WILL LIFE INSURANCE PURCHASERS EVER BE PROVIDED WITH ENFORCEABLE CONSUMER FRIENDLY DISCLOSURES?

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I. INTRODUCTION

A. *General Introduction*

Life insurance is a necessary and important consideration in estate and retirement planning; however, few members of the public have a good understanding of life insurance. In purchasing life insurance, people rely almost completely on their insurance sales agent to recommend a policy that meets their particular needs and to explain the costs and benefits of the policy.

A number of insurance sales agents encourage this reliance by advertising. They hold themselves out as financial and estate planners with specialized knowledge in strategies to maximize their clients' investment return and minimize their clients' income and estate taxes. Many life insurance companies encourage public reliance upon their sales agents' financial and estate planning knowledge by sponsoring seminars and publishing articles on these topics.

While insurance agents primarily advise prospective clients through verbal consultation, computer printouts are used to illustrate premium payments, death benefits, and cash values. In Iowa, these printouts as well as a life insurance buyer's guide must be given to a prospective buyer of life insurance policies.[1]

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The Iowa Administrative Code provides that terms such as "financial planner" should not be used to imply the insurance agent is acting in that capacity unless he or she is, in fact, acting as a financial planner.[2]

In practice, the illustrations on the computer printouts are written by the insurance company in a financial industry format, which does not clearly present the information they purport to provide. The use and format of these illustrations are designed to enhance the image of their presenter as a professional, who "understands these things," rather than as an instrument of enlightenment for the consumer. Because heavy use of industry jargon and arcane format requires the presenter to interpret the illustration, the consumer may not understand the true nature of the material presented. Although normally produced by computer, the illustrations are not user-friendly. The agent-financial planner will inform the client of the built-up cash value expected fifteen or twenty years after purchasing the policy. It is usually not clear to the client that only the face value of the policy is paid upon death; in reality the cash value of the policy belongs to the insurance company, not to the client.

Most of the time, the client is unaware that over fifty-five percent of the first year's premium paid for cash value life insurance usually goes to the agent as a sales commission, with lesser commissions paid annually over the next five to nine years.[3] Up-front commissions on sales of cash value life insurance have prompted agents and companies to use many different sales concepts to justify the purchase to the client.

The Iowa Administrative Code does not address how some agents misrepresent a concept of market life insurance to the buyer. The insurance sales agent-financial planner focuses the buyer's attention on a problem about which the buyer may not have been aware. The agent then presents a concept to solve the problem. In this situation, the life insurance is only a means of implementing the concept. Financial disclosures of the policy's inner workings become irrelevant to the buyer, who is purchasing the policy to implement the concept designed to solve a problem the agent brought to his or her attention. The buyer does not notice or care how little they are really getting in the bargain, or beyond the assurances of the agent, whether the concept works and the life insurance policy is the correct financial instrument to use.

Is it a misrepresentation, as defined by Iowa Code section 507B.4(1), when an insurance agent misrepresents a concept that is applicable to a consumer's needs in order to justify the sale of a life insurance policy?[4]

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1. IOWA ADMIN. CODE r. 191-15.69(2) (1993) (implementing IOWA CODE § 507B (1993) and ensuring disclosure of information necessary to secure a buyer's ability to select the most appropriate life insurance policy).

2. *Id.* r. 191-15.70(3).

3. JACKSON NATIONAL LIFE INSURANCE COMPANIES, COMMISSION SCHEDULE (rev'd 8-94) (on file with the *Drake Law Review*). Jackson, an insurer out of Lansing, Michigan, is a life insurance business in the state of Iowa. Their commission schedule shows 50% to 85% of the first year's premium is paid to the selling agent. *Id.*

4. *See* IOWA CODE § 507B (1993).

B. *Example of the Misrepresentation of a Concept and a Policy to Sell Life Insurance*

In the mid-1980s Connecticut General Life Insurance Company (CG) and some of its agents promoted a non-qualified deferred compensation (NQDC) concept to small professional corporations (PC).[5] This concept was sold primarily to doctors who were controlling shareholders in one or two shareholder PCs.[6] The PC contracted with the controlling doctor to defer some of the doctor's income until after the doctor retired.[7] The PC would buy CG cash value life insurance on its controlling shareholder-doctor, paying relatively large premiums for the first ten years.[8] Commencing in the twentieth year of the policy, the PC could borrow annually against the built-up cash value of the policy to pay deferred compensation to the then retired doctor without the borrowed amount constituting income to the PC.[9] This concept was represented as a way to avoid employee matching and yearly dollar caps required by the Internal Revenue Service for a qualified deferred compensation program.[10] Between July of 1983 and 1986, Connecticut General sold $80,000,000 to $90,000,000 in premiums per annum of life insurance by using this concept, which was designed for small closely-held companies.[11] The Connecticut General agency in northwest Iowa sold many life insurance policies during this period, using the non-qualified compensation concept.[12] The northwest Iowa agency did not represent its agents as insurance salespersons or agents.[13] All advertising and letterheads were carefully crafted to omit the words "insurance" or "premiums."[14] The agents represented themselves as "financial planners."[15] The cash value life insurance policy itself was represented as an "investment" with a very high rate of return, having only "enough life insurance to make it legal."[16]

