

# Failure to discuss living benefits could lead to litigation

Ignoring long-term care or critical illness insurance could be considered a breach of fiduciary responsibility, cautions advisor

By Wendy Cuthbert – February 2003 – Investment Executive

As if advisors didn't have enough to keep them awake at night. According to Thais McKee, vice president of living benefits at **Investment Planning Counsel of Canada** in Markham, Ont., insurance-licensed advisors need to be vigilant about offering their clients living-benefits insurance products, or face possible future litigation. "I think the notion of looking at a client's situation from a living -benefits perspective is new and is often neglected, even by folks who specialize in insurance," says McKee. This is a grave mistake and could come back to haunt insurance-licensed advisors. Long-term care and critical illness insurance can round out a sound financial plan, McKee says. Canadians are living longer, and often require special medical care and long-term care housing in the final two to 10 years of their lives. Yet many planners still simply block off a number of years for retirement in their financial plans without considering the extra costs in the latter stages. "Poor health always costs more than good health," says McKee. Canadians are also suffering higher rates of heart disease, strokes and cancer — the "Big Three" in the world of critical illness. The lump-sum payout of CI insurance makes this product an essential part of a financial plan for some families, she says: "Without cash flow [in these situations], a family is toast."

## New kids on block

Yet, because of their relative "new kid on the block" status, long-term-care and critical illness insurance are often passed over by planners, she says. (In the U.S., where the long-term care industry has been active longer than in Canada, penetration is still only 14% for this coverage.) Consider the example of an advisor who puts everything into mutual funds, with perhaps a nod to life insurance, in a client's retirement income plan. Ignoring lump-sum critical illness insurance or neglecting to make any concessions to long-term care is a serious error, and can't be considered whole financial planning, says McKee.

"If these things don't surface, at least in the discussion stage, parlayed as a recommendation, the client could come back and say that particular insurance-licensed professional did not fulfil his or her fiduciary responsibility," she says.

Steve Howard, Toronto-based CEO of **Advocis**, the new organization for Canadian financial advisors, agrees. "It's a plausible scenario that advisors could wander into difficulty in this area," he says. However, in such a new and evolving area, for now, it's just that — a scenario. But with the industry moving toward a more regulated model, in which relationships and advice will be more strictly defined, this could change. "I'm guessing we're just on the edge of this kind of exposure becoming a greater reality for advisors," he says. Howard's advice is to continue doing what most planners have been doing for years: consistently confirming the nature of the relationship and the services offered, and keeping up to date on changing products. By continuing good practices, litigation won't be a problem, he adds: "All we're talking about is good service."

Neil Gross, a lawyer who specializes in investment malpractice litigation with Toronto-based law firm **Carson Gross Christie & Knudsen**, says that he has not heard of any cases arising from these issues, but that doesn't mean they don't exist. (The U.S. Certified Financial Planner Board of Standards Inc. says it is aware of cases in civil court.)

"I believe what matters is the nature of the engagement," Gross says. No planner would be obliged to inform former one-off clients about these products, unless the services promised as much. But planners hired to provide comprehensive planning or those engaged on an ongoing basis could arguably face litigation in the future. "I think there's potential for a claim if there is a failure to suggest appropriate types of coverage," he says. His fear, however, is that every insurance agent in Canada could take this remote possibility to heart. "The idea that my agent, fearing he might someday be liable if he doesn't recommend every known type of policy under the sun, scares me to bits because that means he probably will proceed to do so," he says.

However, he says, advisors should protect themselves by leaving a paper trail, indicating they are up to date about a client's needs and new products. In addition, they must show they are current when it comes to new products for their clients. Encouraging clients to come forward if their financial or personal situations change is also key to protecting oneself. **IE**