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IN THIS ISSUE

This article analyzes Sun Life Assurance Co. of Canada v. Imperial Premium Finance, a recent Eleventh Circuit opinion, and the important takeaways practitioners must consider both procedurally and substantively.

Sun Life Assurance Co. of Canada v. Imperial Premium Finance: Recent Developments Related to Financed Life Insurance Policies

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After dueling in separate federal district court lawsuits,[1] Sun Life Assurance Company of Canada ("Sun Life") and Imperial Premium Finance, LLC and its affiliates (collectively "Imperial") continued in separate appeals decided by the Eleventh Circuit on September 18, 2018.[2] The separate appeals arose out of stranger-oriented life insurance policies, also known as financed life insurance policies, issued by Sun Life to non-parties, which were later acquired by Imperial through the non-parties' assignment of the policies.[3] In short, the life insurance policies were issued to senior citizens, the non-parties, by Sun Life, but the policies were ultimately procured by Imperial through an affiliated company.[4] Imperial's ownership interest in the policies developed as follows:

> (i) a senior citizen applied for and received a life insurance policy from Sun Life, naming as the policy beneficiary an irrevocable life insurance trust established for the benefit of his or her spouse and/or children; (ii) the insured secured non-recourse financing for the payment of the monthly policy premiums from Imperial, with the policy serving as collateral; (iii) pursuant to the loan agreements, Imperial was permitted to foreclose on and acquire the policy if the borrower defaulted; and (iv) the borrower defaulted, leading Imperial to take ownership of the insured's policy.[5]

Once Sun Life learned of Imperial's procurement of the policies, it questioned the adequacy of Imperial's acquisitions and ownership interests under the policies and under the law, which led to the competing lawsuits subject to the separate appeals before the Eleventh Circuit.[6]

Procedural and Factual Background

Upon learning of Imperial's procurement of the policies, Sun Life sued Imperial in district court.[7] Sun Life's claims stemmed from two areas of concern. First, Sun Life alleged that Imperial's ownership of the policies violated state law restrictions on the wagering on human life, and Sun Life further alleged Imperial secured the policies through a fraudulent and conspiratorial scheme.[8] More specifically, Sun Life's complaint

[1] *See Sun Life Assurance Co. of Canada v. Imperial Holdings*, Case No. 13–80385–Civ–Brannon, 2017 WL 5448397 (S.D. Fla. Jan. 12, 2017) (Order Denying Motion to Alter or Amend Judgment); *Sun Life Assurance Co. of Canada v. Imperial Holdings*, Case No. 13–80385–Civ–Brannon, 2016 WL 10565034 (S.D. Fla. Sept. 22, 2016) (Order Granting Sun Life's Motion for Summary Judgment); *Sun Life Assurance Co. of Canada (U.S.) v. Imperial Holdings*, Case No. 13-80385-Civ-Brannon, 2014 WL 12452450 (S.D. Fla. June 26, 2014) (Order Granting Motion to Dismiss).

[2] *Sun Life Assurance Co. of Canada v. Imperial Premium Finance*, Nos. 17-10189, 17-10415, 2018 WL 4443054 (11th Cir. Sept. 18, 2018).

[3] *Sun Life Assurance Co.*, 2018 WL 4443054, at *1-2.

[4] *Id.* at *1.

[5] *Id.*

[6] *Id.* at *2.

[7] *Id.*

[8] *Id.*

alleged the following counts against Imperial: (i) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"); (ii) RICO conspiracy; (iii) fraud; (iv) aiding and abetting fraud; (v) civil conspiracy to commit fraud; (vi) tortious interference with contractual relations; and (vii) declaratory judgment that the policies were *void ab initio*.[9]