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5. Iowa Lakes Orthopaedics, P.C. v. Charles J. Maxwell & Co., No. 89-1767, slip op. at 2 (Iowa Ct. App. Apr. 2, 1991).
6. *Id.* at 2-3.
7. *Id.*
8. *Id.*
9. *Id.* at 3.
10. The Internal Revenue Code distinguishes qualified from non-qualified deferred compensation. *See* I.R.C. §§ 401—404 (West Supp. 1994). *See also* COMMERCE CLEARING HOUSE, 1994 TAX ANGLES FOR SPECIAL TAXPAYERS 28 (1993) (defining qualified plans as pension, profit-sharing, stock bonus and annuities by the Internal Revenue Code); *The Use of Non-Qualified Deferred Compensation in Closely Held Business*, 3 Fin. & Est. Plan. (CCH) ¶ 21,901 (1983) (setting forth a survey of the use of non-qualified deferred compensation in the closely held business).
11. Joint Appendix at 415-16, Iowa Lakes Orthopaedics, P.C. v. Charles J. Maxwell & Co., No. 89-1767 (Iowa Ct. App. Apr. 2, 1991).
12. *Id.* at 366-67.
13. Iowa Lakes Orthopaedics, P.C. v. Charles J. Maxwell & Co., No. 89-1767, slip op. at 4 (Iowa Ct. App. Apr. 2, 1991).
14. *Id.*
15. *Id.*
16. *Id.* at 6.

The agency sold this concept to PCs in Spirit Lake and Spencer, two towns in Iowa.[17] Each PC had two doctors; thus, the presentation resulted in the sale of four cash value insurance policies. The Spirit Lake PC invested $47,000 over two years on its two doctor-shareholders, which provided an initial death benefit of $44,000 on one doctor and $46,000 on the other doctor.[18] The Spencer PC invested $40,000 over four years with similar death benefit amounts on each of its doctor-shareholders.[19] Upon consulting other financial planners, both of these PCs determined they had purchased only life insurance policies, and each PC demanded its money back.[20] The policies were terminated by CG, and, for a complete release, CG offered to refund $8700 to the Spirit Lake PC, with CG retaining $38,515 of the PC's "investment."[21] One of the Spirit Lake PC's unpaid premium "investments" was treated as a loan against the policy.[22] In return for a complete release from the Spencer PC, CG offered to refund $22,000, with CG retaining $18,000.[23]

Connecticut General's promotion of this NQDC concept to small PCs directly contradicted the 1979 Tax Court decision in *Congleton v. Commissioner*.[24] *Congleton* held compensation payable from a small corporation to a controlling corporate shareholder could not be deferred by the controlling shareholder contracting with the corporation to do so.[25] The Tax Court found it was, in effect, the same party on both sides of the contract and not an arm's length transaction.[26]

The Spirit Lake PC filed a complaint with the Iowa Insurance Commissioner, and later the Spencer PC filed a similar complaint which was joined with the complaint filed by the Spirit Lake PC.[27] The Commissioner took no action. The Spirit Lake PC then filed a lawsuit against CG and its agents for

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17. Joint Appendix at 71-74, 102-06, 366-68, Iowa Lakes Orthopaedics, P.C. v. Charles J. Maxwell & Co., No. 89-1767 (Iowa Ct. App. Apr. 2, 1991).

18. Iowa Lakes Orthopaedics, P.C. v. Charles J. Maxwell & Co., No. 89-1767, slip op. at 2-3 (Iowa Ct. App. Apr. 2, 1991).

19. Joint Appendix at 452, Iowa Lakes Orthopaedics, P.C. v. Charles J. Maxwell & Co., No. 89-1767 (Iowa Ct. App. Apr. 2, 1991).

20. Iowa Lakes Orthopaedics, P.C. v. Charles J. Maxwell & Co., No. 89-1767, slip op. at 3 (Iowa Ct. App. Apr. 2, 1991).

21. *Id.*; *see also* Joint Appendix at 800-03, Iowa Lakes Orthopaedics, P.C. v. Charles J. Maxwell & Co., No. 89-1767 (Iowa Ct. App. Apr. 2, 1991).

22. *Id.*

23. Joint Appendix at 452-56, Iowa Lakes Orthopaedics, P.C. v. Charles J. Maxwell & Co., No. 89-1767 (Iowa Ct. App. Apr. 2, 1991).

24. Congleton v. Commissioner, 38 T.C.M. (CCH) 584 (1979).

25. *Id.* at 590.

26. *Id.*

27. The Spirit Lake PC filed its complaint with the Commissioner on August 25, 1987. Joint Appendix at 838-41, Iowa Lakes Orthopaedics, P.C. v. Charles J. Maxwell & Co., No. 89-1767 (Iowa Ct. App. Apr. 2, 1991). The Spencer PC filed its complaint on December 18, 1990. Findings of Fact, Conclusions of Law, and Order of Dismissal, *In re* the Conduct of Connecticut General Ins. Co. & Charles J. Maxwell, Mar. 31, 1994, at 1 (on file with the author).

rescission of the contracts, refund of the premiums, and punitive damages.[28] On the eve of trial, CG offered to refund the whole premium advanced by the Spirit Lake PC if the PC would agree not to disclose the terms of the settlement to anyone.[29] The PC refused to sign a gag release. The trial court, however, dismissed the lawsuit.[30] The Iowa Court of Appeals reversed, rescinded the policies, ordered the premiums refunded, but found the evidence did not support an award of punitive damages.[31] The appellate court held that by their representations and actions, the defendants assumed a greater duty to the plaintiffs than just agents, and the plaintiffs clearly did not intend to buy only life insurance policies.[32] The court held the policies were not an appropriate vehicle for the plaintiffs' intended purposes.[33] Accruals on the principal would have been substantially greater in an investment vehicle that did not reduce the plaintiffs' initial "investments" by a 55% agent's commission.[34] The agents and CG filed an application for further review to the Iowa Supreme Court, but without further negotiations with the plaintiffs withdrew the application before the Iowa Supreme Court acted upon it.[35]

After the appellate court decision, the Iowa Insurance Commissioner ordered a hearing on the complaints.[36] Prior to the hearing, the Commissioner entered into a stipulation with CG and its agent, which limited the hearing on the conduct of CG and its agent to the sole issue of whether the complainants understood the true nature of their purchase involved only life insurance.[37]

In the stipulation, the Commissioner agreed with CG and its agent that the Commission was not seeking a penalty against CG or its agent based on any claim that the plan or policy purchased by the complainants was inappropriate for their needs. Therefore, any evidence regarding such a claim was irrelevant and inadmissible.[38] The Administrative Law Judge found that the policies sold to the complainants were sold by the CG agent in his capacity as a financial advisor to

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28. Iowa Lakes Orthopaedics, P.C. v. Charles J. Maxwell & Co., No. 89-1767, slip op. at 3 (Iowa Ct. App. Apr. 2, 1991).

