SUTHERLAND

LEGAL ALERT

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Summary Judgment Granted for Defendant in Certified Deferred Annuity Class Action

In a substantial victory for deferred annuity issuers, Judge Claudia Wilken of the U.S. District Court for the Northern District of California on October 6, 2010, granted Defendant's motion for summary judgment in *Kennedy v. Jackson Nat'l Life Ins. Co.*, No. C 07-0371 CW (N.D. Cal. Oct. 6, 2010). As previously reported here, on June 23, 2010, Plaintiff obtained certification of a nationwide senior citizen RICO class and a California-only senior citizen subclass asserting state law elder abuse, Unfair Competition Law (UCL), and False Advertising Law (FAL) claims arising out of Defendant's allegedly unlawful annuity sales practices. In this week's ruling, Judge Wilken dismissed both the class claims and Plaintiff's individual fraud-based common law claims. (Please click here for the opinion.)

The majority of the court's decision focused on Plaintiff Janice Kennedy's failure to establish a triable issue as to whether Defendant engaged in a pattern of racketeering activity, a necessary element of a RICO cause of action. In particular, the court found no evidence to suggest that Defendant engaged in a scheme to defraud senior citizen purchasers when it (1) failed to disclose to them the amounts and effects of commissions it paid to agents who sold its products, (2) failed to explain the effect of the purported "bias" in its market value adjustment/excess interest adjustment (MVA/EIA), and (3) used the term "bonus" to describe the higher first-year credited rate offered to purchasers of its "Bonus Max Two" product.

With respect to the commission issue, the court held that an insurer has no affirmative duty under California law to disclose its commissions and their effects to purchasers of its products, and Defendant's disclosures did not amount to half-truths that would trigger a duty to provide further explanatory information. Plaintiff was unable to point to any case law establishing an affirmative duty to disclose commissions, and the court rejected the argument that such a duty arises under either section 785(a) of the California Insurance code, which imposes a "duty of honesty, good faith, and fair dealing" on insurers doing business with senior citizens, or section 332 of the California Insurance code, which requires that "[e]ach party to a contract of insurance . . . communicate to the other in good faith, all facts within his knowledge which are or which he believes to be material . . . and which the other has not the means of ascertaining." The court concluded that Plaintiff failed to demonstrate that an explicit disclosure of commissions would have influenced her evaluation of the annuity she purchased, agreeing with Defendant's expert, who explained that the terms of an annuity contract—the minimum guaranteed interest rate, withdrawal charges, etc.—adequately reflect the insurer's costs, including commissions.

Similarly, Judge Wilken found no merit to Plaintiff's contention that Defendant engaged in a scheme to defraud its senior citizen annuity customers by failing to explain the effect of a purported "bias" contained in its MVA/EIA formula. The court noted that the formula, including the bias, was set forth in the annuity contract and that it was disclosed that the MVA/EIA could, subject to certain conditions, adjust how much an annuitant receives upon making a withdrawal. No further disclosure was deemed necessary. Notably, the question of whether a MVA/EIA constitutes a surrender charge and must be disclosed as such was not before the court. This issue was addressed by the Northern District of California last week in *Rand v. Am. Nat'l Ins. Co.*, C 09-639 SI (N.D. Cal Sept. 29, 2010). A copy of Sutherland's Legal Alert on that decision is available here.

Finally, the court dispensed with Plaintiff's claim that Defendant's use of the term "bonus" to describe the higher first-year interest rate offered in connection with its "Bonus Max Two" annuity was fraudulent. The court explained that the Plaintiff's annuity provided a higher first-year interest rate than non-bonus annuities and, because of that higher rate, Plaintiff had more money available to her to be taken in the form of free withdrawals. Based on those facts, the court concluded that Defendant's representation that its annuities with higher initial interest rates provide a bonus was not false. Nor, in the court's opinion, was it a half-truth for Defendant to represent that its annuities offer a bonus. Given the fact that Defendant disclosed, in bold print on the front page of its annuity contracts, that the interest rate on its bonus products would be lower in subsequent years than the interest rates offered on non-bonus products, the court dismissed Plaintiff's contention that the term "bonus" was misleading because it did not convey the alleged illusory nature of the higher first-year rate.

Having disposed of the nationwide RICO claims, the court spent little time disposing of the California state law claims. Based on the findings described above, Plaintiff was found to be without standing to bring a claim under the UCL, because the money she had allegedly lost—a surrender charge and an MVA/EIA adjustment—had not been lost as a result of unfair competition. Similarly, having been presented with no evidence that Defendant disseminated advertising or other materials to its senior citizen customers that were misleading, or in some way misrepresented the nature of its annuity products, the court found that neither the class claims for elder abuse and violation of the FAL, nor Plaintiff's individual fraud claims could survive summary judgment. Accordingly, Judge Wilken granted Defendant's motion in its entirety, awarding costs, and directing the clerk to "close the file."

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If you have any questions regarding this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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