

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PNC BANK, NATIONAL ASSOCIATION, : CIVIL ACTION  
Trustee of the Harold G. Fulmer, :  
III Irrevocable Deed of Trust :  
dated August 21, 1987 :  
 :  
 :  
v. :  
 :  
 :  
AMERUS LIFE INSURANCE COMPANY, : NO. 04-5015  
*et al.* :

**MEMORANDUM AND ORDER**

Fullam, Sr. J.

January 31, 2005

Defendant, AmerUs Life Insurance Company, removed this insurance dispute from the Court of Common Pleas of Lehigh County, Pennsylvania. Although diversity is lacking on the face of the complaint, AmerUs has moved to dismiss the non-diverse defendants as fraudulently joined, thus creating federal jurisdiction. Plaintiff has moved to remand the action to state court. The case will be remanded.

The complaint alleges that AmerUs, the insurer, wrongfully failed to apply the fund or cash value in a whole life insurance policy toward the premium payment owed and wrongfully failed to apply the premium payment accepted from the decedent during the grace period. The policy, in the amount of \$10,000,000, had quarterly premiums in the range of \$20,000. The premium payments usually were made from the fund or cash value if sufficient. With regard to the agents, the complaint alleges that the agents

had an affirmative, continuing duty to advise the policy holder of the consequences of nonpayment of premiums and make certain that the insurer applied the cash values to the premiums. Defendant argues that no such duty exists and the statute of limitations has expired.

Were the standard to be applied that of a motion to dismiss for failure to state a claim, Defendant might well prevail. The Court of Appeals, however, has made clear that the inquiry to determine fraudulent joinder is significantly less searching than that under Rule 12(b)(6). Dismissal for fraudulent joinder is appropriate only if the joinder was "wholly insubstantial and frivolous." Batoff v. State Farm, 977 F.2d 848, 852 (3d Cir. 1992). "[I]f there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court." Id. at 851.

I cannot say it is entirely beyond the realm of possibility that in connection with a whole life insurance policy a Pennsylvania court would impose a continuing duty upon the agent to advise the policy owner about payments. Pennsylvania courts have recently applied the professional standards of section 299A of the Restatement (Second) of Torts to insurance agents. See Wisniski v. Brown & Brown Ins. Co. of Pa., 852 A.2d 1206 (Pa.

Super. Ct. 2004) 852 A.2d at 1212; Pressley v. Travelers Prop. Cas. Corp., 817 A.2d 1131, 1138 (Pa. Super. Ct. 2003). A state court may well decide to dismiss the claims against the agents on the merits, but I do not reach that question.

An order follows.

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ORDER

AND NOW, this 31<sup>st</sup> day of January, 2005, upon consideration of Defendant's Motion to Dismiss Fraudulently Joined CoDefendants, Plaintiff's Motion to Remand, and the responses thereto,

IT is hereby ORDERED that:

- 1) Defendant's Motion is DENIED.
- 2) Plaintiff's Motion is GRANTED, except as to the request for attorney's fees, which is DENIED.
- 3) The Clerk is directed to REMAND the case to the Court of Common Pleas of Lehigh County, Pennsylvania.
- 4) The Court is without jurisdiction to consider any other motions.
- 5) The Clerk is directed to mark the case CLOSED.

BY THE COURT:

/s/John P. Fullam, Sr. J.  
John P. Fullam, Sr. J.