29. Letter from Steve Avery, Counsel for Connecticut General, to David J. Stein, Sr., Counsel for Spirit Lake PC (Aug. 17, 1989) (on file with the author).

30. Joint Appendix at 42, Iowa Lakes Orthopaedics, P.C. v. Charles J. Maxwell & Co., No. 89-1767 (Iowa Ct. App. Apr. 2, 1991).

31. Iowa Lakes Orthopaedics, P.C. v. Charles J. Maxwell & Co., No. 89-1767, slip op. at 10 (Iowa Ct. App. Apr. 2, 1991).

32. *Id.* at 6-8.

33. *Id.* at 9.

34. *Id.*

35. Appellees' Withdrawal of Application for Further Review, Iowa Lakes Orthopaedics, P.C. v. Charles J. Maxwell & Co., No. 89-1767, May 20, 1991 (filed with the Iowa Supreme Court) (on file with the author).

36. Notice of Hearing, *In re* the Conduct of Connecticut General Ins. Co. & Charles J. Maxwell, Oct. 20, 1992, at 1 (on file with the author).

37. Stipulation, *In re* the Conduct of Connecticut General Ins. Co. & Charles J. Maxwell, Feb. 15, 1993, at 1 (on file with the author).

38. Stipulation, *In re* the Conduct of Connecticut General Ins. Co. & Charles J. Maxwell, Mar. 3, 1993 (on file with the author).

the complainants, but the agent's conduct as a financial advisor was not at issue.[39] Thus, the issue of the agent's use of his confidential relationship as complainant's financial advisor in effectuating the sales of insurance policies was not addressed at the hearing on the conduct of CG and its agent. The Administrative Law Judge found no violation of Iowa Code chapter 507B.[40] By this time, a news release reported that the Florida Insurance Commissioner had conducted an investigation.[41] The investigation revealed that Metropolitan Life Insurance Company had been using a similar retirement sales concept to sell Metropolitan life insurance.[42] Consequently, Metropolitan agreed to refund premiums on misrepresented policies through the Iowa Insurance Commissioner's office.[43]

II. UNFAIR OR DECEPTIVE ACTS: LEGISLATION AND ENFORCEMENT

A. *Adoption of Insurance Regulation*

On March 9, 1945, Congress expressed its intent that states should regulate the insurance industry.[44] In the McCarran-Ferguson Act, Congress further provided that from the law's enactment to January 1, 1948, the Sherman Act,[45] the Clayton Act,[46] and the Federal Trade Commission Act[47] shall "not apply to the business of insurance or to acts in the conduct thereof."[48]

As a result of this congressional direction, the National Association of Insurance Commissioners drafted model uniform legislation entitled "An Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance," which Iowa adopted nine years later.[49]

Very little tangible legislative history accompanied the enactment of Iowa Code chapter 507B.[50] Section 507B.1 declares the purpose of the chapter is "to regulate trade practices in the business of insurance in accordance with the intent of Congress."[51]

Section 507B.4 defines the acts that are unfair methods of competition and unfair or deceptive acts under the statute.[52] Section 507B.6 provides for a hear-

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39. Findings of Fact, Conclusions of Law, and Order of Dismissal, *In re* the Conduct of Connecticut General Ins. Co. & Charles J. Maxwell, Mar. 31, 1994 (on file with the author).

40. *Id.*

41. Jane Bryant Quinn, *Investigate Whether Insurance Agent Bilked You*, DES MOINES REG., Mar. 28, 1994, at 6S.

42. *Id.*

43. *Id.*

44. McCarran-Ferguson Act, ch. 20, 59 Stat. 33, 34 (1945) (codified as amended at 15 U.S.C. §§ 1011—1015 (1988)).

45. Sherman Act, 15 U.S.C. §§ 1—7 (1988).

46. Clayton Act, 15 U.S.C. § 12 (1988).

47. Federal Trade Commission Act, 15 U.S.C. §§ 41—51 (1988).

48. 15 U.S.C. § 1013(a) (1988).

49. *See* IOWA CODE § 507B (1993).

50. Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35, 41 (Iowa 1982).

51. IOWA CODE § 507B.1 (1993).

52. *Id.* § 507B.4.

ing procedure when, in the discretion of the Iowa Insurance Commissioner, the Commissioner has reason to believe any person in the state has engaged in such acts, and it is in the public interest to prosecute such acts.[53] Upon a finding of unfair competition or deceptive acts, a cease and desist order shall be issued,[54] as well as an assessment of a civil penalty of not more than $1000 per act with an aggregate limit of $10,000.[55] If the person knowingly committed the act, not more than $5000 per act with an aggregate limit of $50,000 shall be assessed[56] and the person's license will be suspended.[57] In *Dolan v. AID Insurance Co.*,[58] the Iowa Supreme Court recognized Iowa Code chapter 507B provides no real consolation to an aggrieved insured.[59] The statute does not grant the Insurance Commissioner authority to make the insured whole by directing a refund.[60]

