

'Secret' life insurance triggers suits

Tresa Baldas / Staff reporter

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They're known as "dead peasant" policies — secret life insurance policies taken out on unwitting employees — and they've ignited a forest fire of litigation that won't die down.

Since emerging several years ago, dead-peasant policies have landed numerous employers in court, accused of profiting off the deaths of rank-and-file employees. More recently, the insurance industry and banks have been dragged into the legal morass, both accused of illegally benefiting off these policies, formally known as corporate-owned life insurance policies (COLI).

In Oklahoma, a federal judge recently ruled that employees have legal grounds to sue an insurance company for selling and maintaining secret life insurance policies on their lives. The plaintiffs claim that the insurance company unlawfully misused their names, Social Security numbers and other personal information to market and sell their product.

Havenstrite v. Hartford Life Ins. Co., No. 4:2008cv00410 (N.D. Okla.).

Insurance companies are also facing lawsuits by their own clients — disappointed buyers, such as Wal-Mart Stores Inc., which is suing AIG Life Insurance Co. and Hartford Life Insurance Co. over COLI policies gone bad. Claiming losses of more than \$150 million, Wal-Mart claims the defendants failed to warn the company of the inherent dangers of buying COLI policies. *Wal-Mart v. AIG Life Insurance*, No. 579 (Del.). Officials at AIG and Hartford Life were unavailable for comment. Barry Chasnoff of Akin Gump Strauss Hauer & Feld, who is representing Hartford Life, declined comment, citing company policy.

Next on the list: banks

Banks, meanwhile, are next on the list of dead-peasant lawsuit targets. Two law firms in Texas say they are on the brink of announcing lawsuits against major players in the banking industry accused of taking out life insurance policies on low-level employees, such as tellers, without consent or, in some cases, informed consent. The firms claim that nearly half of all U.S. banks have reported owning bank-owned life insurance (BOLI) policies on employees, at an estimated value of \$120 billion.

"It appears that there are a substantial number of policies on employees that are still being written and purchased by the national banks. And the amount of insurance on each individual bank employee is staggering. We may be talking about seven figures," said Mike Myers, a partner at Houston's McClanahan Myers Espey, who is planning to file dead-peasant lawsuits against some major banks in the coming weeks. "I think the banks have become savvy enough for litigation purposes that they're going to have a sheet of paper to wave around that has the word consent on it, but whether it's an informed consent . . . I don't know."

Myers, who has settled dead-peasant class actions against Wal-Mart and Fina Oil and Chemical Co. in recent years, claimed that, while many banks are getting employee consent for life insurance policies, they're leaving out a crucial detail: how much money the policy is worth.

"That's the part that makes people say, 'Wait a minute. What are you talking about here?' " Myers said.

Many banks were contacted for this story, but nearly all declined comment, including JPMorgan Chase & Co., Washington Mutual Inc., Citigroup Inc. and Wachovia Corp. Another bank, Wells Fargo & Co., didn't return calls seeking comment.

Bank of America Corp. officials issued a statement acknowledging that the company uses BOLI policies and asserting that they are legal. "The bank does have this type of insurance in place. It is a legitimate business practice used by many companies. And, like many companies, Bank of America uses this insurance to help defray the cost of employee benefits," said Bank of America spokesperson Shirley Norton. She would elaborate no further.

Meanwhile, John Failla, a partner in the litigation group and insurance recovery practice at New York's Proskauer Rose, believes that COLI and BOLI policies are unfairly getting a bad name. He said these policies, when structured properly, can serve a legitimate business purpose, such as providing a company tax benefits that can be used to provide more employee benefits. "They're characterized in an overly morbid-type of manner and [a] disparaging type," Failla said. "But they can serve legitimate functions and should be considered on that level."

Failla, who advises business policy holders on insurance matters, noted that, despite all the litigation surrounding COLI policies, they're still wildly popular, accounting for more than 20% of life insurance policies written every year. "Look, COLI is a very, very active market," Failla said, "I think it's fair to say that they're writing billions of dollars a year of face amounts . . . I think the statistics I've seen suggest that, even now, a quarter or more of the largest companies have COLI programs."

Making progress

And the insurance companies selling these policies are getting it right, said Steven Davis, chairman of the insurance practice at Philadelphia's Stradley Ronon Stevens & Young, who represents life insurance companies in regulatory matters.

"The awareness of this and the negative publicity about it has resulted in changes in laws and changes in the way the insurance companies deal with their purchasers," Davis said.

Davis noted that, in 2006, Congress adopted new COLI best practices when it passed the Pension Protection Act, which requires that employers get the written consent of rank-and-file employees insured under a COLI policy and notify them of the maximum amount of the policy.

The legislation followed a series of suits that triggered widespread publicity and controversy. One Wal-Mart class action yielded a \$10.3 million settlement in 2004; another settled for \$5 million in 2006. *Lewis v. Wal-Mart Stores Inc.*, No. 02-CV-944-EA (N.D. Okla.); *Mayo v. Hartford Life Ins. Co.*, No. H01-2139 (S.D. Texas). A class action against Fina Oil settled for \$4 million in 2005. *Payne v. Fina Oil and Chem. Co.*, No. E 170245 (Jefferson Co., Texas, Dist. Ct.).

"Purchasers have become aware of plaintiffs' lawyers that are out there trying to make money on this, and therefore, I think most companies — both selling and purchasing these items — try to do it in a way that will avoid [suits]," Davis said. "Nobody wants to get sued for this stuff."

Maybe not, but the lawsuits are still rolling in. Suits against Wal-Mart in Florida and Louisiana allege that policies worth up to \$10 million and \$6 million, respectively, were taken out without employee consent. *Atkinson v. Wal-Mart*, No. 8:08-cv-691-T-30TMB (M.D. Fla.); *Wing v. Wal-Mart*, No. 2:2008cv00951 (W.D. La.). Wal-Mart did not return calls for comment, nor did the company's lawyers.

Meanwhile, plaintiffs' lawyer Scott Clearman of The Clearman Law Firm in Houston believes there are plenty more unwitting employees who have secret life insurance policies on them. Having handled numerous dead-peasant suits during the past decade, he is now investigating several banks for alleged BOLI abuses.

Clearman said he is preparing to file suits against some banks — which he would not name — within a month. Noting that it was only in 2006 that federal law required employers to get consent from employees, he said he believes there are plenty of old policies still floating around that no one knows about. "I have no problem with people who do it correctly," he said. "But those people who don't are many."