

June 30, 2010

Class Certified in Action Involving Annuity Sales to Seniors

On June 23, 2010, the U.S. District Court for the Northern District of California certified two classes of senior citizens (individuals sixty-five years of age or older) who had purchased deferred annuities, some of which included a bonus feature. Plaintiff in *Kennedy v. Jackson Nat'l Life Ins. Co.*, No. C 07-0371 CW (N.D. Cal. June 23, 2010) alleged that Defendant engaged in unlawful practices in making such sales, and the court certified a nationwide class with respect to a RICO claim and a California class with respect to certain state law claims, both under Fed. R. Civ. P. 23(b)(3). ([Please click here for the opinion.](#))

According to the court, Plaintiff alleged that Defendant “does not adequately disclose that its ‘deferred annuities are worth substantially less than the purchaser’s original invested funds;’ that it pays commissions that ‘adversely impact the performance of the annuities;’ that its bonuses are illusory because it ‘recoups those bonuses through higher surrender charges, longer surrender periods, and reduced interest charges, caps or participation rates;’ and that it imposes ‘fees and loads through indecipherable product design and mechanics.’” Plaintiff claimed violations of RICO; a California statute prohibiting financial abuse of elders; the California Unfair Competition Law (UCL); and California false advertising laws. Plaintiff also asserted claims for fraudulent concealment, fraudulent inducement and misrepresentation, and common law fraud, but did not seek class certification on any of these additional claims.

Most of the analysis by the court focused on whether Plaintiff had met the requirement of Rule 23(b)(3) that common issues predominate over individual issues. Given that, as the court found, each proposed class claim involved an element of fraud, the insurer argued that individual issues would predominate because there was no uniform training or script for sales; the sales presentations varied; and the disclosures, applications, marketing materials, agent communications, and contracts also varied. Nonetheless, the court found that Plaintiff had alleged a common course of conduct on which certification could be based by claiming that:

- The use of the term “bonus” was misleading without regard to the disclosures made;
- Defendant’s disclosure of agents’ commissions did not include any discussion of the effect that commissions might have on an annuitant’s rate of return; and
- Defendant’s disclosures with respect to the effects of the market value adjustment/excess interest adjustment (MVA/EIA) were inadequate and did not vary materially on an individual basis.

The court rejected Defendant’s argument that proof of causation under RICO would be an inherently individualized issue because of varying investment objectives. The court stated that “[i]f Plaintiff proves that the annuities do not offer a benefit in relation to their cost, a reasonable inference could be drawn that class members would not have purchased them had they been fully informed about material facts.” The court also found that Plaintiff had offered methodologies for proving claimed damages under RICO for the bonus and annuity issues on a classwide basis and that her failure to offer such a methodology for the MVA/EIA issue did not preclude certification. The court similarly found that the predominance requirement was met for the state law claims.

Defendant’s request to have its summary judgment motion decided at the same time as Plaintiff’s class certification motion was denied, as the court set a separate hearing on Defendant’s summary judgment motion in August. The court denied Defendant’s motion to strike Plaintiff’s expert’s report and testimony on damages, stating that at the class certification stage it was enough that the expert presented what the

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court viewed to be “ ‘scientifically reliable’ and relevant evidence tending to show the predominance of common questions of fact concerning damages,” notwithstanding the fact that the expert offered only “limited justification” for his theory.



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