B. *Lack of a Private Cause of Action to Enforce*

In *Seeman v. Liberty Mutual Insurance Co.*,[61] the Iowa Supreme Court held section 507B.4(9)(f) does not create a private cause of action for damages.[62] Seeman, an injured workers' compensation claimant, brought an action against Liberty Mutual for damages, alleging Liberty Mutual violated section 507B.4(9)(f) by unreasonably delaying payment of a settlement of his workers' compensation claim.[63] The action was removed to federal court.[64] The federal court certified two questions for the Iowa Supreme Court to answer: (1) does section 507B.4(9)(f) create a cause of action for damages to an individual; and (2) does following a general business practice of inexcusably delaying payments of a settlement sum violate section 507B.4(9)(f)?[65]

The court rejected Seeman's argument that a breach of a duty or standard created by statute gives rise to a cause of action for negligence when the statute is silent with respect to the existence of a private remedy.[66] The court held: "Negligence is a common-law tort that 'falls below the standard established by law for the protection of others against unreasonable risk of harm.'"[67] The court

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53. *Id.* § 507B.6.
54. *Id.* § 507B.7(1).
55. *Id.*
56. *Id.* § 507B.7(1)(a).
57. *Id.* § 507B.7(1)(b).
58. Dolan v. AID Ins. Co., 431 N.W.2d 790 (Iowa 1988).
59. *Id.* at 794.
60. IOWA ADMIN. CODE r. 191-15.70(3) (1993); Holland v. State, 115 N.W.2d 161, 163-64 (Iowa 1962) (discussing the limits on administrative rules adopted under § 507B).
61. Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35 (Iowa 1982).
62. *Id.* at 43.
63. *Id.* at 36-37.
64. *Id.* at 37.
65. *Id.* at 36.
66. *Id.* at 37.
67. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 282 (1965)).

stated a statute may create the duty the actor owes to the victim, thereby satisfying one element of negligence.[68]

> A statutory duty or standard may thus establish an essential element for a negligence action. However, it does not provide the cause of action. The cause of action itself is a creation of the common law that is inherent in the tort of negligence. The duty or standard of care, statutory or otherwise, is merely an element of proof that comes into play after an action has been rightfully commenced pursuant to the pre-existing common-law cause of action.[69]

In determining whether a cause of action for a private lawsuit should be judicially implied from chapter 507B, the *Seeman* court applied the four-factor test set forth in *Cort v. Ash*.[70] Using this test, the court concluded: (1) The plaintiff was a member of the class of persons for whose special benefit the section was enacted; (2) it was not the legislative intent to create or deny a remedy, and the strong policy declaration in the statute suggests a private cause of action would be appropriate and consistent with the underlying purpose of the statute; and (3) the implication of a private cause of action did not intrude into an area over which the federal government has exclusive jurisdiction or that has been delegated exclusively to the state administrative agency.[71] As to the fourth factor, the court held the legislature intended administrative sanctions to be the exclusive method enforcing the chapter.[72] The court found a collateral statutory cause of action did not exist, and a common-law tort action was not recognized for an insurer's bad faith and inexcusable delay in settling an insurance claim.[73]

At least forty-four states have adopted versions of the model act,[74] and the appellate courts in three of these states have considered the issue of whether

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68. *Id.*
69. *Id.*
70. *Id.* at 38; *see* Cort v. Ash, 422 U.S. 66, 78 (1975).

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, . . . does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id.

71. Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35, 41-43 (Iowa 1982).
72. *Id.* at 42.
73. *Id.* at 43.
74. ALA. CODE §§ 27-12-1 to 27-12-24 (1986); ALASKA STAT. §§ 21.36.010—.36.420 (1993); ARIZ. REV. STAT. ANN. §§ 20-441 to -466.01 (1990); ARK. CODE ANN. §§ 23-66-201 to 23-66-214 (Michie 1994); CAL. INS. CODE §§ 790—790.10 (West 1993); COLO. REV. STAT. §§ 10-3-1101 to -1114 (West 1994); CONN. GEN. STAT. ANN. §§ 38A-815 to 38A-823 (West 1992); DEL. CODE ANN. tit. 18, §§ 123-1, 2318 (1989); FLA. STAT. ANN. §§ 626.951— 626.989 (West 1984);

statutes similar to section 507B.4(9)(f) provide for a private cause of action.[75] The California Supreme Court[76] and the West Virginia Court of Appeals[77] found a private cause of action by implication; the Illinois Court of Appeals held an individual did not have such a cause of action.[78]

The next Iowa case on the availability of a private cause of action to enforce chapter 507B was *Bates v. Allied Mutual Insurance Co.*,[79] which involved a claim for an insurer's bad faith.[80] In 1991 a federal court, in *Kelly v. State Farm Mutual Auto Insurance*,[81] set out what was perceived to be the Iowa law on bad faith actions prior to *Bates*:

> In 1982, the Iowa Supreme Court adopted third-party bad faith as a cause of action. . . . Two years later, in 1984, the Iowa legislature adopted a comparative fault tort system. 1984 Iowa Acts ch. 1293, codified at Iowa Code ch.

