

Class Action Defense Strategy Blog

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[Eighth Circuit Denies Class Certification of UCL Cause of Action Despite Tobacco II's Holding](#)

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In [Avritt v. Reliastar Life Ins.](#), ___ F.3d___ (8th Circ. 8-12-2010), the Eighth Circuit Court of Appeal affirmed an order denying class certification of a putative class of California annuity investors who were allegedly misled by the defendant. The opinion re-affirms the federal rules that require the plaintiff to show that it can prove reliance and damages on a class-wide basis before the court certifies a class while simultaneously limiting the persuasive authority of *Tobacco II*.

The annuities at issue in this case were marketed and sold by thousands of independent sales agents. The annuities functioned by allowing an annuitant to pay money into the annuity and receive a rate of return based on an interest rate set by the defendant. The investment contracts specifically guaranteed “an effective yearly interest rate of three percent.” [Avritt](#), *3. According to the contract terms, the amount of interest paid to the annuitants could vary, sometimes exceeding the minimum rate, and that some deposits would earn interest at one rate while other deposits received a different rate of return.

This case revolved around the defendant’s practice of crediting recent deposits into the annuity at a higher interest rate and then reducing the credited interest rate for those deposits as time went on. Essentially, as the court explains, the deposit first gets an “introductory rate.” The annuitant is thus making a greater rate of return on this investment than is guaranteed by the contract. However, as time goes on, the introductory rate is eliminated so that the same deposit will no longer have the same rate of return, even though the rate of return always meets or exceeds the guaranteed interest rate within the contract of 3%. [Id.](#) This is a common practice within the industry, such that investment guides inform potential annuity investors not to purchase “an annuity based solely on its introductory rate.” [Id.](#) at *4.

The plaintiffs were a husband and wife who each purchased annuities from the defendant. The husband purchased his annuity first and, after years of reviewing his investment statements, his wife purchased an annuity in her own name. [Id.](#) at *2. The plaintiffs claimed damages as a result of the defendant’s practice of crediting new annuity deposits at a higher rate than older deposits, essentially alleging a “bait and switch” that leads the annuitants to expect greater investment

returns than they will actually receive over the life of the annuity.

The plaintiffs filed their complaint in the Federal District Court of Minnesota alleging, among other causes of action, breach of contract (under Washington State law, per the contract language), and violation of California's Unfair Competition Law ("UCL"). The plaintiffs sought to certify a class of California residents who purchased annuities from the defendants. The district court denied certification because the plaintiffs "failed to establish that common questions predominated over individual issues." The plaintiffs appealed.

The Eighth Circuit initially addressed the plaintiffs' breach of contract cause of action. The plaintiffs alleged that the defendant breached the contract by not uniformly applying the interest rates to all deposits. Id. at *8. The court was skeptical of this interpretation, as the contract language specifically provided that multiple interest rates could be "credited" at any given time, as long as the rates were above the guaranteed 3%. Id. at *9.

Even if the court assumed that the plaintiffs' interpretation was reasonable, the plaintiffs would be unable to rely on evidence common to the whole class. Since the plaintiffs' interpretation relies on the fact that the contract is ambiguous, that ambiguity would allow the defendant to introduce extrinsic evidence from the time of contracting to bolster its proffered interpretation. Id. This extrinsic evidence would include the statements and conduct of every class member when they signed the contract. Id. at *10. Thus, the plaintiffs' proffered interpretation meant that the individual issues of each class member were incompatible with class-wide proof of the breach of contract claim and class certification was denied on the contract cause of action.

As to the UCL claims, on appeal, the plaintiffs argued that, under Tobacco II, they "are not required to produce evidence of individual class members' reliance or injury." Id. at *15. The Eighth Circuit rejected this argument completely. First, the court noted that Tobacco II did not have "any bearing on whether a plaintiff can satisfy the class certification requirement that common questions of law or fact predominate." Id. Citing Cohen v. Direct TV, Inc., 101 Cal. Rptr. 3d 37 (2009), the Eighth Circuit determined that Tobacco II did not eliminate "any need to show that unnamed class members relied on any misrepresentations of were actually injured." Id.

The Eighth Circuit then determined that Tobacco II was incompatible with federal law regarding standing. Id. at *16. All federal plaintiffs must show "injury in fact" under Article III of the U.S. Constitution, and that applies equally to class actions such that "a class cannot be certified if it contains members who lack standing." Id. Accordingly, Tobacco II's holding that a class can be certified as long as a sole class representative has an "injury in fact" is contrary to federal law, as was noted in Justice Baxter's Tobacco II dissent. Id., citing Tobacco II, 207 P.3d at 42-44 (Baxter, J., dissenting).

Finally, the Eighth Circuit determined certification of the UCL claim was inappropriate because individual evidence of each class member's reliance would be necessary to establish the defendant's liability. Id. at *17. Since the defendant used thousands of individual sales agents, who did not have a uniform "sales script," it would be impossible to establish that the defendant used unfair business practices when it sold the annuities without evaluating each sales

transaction. Id. Furthermore, the court noted that the varied sophistication of the class members would prevent class-wide evidence of reliance. Even amongst the named plaintiffs, the husband purchased the annuity without doing any research before the purchase, while his wife carefully scrutinized his account statements for years before purchasing her own annuity. Id. With such varied experiences amongst the class members, “it is unlikely that any misconduct could be uniformly established as to all purchasers” and the Eighth Circuit affirmed the district court’s denial of class certification. Id.

Avritt, although only persuasive authority for California state courts, provides ample strategies to defeat class certification. By turning the court’s attention to the need for extrinsic evidence necessary to interpret an allegedly ambiguous contract (as well as the individualized issues associated with that evidence), the defendants defeated class certification on the contract claim even where the contract language was identical amongst the class members. Furthermore, the Eighth Circuit’s discussion of Tobacco II is carefully reasoned and persuasive that a plaintiff must still show that common issues of law or fact predominate over individual claims. When the defendant can show that no two class members’ experiences were exactly the same, like the defendant in Avritt, class certification should be denied. California state court litigants, therefore, should use Avritt for all its worth, especially when confronted with a plaintiff who erroneously believes Tobacco II makes class certification under the UCL a foregone conclusion.