As it relates to an alleged fraudulent conspiracy on the part of Imperial, Sun Life claimed Imperial knew that Sun Life would not have issued any of the policies in question, due to profitability concerns, if it had known of the non-party applicants' pre-determined intent to use premium financing and intent to transfer ownership to Imperial—a company alleged to use the polices as investments.[10] Sun Life alleged that the scheme began with the use of a network of insurance adjusters who recruited senior citizens to originate policies to be funded by Imperial.[11] Once recruited, the producers allegedly helped the senior citizens obtain the necessary medical records and life expectancy reports, which the producers later provided to Imperial to determine if the senior citizen "was suitable for Imperial's purposes."[12] If suitable, Imperial then allegedly directed the producers to move forward with a formal application.[13] Of importance, Sun Life required the producers and the senior citizens to affirmatively answer whether premium financing would be used to fund the policies, to which the producers allegedly answered in the negative.[14] In addition, while Sun Life did pay a commission to the producers, they were required to turn their commission over to Imperial.[15] Imperial remitted anywhere between 10 and 50 percent back to the producers.[16] Sun Life further alleged that Imperial hid from Sun Life that it was making premium payments after the alleged procurement scheme was said and done and alleged that Imperial used the Bank of Utah to issue the payments directly to Sun Life in order to conceal Imperial's involvement.[17] Typically, the non-parties allegedly defaulted after two years, which allowed Imperial to foreclose on the loans, take ownership of the policies, and submit beneficiary change forms to Sun Life—finally advising Sun Life of its interest in the policies.[18]

Imperial denied all of Sun Life's allegations and through its subsidiary, initiated a lawsuit

[9] *Id.* at *3.
[10] *Id.* at *2 ("The premise of Imperial's alleged scheme rested upon the difference between policies likely to be in effect over a long period (profitable to Sun Life but not to Imperial) and policies that would likely be paid out in the short term (less profitable to Sun Life but more profitable to Imperial). Under the scheme, if Imperial were the owner or beneficiary of multiple policies it could decide which ones were more likely to result in an early payout and stop paying premiums on the rest.").
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Sun Life Assurance Co.*, 2018 WL 4443054, at *2.
[15] *Id.*
[16] *Id.*
[17] *Id.* at *3.
[18] *Id.*

alleging that Sun Life's lawsuit breached the incontestability clauses[19] and rights-and-privileges clauses[20] in the policies and further alleged Sun Life perpetrated a fraudulent scheme of its own.[21] Sun Life allegedly interfered with Imperial's rights-and-privileges in four ways:

> (i) refusing to honor requests to name Imperial as a policy owner and beneficiary; (ii) failing to provide Imperial with timely notice that a policy was lapsing; (iii) interfering with Imperial's ability to assign rights under the policies; and (iv) contesting the policies outside of the contestable period.[22]

In response to Sun Life's alleged fraudulent scheme, Imperial alleged that Sun Life falsely told the policyholders it would not contest policies beyond the two-year period to do so, and Imperial alleged that Sun Life fraudulently omitted its "true views" in post-contract communications that the policies were in fact valid and incontestable.[23]

The district court ultimately dismissed all of Sun Life and Imperial's claims at different stages in the litigation.[24] Sun Life appealed the dismissal of each of its claims while Imperial only appealed the dismissal of its breach of contract claims and fraud claims.[25]

The Eleventh Circuit's findings

The Eleventh Circuit ultimately disagreed with the district court in part and vacated the district court's dismissal of Sun Life's RICO, RICO conspiracy, fraud, aiding and abetting fraud, and tortious interference with contractual relations claims.[26] The Eleventh Circuit affirmed the dismissal of Sun Life's fraud, conspiracy and declaratory judgment claims.[27] The court affirmed the dismissal of Imperial's breach of contract claim to the extent it asserted a breach of the rights-and-privileges clause but, vacated the district court's dismissal to the extent the breach of contract claim asserted a breach of the incontestability clause.[28] The dismissal of Imperial's fraud claim was affirmed.[29]

Pleading choice-of-law

Sun Life ended up in hot water before the district court and the Eleventh Circuit as a result of its failure to timely plead choice-of-law. As a result, Sun Life waived any chance to rely on non-forum law to interpret the