GA. CODE ANN. §§ 33-6-1 to 6-14 (1994); HAW. REV. STAT. §§ 431:13-101 to :13-107 (1985); IDAHO CODE §§ 41-1301 to -1333 (1991); ILL. ANN. STAT. ch. 215, para. 5/421—434 (Smith-Hurd 1993); IND. CODE ANN. §§ 27-4-1-1 to -1-19 (West 1994); IOWA CODE §§ 507B.1—.14 (1995); KAN. STAT. ANN. §§ 40-2401 to -2421 (1993); LA. REV. STAT. ANN. §§ 1211—1220 (West 1994); ME. REV. STAT. ANN. tit. 24-A, §§ 2151—2183 (West 1993); MD. ANN. CODE art. 48A §§ 212—240J (1994); MASS. GEN. LAWS ANN. ch. 176D, §§ 1-14 (West Supp. 1995); MICH. COMP. LAWS ANN. §§ 500.2001—.2093 (West 1993); MINN. STAT. ANN. §§ 72A.01—.17 (West Supp. 1995); MISS. CODE ANN. § 83-5-29 (1991); MO. ANN. STAT. § 375.930—.948 (Vernon 1991); MONT. CODE ANN. §§ 33-18-101 to -18-102 (1993); NEB. REV. STAT. §§ 44-1522 to -1535 (Supp. 1988); NEV. REV. STAT. ANN §§ 686A.010—.280 (Michie 1991); N.H. REV. STAT. ANN. §§ 417:1-:17 (1991); N.J. STAT. ANN. §§ 17:29B-1 to B-14 (West 1994); N.M. STAT. ANN. §§ 59A-16-1 to -16-30 (Michie 1992); N.Y. INS. LAW §§ 2401—2409 (McKinney 1995); N.C. GEN. STAT. §§ 58-63-1 to -63-65 (1994); N.D. CENT. CODE §§ 26.1-0401 to -0419 (1995); OHIO REV. CODE ANN. §§ 3901.19—.221 (Anderson 1994); OKLA. STAT. ANN. tit. 36, §§ 1201—1227 (West 1995); PA. CONS. STAT. ANN. §§ 1171.1—.14 (West Supp. 1995); R.I. GEN. LAWS §§ 27-29-1 to -29-14 (1994); S.C. CODE ANN. §§ 38-57-10-32 (Law. Co-op. Supp. 1994); S.D. CODIFIED LAWS ANN. §§ 58-33-1 to -33-89 (Supp. 1995); TENN. CODE ANN. §§ 56-8-101 to -8-118 (1994); VT. STAT. ANN. tit. 8, §§ 4721—4726 (1993); VA. CODE ANN. §§ 38.2-500 to -517 (Michie Supp. 1995); W. VA. CODE §§ 33-11-1 to -11-4 (Michie Supp. 1995); WYO. STAT. §§ 26-13-101—13-124 (1995).

75. Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35, 40 (Iowa 1982).

76. Royal Globe Ins. Co. v. Superior Court, 592 P.2d 329, 332-33 (Cal. 1979), *overruled by* Moradi-Shalal v. Firemen's Fund Ins., 758 P.2d 58 (1988). The California Supreme Court in *Moradi-Shalal v. Firemen's Fund Ins.* held for all prospective California cases there is no private cause of action for an insurer's violation of the California Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance Act, sections 790.03 and 790.09 of the California Insurance Code. The California Supreme Court noted that at the time of writing the opinion 48 states had adopted the model act. Only two states other than California recognized such a statutory cause of action for private litigants, and in those states allowing a private action, more than a single violation is required for the basis of a lawsuit. Moradi-Shalal v. Firemen's Fund Ins., 758 P.2d at 63-64 (citing Klandt v. Fink, 658 P.2d 1065, 1068 (Mont. 1983) and Jenkins v. J.C. Penney Casualty Ins. Co., 280 S.E.2d 252, 259-60 (W. Va. 1981)). The California case of *Royal Globe* and *Moradi-Shalal* both involved claims for bad faith by third parties who were not parties to the insurance contract.

77. Jenkins v. J.C. Penney Casualty Ins. Co., 280 S.E.2d 252, 258 (W. Va. 1981).

78. Scroggins v. Allstate Ins. Co., 393 N.E.2d 718, 721 (Ill. Ct. App. 1979).

79. Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255 (Iowa 1991).

80. *Id.* at 258.

81. Kelly v. State Farm Mut. Ins. Co., 764 F. Supp. 1337 (S.D. Iowa 1991).

> 668. The statute applies to tortious "conduct that is negligent or reckless or subjects a person to strict tort liability or breach of warranty. In 1988, the Iowa Supreme Court extended the bad faith cause of action to first-party situations. A first-party suit . . . is a cause of action against an insurer for bad faith failure to pay its own insured.[82]

Subsequently, in *Bates,* the plaintiff, a third party who was injured in an automobile accident,[83] filed a third-party bad faith claim and private action to enforce section 507B.4(9)(f) for fraudulent settlement practices against the other driver's insurance company.[84] Bates contended, in light of Iowa Code chapter 668 and *Dolan v. AID Insurance Co.*, the court should recognize a private action under section 507B.4(9)(f).[85] The court held *Kooyman v. Farm Bureau Mutual Insurance Co.*[86] was a first-party cause of action for bad faith, not a third-party cause of action.[87] The court explained Kooyman had been assigned the first-party cause of action for bad faith in Kooyman's settlement with the first party.[88] The distinction was the first-party insured had a contractual relationship with the insured and the third party did not.[89] The *Bates* court followed the *Seeman* holding that the intention of chapter 507B does not create a private cause of action.[90]

Even in a first-party situation, it appears the Iowa Supreme Court will not recognize a private bad faith action for violation of section 507B.4(1) or a failure to provide the disclosures required by Administrative Code Section 191-15. Section 507B.4 and the Iowa Administrative Code, however, appear to establish a statutory standard for negligent misrepresentation.

