurance agent's compensation structure;
- Presenting information regarding the insurance company's financial strength and claims payment abilities;
- Using objective criteria for selecting insurance carriers;
- Assessing the risk/reward characteristics of suggested policies;
- Ensuring that appropriate avocational, financial, and medical underwriting is available to provide for open market bidding; and
- Monitoring each insurer's financial condition and each policy's economic performance.

How the Charter of Insurance Procedure Can Help Mitigate Liability

General Applicability to Insurance Contracts. The Charter of Insurance Procedure reflects the belief that, for *every* insurance contract, regardless of whether it is part of a business planning, employee compensation program, or estate trust, the client should demand and receive advice that conforms definitively to the Prudent Investor Rules. By documenting methods and rationale for insurance decisions (including decisions *not* to purchase insurance), the statement ensures that any future challenge to the attorney's prudence will be based on matters of fact rather than opinion.

Adherence to the standards required under the Prudent Investor regulations offers valuable protection to all parties in the event of future carrier insolvencies, contract underperformance, unanticipated premium increases, and so forth.

> The trustee's duties apply not only in making investments but also in monitoring and reviewing investments, which is to be done in a manner that is reasonable and appropriate....The trustee's compliance with these fiduciary standards is to be judged as of the time the investment decision in question was made, not with the benefit of hindsight or by taking account of developments that occurred after the time of a decision to make, retain, or sell an investment. The question of whether a breach of trust has occurred turns on the prudence of the trustee's conduct, not on the eventual results of investment decisions.[16]

The Charter of Insurance Procedure Does Not Guarantee Results. The purpose of the Charter is not to guarantee that a client receives the best deal in the marketplace. Indeed, neither the attorney nor any insurance agent can ever guarantee such a result. Rather, it is meant to provide a framework of procedural prudence that documents a reasonable level of care and diligence in obtaining coverage, and a commitment to deliver meaningful future policy performance monitoring information to the client. As such, it is a cornerstone document in the implementation of asset conservation programs and can be critical in liability management for both attorneys and trustees.

Excellence: The Other Benefit of the Charter of Insurance Procedure. Irrespective of malpractice claims protection, clients can only benefit from an understanding of how much the viability of their insurance programs depend on:

- Competent, unbiased insurance analysis for determining coverage amounts, selecting appropriate policy forms from stable carriers, and adopting prudent policy designs;

- A high level of medical, avocational, and financial underwriting expertise; and
- Regular, periodic monitoring of in-force contracts.

Because it spells out an inherently prudent procedure for acquiring and monitoring insurance, the Charter should help clients improve their insurance portfolios. Because commissioned sales agents cannot espouse to the standards of objectivity that characterize the legal or accounting professions, the best alternative is to conduct insurance transactions in accordance with written guidelines for compensation disclosure, for financial evaluation and for application, underwriting, and monitoring activities. ■

---

[1]B.A. Christensen, JD, CLU. "Lawyer Liability for Life Insurance Policy Selection," Real Property, Probate and Trust Law Section, American Bar Association Annual Meeting (Aug. 1994), p. 1.

[2]Id.

[3]P. Collins and R. Curran, "Ethical Considerations And Malpractice Claims: How An Attorney Can Effectively Supervise A Life Insurance Transaction," Trusts & Estates (Nov. 1995), pp. 39–53.

[4]When insurance policies constitute all or a portion of a trust estate, the trust fiduciaries will have to pay special attention to transaction costs. See, for example, E. Halbach, "Redefining The 'Prudent Investor Rule' For Trustees," Trusts & Estates, (December, 1990): "What is important is that all trustees—professionals as well as individual trustees—realize the need to pay attention to costs." pp. 17–18.

[5]Restatement of the Law Third: Trusts (Prudent Investor Rule). The American Law Institute, St. Paul, Minn. (1992), p. 8. See also Uniform Prudent Investor Act, National Conference of Commissioners on Uniform State Laws (Chicago, 1994).

[6]See, for example, C.M. Whitelaw and D.M. Culver, "Managing Trust-Owned Life Insurance Policies," Trusts & Estates (Apr. 1993): "Life Insurance in a trust is a fiduciary investment," p. 46; D.V. Maurer, "Irrevocable Life Insurance Trusts: Good Business for Banks?," Trusts & Estates (May 1992), pp. 24–32. See also R. Weber, "Is Life Insurance an Investment? Let's Try Another Word," American Society of CLU and ChFC, Society Page (Aug. 1995): "today's life insurance policies are assets that need to be managed and monitored," p. 14.

[7]B.A. Christensen, "There is no such thing as a due diligence requirement imposed on insurance agents," Trusts & Estates (Oct. 1990), pp. 57–58.

[8]Restatement of the Law Third: Trusts (Prudent Investor Rule). op. cit., § 171, Comment A.

[9]Restatement Of The Law Third: Trusts (Prudent Investor Rule). op. cit., Chapter 7, ¶¶ 5 & 10.

[10]See also D. Maurer, op. cit., p. 28; D. Trone and W. Allbright, "The Procedurally Prudent Investment Process," J. of Asset Prot. (Mar./Apr. 1996), pp. 53–54: "The 'after the transfer' asset management process can be easily overlooked or at least minimized, because so much time may have been devoted to the structure decision or the administrative requirements necessary to operate the entity on an annual basis....This lack of strategic planning can result in the piercing of the veil of the entity or voiding the transfer if it is shown that the entrusted assets are not prudently managed."

[11]Restatement of the Law Third: Trusts (Prudent Investor Rule). op. cit., § 171, Comment A.

[12]See, for example, R. Puelz, "A Process for Selecting a Life Insurance Contract," J. of Risk & Ins. (Mar. 1991), pp. 138–146; J. Rubin, "How to Recommend a Policy to a Client," Trusts & Estates (May 1990), pp. 49–53; A.H. Hill, "Insurance From The Estate Planners' Perspective," Trusts & Estates (June 1990), pp. 73–77; S.B. Parrish and D.R. Stephens, "With All Due Care," Best's Rev. (June 1992), pp. 59–117. Chapter Seven of The Insurance Counselor: Life Insurance Due Care, op. cit., is a particularly good example of customary methods used to compare life insurance policy illustrations.

[13]Restatement Of The Law Third: Trusts (Prudent Investor Rule). op. cit., Chapter 7, p. 4.

[14]Brogan, James, "Evaluating A Survivorship Life Insurance Plan For Clients," Trusts & Estates (Jan. 1991), pp. 35–38.

[15]Report of the Yield Index Advisory Committee, NAIC Proceedings (1986) Vol I., pp. 647–648.

[16]Op. cit., Restatement of the Law Trusts., pp. 10–11.