[19] The incontestability clause at issue reads as follows: After this Policy has been in force during the lifetime of the [i]nsured for a period of two years from its Issue date, we [Sun Life] cannot contest it except for non-payment of [p]remiums. *Id.* at *3.
[20] The rights-and-privileges clause at issue reads as follows: You [the policyowner] have the sole and absolute power to exercise all rights and privileges under [the Policy] without the consent of any other person. *Id.* at *4.
[21] *Id.* at *3.
[22] *Id.* at *4.
[23] *Id.*
[24] *Id.* at *4-5.
[25] *Sun Life Assurance Co.*, 2018 WL 4443054, at *5.
[26] *Id.* at *19.
[27] *Id.*
[28] *Id.*
[29] *Id.*

policies at issue. Specifically, Sun Life's declaratory judgment count requesting a declaration that "each of the policies procured through the Imperial scheme lacked an insurable interest at its inception and should be declared void *ab initio*" did not pass muster under forum law.[30] Affirming the dismissal of Sun Life's declaratory judgment claim and affirming this procedural defect, the Eleventh Circuit reasoned Sun Life waived the ability to rely on non-forum law because it failed to plead the non-forum law it sought to rely on in its complaint and then again, failed to *adequately* plead it at the dispositive motion stage.[31] Generally referencing a choice-of-law analysis in opposition to Imperial's dispositive motions was not sufficient, and the Eleventh Circuit made clear that the burden was on Sun Life to adequately raise choice-of-law at the earliest stage possible.[32]

The Eleventh Circuit's reasoning regarding Sun Life's claims

The district court dismissed Sun Life's RICO and fraud claims at summary judgment holding that such claims were barred by the incontestability clause; a conclusion with which Eleventh Circuit disagreed.[33] Imperial argued the incontestability clause barred Sun Life from even bringing a lawsuit, and the Eleventh Circuit again disagreed and made an important distinction.[34] The purpose of an incontestability clause is to create assurance of a benefit, which, in the context of life insurance, protects against remedies such as rescission of a policy once the period of time allotted by the incontestability clause has passed. The Eleventh Circuit reasoned that because Sun Life was not seeking to void or contest the viability of the policy, but was seeking recovery of lost profits attributable to the fact that the policies were investor-owned, its RICO and fraud claims survived to the extent the claims sought a remedy other than rescission of the policies.[35]

The Eleventh Circuit affirmed the dismissal of Sun Life's fraudulent conspiracy claim. The court held that Sun Life's claim that Imperial conspired with the insurance producers to commit fraud failed because it did not allege that the producers and Imperial were *independent* entities capable of conspiring to commit common law fraud. In reaching this conclusion, the Eleventh Circuit relied on prior precedent and reasoned that a single, legal entity consisting of a corporation and its agents cannot conspire with itself.[36] However, the intracorporate conspiracy doctrine does not apply to civil claims for RICO conspiracy and therefore, did not apply to Sun Life's RICO conspiracy claim.[37]

[30] *Id.* at *6-7, 12.
[31] *Id.* at *6-7.
[32] *Id.* at *7.
[33] *Id.* at *8.
[34] *Id.* at *8-9.
[35] *Id.*
[36] *Sun Life Assurance Co.*, 2018 WL 4443054, at *9 (citing *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1036 (11th Cir. 2000) (en banc) (discussing intracorporate conspiracy doctrine)).
[37] *Id.* at *10 (citing *Kirwin v. Price Commc'ns Corp.*, 391 F.3d 1323, 1326–27 (11th Cir. 2004)).

Therefore, the Eleventh Circuit held that Sun Life pled a viable RICO conspiracy claim.[38]

The Eleventh Circuit vacated the district court's dismissal of Sun Life's claim of aiding and abetting fraud because the Court believed that Sun Life plainly and correctly plead the claim.[39] Last, the court held that Sun Life properly pled its tortious interference with contractual relations claim, and vacated the district court's holding.[40] The basis of this claim stemmed from Sun Life's allegation that the insurance producers conspired with Imperial to defraud Sun Life, as Sun Life and the producers had exclusive contracts with each other that Imperial was aware of during its alleged fraudulent scheme.[41] The Eleventh Circuit held that even if Federal Rule of Civil Procedure 9(b) applied and required specificity, Sun Life was not required to plead Imperial's actual knowledge of the contracts between Sun Life and the insurance producers.[42]