C. *Administrative Enforcement*

Iowa Code section 507B.6 directs the Insurance Commissioner to use discretion in deciding if it is in the public interest to prosecute specific acts of misrepresentation or nondisclosure in the sale of insurance.[91] The 1988 amendment to Iowa Code section 505.8 also charged the Commissioner with the duty of "prepar[ing] a plan of action outlining the alternatives and incentives for increasing in-state investments of domestic and nondomestic insurance companies."[92] The legislative purpose of the bill was to increase jobs, tax revenues, and the number of insurance companies through the Insurance Commissioner.[93] The

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82. *Id.* at 1340 (citations omitted).
83. Bates v. Allied Mut. Ins. Co., 467 N.W.2d at 256.
84. *Id.* at 257.
85. *Id.* at 259.
86. Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30 (Iowa 1982).
87. Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255, 258 (Iowa 1991).
88. Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d at 36.
89. Bates v. Allied Mut. Ins. Co., 467 N.W.2d at 258-59.
90. *Id.* at 259-60.
91. IOWA CODE § 507B.6 (1993).
92. IOWA CODE § 505.8(5)(b) (1993).
93. Senate File 2338, 72nd Iowa General Assembly, ch. 1159 § 2, 1988 Session.

friction between regulating the insurance industry and simultaneously facilitating its expansion appears to be a conflict of interest for the Commissioner.

Insurance is an enormous industry that states seek for economic development. In 1993, Americans purchased 1678.3 billion dollars of new life insurance and 1101.327 billion dollars of ordinary life insurance.[94] In 1993, Iowans purchased 10.447 billion dollars of ordinary life insurance[95] and as of December 31, 1993, Iowa life insurance companies had total "admitted assets" of 71.2 billion dollars.[96] How does the Commissioner weigh the public interest to prosecute specific acts of misrepresentation or nondisclosure in light of the tax and employment benefits the industry brings to Iowa?

Without recognition of a private lawsuit to enforce section 507B.4(1), or at least recognition that section 507B.4(1) and Iowa Administrative Code section 191-15 create a statutory standard of care, an individual who has lost money because of an agent's misrepresentations or failure to disclose information is left with the common law claims of misrepresentation and fraud.

III. ESTABLISHMENT OF A FIDUCIARY RELATIONSHIP

When an agent is acting as an advisor, the relationship with a client becomes a fiduciary relationship. Fiduciary relationships are those in which one party reposes special trust and confidence in the other who is in a position to have and exercise influence.[97] A fiduciary relationship arises whenever a continuous trust is reposed by one person in the skill and integrity of another.[98] Even a sophisticated, informed person may need the protection of fiduciary duty because it is the nature of the relationship that creates a danger of abuse.[99] One who

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94. AMERICAN COUNCIL OF LIFE INSURANCE, 1994 LIFE INSURANCE FACT BOOK 8 (1994).
95. *Id.* at 9.
96. REPORT OF THE INSURANCE DIVISION OF IOWA, STATE OF IOWA 117 (1993).
97. Kurth v. Van Horn, 380 N.W.2d 693, 698 (Iowa 1986).
98. *Id.* at 695 (holding a fiduciary relationship exists when one person is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship). When banks hold themselves out as financial advisors or have actual or constructive knowledge that a depositor is reposing trust and confidence in the bank, a fiduciary duty to fully disclose arises. First Nat'l Bank v. Brown, 181 N.W.2d 178, 182 (Iowa 1970). The California Court of Appeals explicitly stated it was following *Brown* and held if one is justified in relying and in fact does rely, recovery will not be precluded because means of knowledge were available. Security Pacific Nat'l Bank v. Williams, 262 Cal. Rptr. 260, 275 (Cal. Ct. App. 1989). *See* First Nat'l Bank in Sioux City v. Curran, 206 N.W.2d 317, 321 (Iowa 1973) (stating fiduciary relations include any "association in which the parties repose special trust and confidence in each other and are in a position to have and exercise . . . influence over each other"); Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179, 185 (Iowa Ct. App. 1986) (stating fiduciary or confidential relationships exist when "one comes to rely on and trust another in his important affairs . . . [and] whenever a continuous trust is reposed by one person in the skill and integrity of another"); RESTATEMENT (SECOND) OF TORTS § 874 cmt. a (1979).
99. Kevin Rogers, *Trust and Confidential and Fiduciary Duty of Banks in Iowa*, 35 DRAKE L. REV. 611, 620 (1985).

reposes confidence is not on guard, but is exposed and relies upon the other.[100] Once a fiduciary relationship has been established and a breach alleged, the burden shifts to the fiduciary to show proper discharge of duty.[101]

In *Wilkens v. Iowa Insurance Commissioner*,[102] the Iowa Court of Appeals recognized the expertise of Iowa insurance agents, who have passed the requisite knowledge tests, and the Iowa consumer's right to be assured of such expertise as reflected by the agent's signature on the policy.[103] An insurance agent ordinarily assumes only those duties found in an agency relationship and has no duty to advise the insured.[104] When agents hold themselves out as consultants and counselors, they have a duty to advise.[105] They are held to a higher standard of care because they are acting as specialists.[106] Some courts require that the agent receive compensation for the consultation and advice apart from the premiums paid by the insured.[107] Many of the same reasons for recognizing the fiduciary relationship that support adoption of the first party bad faith action also support a finding of a fiduciary relationship, even without payment of fees in addition to premiums when life insurance is sold by agents holding themselves out as financial planners.[108] These reasons include: (1) there is an "uneven bargaining power between . . . [the] insured and . . . [the] insurer [and] the insured needs . . . leverage . . . to even the positions,"[109] (2) "insurance contracts are contracts of adhesion,"[110] (3) "the insurance industry . . . is imbued with the public interest,"[111] (4) the insured is "purchasing peace of mind" in addition to financial

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100. First Nat'l Bank in Sioux City v. Curran, 206 N.W.2d at 322.

101. 37 AM. JUR. 2D *Fraud and Deceit* § 441 (1968).

> [A]s a general rule fraud is not presumed and [must be proven] by the party [alleging] it, that rule is . . . relaxed in cases where a fiduciary relation exists between the parties. . . . In such cases, if the superior party obtains a possible benefit, equity raises a presumption against the validity of the transaction, . . . and casts upon such party the burden of proving fairness, honesty, and integrity in the transaction.

