
Federal judge dismisses adviser suit against ONL

By Kerry Pechter Thu, Oct 10, 2019

The judge rejected the claim that Ohio National Life was obligated by its distribution contract with LPL to keep paying trail commissions on the sale of variable annuities to the advisers who sold them.

In a legal setback for financial advisers who filed a federal class-action suit against Ohio National Life for halting payments of promised variable annuity trail commissions, a federal judge in Ohio last week granted the life insurer its motion for a judgment in its favor.

A copy the decision in the case, *Lance Browning v. Ohio National Life Insurance Company, et al* (1:18-cv-763) U.S. District Court for the Southern District of Ohio, Western Division can be found [here](#).

It was a whipsaw moment for the affected advisers, some of whom have had upwards of \$1 million in trail commissions withheld. Last June 28, a state court judge had denied the insurer's request, saying that its agreements to compensate broker-dealers—LPL Financial in this case—for variable annuity sales included the advisers individually as rightful parties to the agreements.

Adviser hopes rose on that ruling, then fell on October 4 when U.S. District Judge Susan Dlott reversed the state magistrate's decision and dismissed the advisers' claims on the grounds that Ohio National's compensation agreement did not extend past the broker-dealer, and, moreover, that the Securities & Exchange Commission, via FINRA Rule 2320, bars life insurers from paying commissions directly to registered representatives of broker-dealers.

Advisers are, not surprisingly, angry. "Under Ohio state law, which is supposed to govern the contracts, a beneficiary of a contract has the same rights as the signer of the contract. That's why the case moved forward," said an adviser who asked not to be named because he is still a party to a suit over the trail commissions.

"Judge Dlott said FINRA doesn't allow payment of commissions to reps, and that the broker-dealer had no obligation to pay the rep," he added. "That's not true. The rep agreement says that LPL was obligated to pay the reps as beneficiaries of the contract."

This lawsuit is one of several against Ohio National by advisers or broker-dealers. The controversy partly reflects the fact that the variable annuities were very rich a decade ago.

The richness produced immense sales, but the products were unsustainable for the carriers.

According to court filings cited by Yahoo Finance last March, Ohio National and its subsidiaries sold more than \$10 billion in new variable annuities between 2012 and 2018, with between 50,000 and 75,000 independent broker-dealers being paid regular commissions until the insurer unilaterally terminated its contracts with them last year.

Many major VA issuers either got out of variable annuity business entirely or made their contracts more conservative. After staying in the game for years longer, Ohio National finally got out last December. It didn't cancel its VA contracts—it can't—but it did stop paying commissions to reps where it believed that its broker-dealer contracts allowed.

The controversy also reflects the fragmentation of the advisory community (or, as life insurers look at it, their retail distribution channels) and the varied relationships between advisers and broker-dealers. Under Ohio National's agreement with Morgan Stanley, the wirehouse's employee-advisers continue to receive trail commissions.

But at least some of the independent advisers who dealt directly with Ohio National wholesalers, and who each selected his or her own combination of upfront or trail commission, regard their broker-dealer as simply a pass-through of their rightful compensation. For them, FINRA 2320 is largely a regulatory formality required for compliance.

"Advisers are the primary beneficiaries of the broker-dealer contracts," the adviser said. "We are supposed to get 75% to 95% of the [sales compensation]. The broker-dealer just gets a minimal amount. Under Ohio law, if you are a beneficiary of a contract you have a right to get paid under the contract. And the reps are third-party beneficiaries."

But Judge Dlott described the advisers as mere "incidental beneficiaries" without "enforceable rights" under the broker-dealers' contracts with Ohio National. Therefore the reps can't "assert claims for breach of the Selling Agreement or for promissory estoppel against Ohio National."

LPL advisers, represented by the Columbus law firms of Meyer-Wilson and Carlile Patchen & Murphy Law, sued Ohio National in federal court as a class. Individual broker-dealers are said to be filing their own lawsuits against Ohio National, but any judgments in those cases may apply only to broker-dealers and not to advisers. If those cases are settled and their proceedings sealed, they won't affect adviser-driven litigation.