The Eleventh Circuit's reasoning regarding Imperial's claims

Sun Life argued that Imperial could not sue for Imperial's breach of the incontestability clause because the litigation privilege applied and provided absolute immunity to Sun Life.[43] Sun Life reasoned that the litigation privilege applied solely through the filing of its declaratory judgment action. The Eleventh Circuit disagreed.[44] The court reasoned that applying the privilege to provide immunity from Imperial's breach of contract claims would not "meaningfully serve the aims of the privilege."[45] The Eleventh Circuit ultimately concluded that the breach of an incontestability clause permits damages, like other contractual prohibitions, and vacated the district court's dismissal of the claim.[46] In so holding, the Eleventh Circuit disagreed with Sun Life' analogy that incontestability clauses serve a similar purpose as statutes of limitations because damages are unavailable when a lawsuit is commenced outside of the statute of limitations.[47] A contestability period is fundamentally different as it is found in a contractual term, not in a statute.[48] Moreover, the clause is mandated by the legislature to be included in insurance contracts, which reveals the legislature's intent for damages to be available upon any breach.[49] In his concurrence, Judge Jordan expressed concerns with future implications related to the affirmance of Imperial's breach of the incontestability clause claim as it relates to damages.[50] Judge Jordan made

[38] *Id.*
[39] *Id.* at *11.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at *13-14.
[44] *Id.* at *13.
[45] *Id.* at *15; *see Debrincat v. Fischer*, 217 So. 3d 68, 70 (Fla. 2017) (holding that applying the privilege to provide immunity from malicious prosecution suits would eliminate the malicious prosecution tort because the first element of the tort is the filing of a lawsuit).
[46] *Sun Life Assurance Co.*, 2018 WL 4443054, at *16.
[47] *Id.* at *15.
[48] *Id.*
[49] *Id.* at *15-16.
[50] *Id.* at *20 (Concurring, Jordan, J.).

clear that the district court must decide the scope of Imperial's claim, including the appropriate measure of damages, on remand.[51]

The Eleventh Circuit affirmed the dismissal of Imperial's breach of the rights-and-privileges clause claim because, unlike the incontestability clause, the damages element could not be satisfied.[52] Imperial alleged that because the Sun Life policies could not be included in a certain credit facility, it had to pursue alternative financing for its premium payments and could only do so on less favorable terms.[53] Therefore, Imperial alleged it suffered $5 million dollars' worth of "interest related" damages.[54] The Eleventh Circuit held that Imperial failed to establish Sun Life's ability to foresee Imperial's alleged damages because prior to issuing its policies, Sun Life put forth significant efforts to avoid the very situation it wound up in—that being, its policies reaching the hands of secondary market investors, like Imperial.[55] Finally, the court affirmed dismissal of Imperial's fraud claim because Imperial's "secret intent" of fraud theory was duplicative of its breach of contract claim and the Eleventh Circuit was not convinced the Sun Life made any misrepresentations in post-contract communications with Imperial.[56]

There are several important takeaways from the Eleventh Circuit's decision. First, when pleading choice-of-law, practitioners must be mindful to raise any choice-of-law issue as soon as possible and must raise it thoroughly. Second, an incontestability clause does not prevent an insurer from filing a lawsuit related to a life insurance policy, after the time limit allocated in the clause has passed, if the insurer is seeking a remedy other than voidance or rescission of the policy. Third, in the Eleventh Circuit, state litigation privileges do not provide immunity from the commencement of a breach of contract claim because the first element of the claim is to file a lawsuit, so providing immunity would essentially eliminate the claim. Finally, the scope of damages recoverable pursuant to a breach of incontestability clause is unclear in the Eleventh Circuit. Practitioners litigating similar claims need to be sure to evaluate how the district court handles this issue upon remand.

[51] *Id.*
[52] *Id.* at *16.
[53] *Id.*
[54] *Id.*
[55] *Id.* at *17.
[56] *Id.* at *17-18.

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