Id.; *see* Matter of Mt. Pleasant Bank & Trust Co., 455 N.W.2d 680, 685 (Iowa), *cert. denied*, 498 U.S. 898 (1990); Rowen v. Le Mars Mut. Ins. Co., 282 N.W.2d 639, 647 (Iowa 1979).

102. Wilkens v. Iowa Ins. Comm'r, 457 N.W.2d 1 (Iowa Ct. App. 1990).

103. *Id.* at 3.

104. 16A JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW & PRACTICE § 8836, at 64-66 (1981).

105. 16A *Id.*

106. Hardt v. Brink, 192 F. Supp. 879, 880-81 (W.D. Wash. 1961); Moore v. Kluthe & Lane Ins. Agency, Inc., 234 N.W.2d 260, 265-66 (S.D. 1975); 16A APPLEMAN & APPLEMAN, *supra* note 104; RESTATEMENT (SECOND) OF TORTS § 552 (1977).

107. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 464-65 (Iowa 1984); Hardt v. Brink, 192 F. Supp. at 880-81; 16A APPLEMAN & APPLEMAN, *supra* note 104.

108. Mary E. Phelan, *The First Party Dilemma: Bad Faith or Bad Business?*, 34 DRAKE L. REV. 1031, 1035-36 (1985).

109. *Id.* at 1035.

110. *Id.* at 1036.

111. *Id.*

security,[112] (5) the extra duty "is needed to insure . . . [the insured] receives the benefit of . . . [the] bargain."[113]

In support of recognition of the bad faith tort for persons who are not "strangers" to the insurance contract, in *Messina v. Nationwide Mutual Insurance Co.*,[114] the District of Columbia Court of Appeals stated, "[t]he bad faith tort is grounded on the covenant of good faith and fair dealing that is implicit in all contracts, supplemented by the idea that insurance contracts have special characteristics that warrant heightened liability for breach of that covenant."[115]

In *Braesch v. Union Insurance Co.*,[116] the Nebraska Supreme Court held that "[w]hen dealing with an innkeeper, a common carrier, a lawyer, a doctor *or an insurer*, the client/customer seeks service, security, peace of mind, protection or some other intangible. These types of contracts create special, partly non-commercial relationships."[117] Iowa courts should recognize that when an agent holds himself or herself out as a financial planner, a fiduciary duty is established.

IV. ENFORCEABLE CONSUMER FRIENDLY FULL DISCLOSURE IN THE SALE OF LIFE INSURANCE

In 1979, a staff report was submitted to the Federal Trade Commission Bureau of Consumer Protection entitled "Life Insurance Cost Disclosure."[118] One of the primary recommendations was to require full and understandable disclosures in the sale of life insurance.[119] The report noted life insurance was second only to savings accounts as a depository for personal savings and life insurance is often sold as a convenient way to save for retirement and other purposes.[120] The report found basic fairness dictates full disclosure of the actual rate of return consumers will receive on their insurance policies and savings.[121] Full disclosures are the only way consumers can make intelligent comparisons of policies and retirement savings plans.[122]

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112. *Id.*
113. *Id.*
114. Messina v. Nationwide Mut. Ins. Co., 998 F.2d 2 (D.C. Cir. 1993).
115. *Id.* at 5; *see* Braesch v. Union Ins. Co., 464 N.W.2d 769, 774-75 (Neb. 1991) (noting the unique "public interest" character of the insurance industry, the fact that an insured seeks to protect against loss rather than gain commercial advantage, and the unequal bargaining power of insurers and insureds); Kranzush v. Badger State Mut. Casualty Co., 307 N.W.2d 256, 261 (Wis. 1981) (stating "the heart of the [bad faith] tort . . . is the fiduciary relationship between the insurer and the insured and the insurer's breach of the duty of good faith and fair dealing implicit in every contract").
116. Braesch v. Union Ins. Co., 464 N.W.2d 769 (Neb. 1991).
117. *Id.* at 774.
118. STAFF REPORT TO THE FTC, LIFE INSURANCE COST DISCLOSURE (1979)[hereinafter STAFF REPORT].
119. *Id.* at 99.
120. *Id.* at 100.
121. *Id.*
122. *Id.* at 101-02.

Federal and state legislatures and regulators have required consumer friendly full disclosures in a variety of consumer transactions.[123] Many of these disclosure laws and regulations allow a private action for a recovery of the consumer's loss and punitive damages.[124]

In 1968, Congress adopted the Truth in Lending Act, which required two consumer credit disclosures: the cost of credit expressed as a dollar amount and the cost of credit expressed as a percentage rate.[125] In March 1980, Congress passed the Truth in Lending Simplification and Reform Act.[126] As a result of the 1980 Act, the Federal Reserve Board rewrote Regulation Z.[127] Regulation Z's primary purpose was to promote an informed use of consumer credit by requiring disclosures of the costs and terms of such credit.[128] The Act and Regulation are enforced through administrative enforcement and civil liability.[129] Consumers who have received incorrect disclosures have the right to sue the creditor who made the misleading disclosures.[130]

The Federal Reserve Board grants exemptions from the Truth in Lending Act to states adopting the Uniform Consumer Credit Code (UCCC).[131] Iowa enacted the UCCC in 1974 and amended Iowa Code chapter 537 to the current form in 1987.[132] Section 537.5201 provides the consumer with a cause of action to recover actual damages and a penalty of not less than $100 or more than $1000 for each violation.[133]

Both federal regulations and state laws require consumer friendly labeling of beverages and food products to disclose everything from weights and fat levels to nutritional values.[134] In 1993, the Iowa Legislature adopted a full disclosure requirement in the sale of residential real estate which specifically requires disclosure of important characteristics of the property and significant defects in any of the structures.[135] Section 558A.6 provides the property transferee with a private action for damages for errors, inaccuracies, or omissions in information required in the disclosures.[136] The provision requires the person making the dis-

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123. *Id.* at 99-103.

124. JOHN R. FONSECA, CONSUMER CREDIT COMPLIANCE MANUAL 7 (2d ed. 1984); *see also* IOWA CODE § 537.5201 (1993) (setting forth consumers' remedies under the Iowa Consumer Credit Code); IOWA CODE § 558A.6 (private enforcement for failure to make full disclosure of defects in a real estate sale).

125. Truth in Lending Act, 15 U.S.C. §§ 1601—1606 (1988).

126. Truth in Lending Simplification and Reform Act, 15 U.S.C. §§ 1602—1691f (1988).

127. Truth in Lending (Regulation Z), 12 C.F.R. § 226 (1994).

128. FONSECA, *supra* note 124, at 6-7.

129. *Id.*

130. *Id.*

131. *See* IOWA CODE §§ 537.1102—.1104 (1993).

132. IOWA CODE § 537 (1993).

133. *Id.* § 537.5201.

134. *See* IOWA CODE § 189.9 (1995); IOWA ADMIN. CODE r. 191-15.66—.73 (1993). *See generally* Food Labeling, 21 C.F.R. § 101 (1994).

135. House File 636, 75th Iowa General Assembly, 1993 Session (enacted as IOWA CODE § 558A (1995)).

136. *Id.* § 558A.6.

closures to be held to a standard of care ordinary in the person's profession, practice, or area of expertise in preparing the information.[137]

The limited requirements of consumer friendly disclosures and their enforceability under state law and regulations, which are similar to Iowa Code chapter 507B in the sale of life insurance, have remained more or less the same as they were fifteen years ago when the Federal Trade Commission Report was presented.[138] The Iowa Insurance Commissioner has made a number of updates in the Administrative Code disclosure requirements; however, there are more consumer friendly disclosure requirements for a seventy-nine cent can of vegetables[139] than for a life insurance policy that is to pay a $200,000 death benefit thirty years after its purchase.[140] The aggrieved consumer has a private action for a misrepresented $1000 consumer loan of one year, but no private action for a misrepresented life insurance policy, which pays a $200,000 death benefit thirty years after its purchase.[141]

Consumer friendly full disclosure should reveal to the insured the rate of return while taking into account the cost of the purchase. Disclosure should specify the amount and percentage the insurer deducts from all premiums for fees, commissions, cost of insurance, and all other costs, and the net yearly savings factor after deducting these costs. A standardized form should disclose the share of the cash value, if any, the beneficiaries receive when the insured dies. Prohibited misrepresentations should include misrepresentations of concepts and applicability of the use of insurance policies to implement the concept. These standardized disclosures should be written in layperson's language. Proper disclosures and expanded truthful representations should be enforceable by private actions for damages and penalties similar to those provided for in the UCCC.

Punitive damages are a necessary deterrent to require full disclosures in the UCCC and should be used to require full disclosure in the sale of life insurance. Without the punitive deterrent, the aggrieved insured is left with either terminating the policy or suing for return of premiums. Termination of a policy when the insured discovers the misrepresentation may result in a refund of less than forty-five percent of the premium. The other fifty-five percent is retained by the insurer.[142] In a fraud or misrepresentation action, the measure of damages usually is the recovery of the benefit-of-the-bargain plus consequential damages or the purchaser's out-of-pocket expenses.[143] To recover punitive damages in a fraud

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137. *Id.*

138. *See* IOWA CODE § 507B (1993); STAFF REPORT, *supra* note 118.

139. *See supra* note 134.

140. *See* IOWA CODE § 507B (1993); IOWA ADMIN. CODE r. 191-15.63—.73 (1993) (requiring disclosures in the sales of life insurance).

141. *See* IOWA CODE § 537.5201 (1993) (allowing private actions to enforce a life insurance policy); *cf.* IOWA CODE § 507B (1993) (prohibiting private actions as evident in *Seeman v. Liberty Mut. Ins. Co.*, 322 N.W.2d 35 (Iowa 1982)).

142. A purchaser of life insurance will only receive a refund of premiums paid during the state mandated "free-look" period. This period is thirty days in Iowa. IOWA ADMIN. CODE ch. 15, p. 22b (1992).

143. Air Host Cedar Rapids, Inc. v. Cedar Rapids Comm'n, 464 N.W.2d 450, 454 (Iowa 1990); Cornell v. Wunschel, 408 N.W.2d 369, 380 (Iowa 1987).

action, there must be aggravating factors such as malice or outrageous conduct.[144] In a successful action for rescission, the plaintiff will obtain the return of premiums paid.[145]

V. CONCLUSION

When an insurance agent holds himself or herself out as the client's financial planner, the courts should hold the agent to the same level of professionalism as a financial planner. The courts should recognize the fiduciary relationship that follows. The fiduciary relationship should not depend upon whether the agent was paid a separate fee for services but on the representation made regarding his or her expertise. When this results in a fiduciary relationship, the agent should have the burden of proving fairness, honesty, and integrity in the transaction.

In life insurance sales, caveat emptor has given way to the need for legislation requiring consumer friendly disclosures enforceable by private actions for damages and punitive amounts for failure to disclose. Providing life insurance purchasers with enforceable consumer friendly disclosures will help the honest life insurance agents and companies by raising their competitors to the same level of honesty.

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144. State Sav. Bank v. Allis-Chalmers Corp., 431 N.W.2d 383, 387 (Iowa Ct. App. 1988).

145. Sabbagh v. Professional & Business Men's Life Ins. Co., 116 N.W.2d 513, 519 (S.D. 1962).