Life Insurance Litigation Update

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Life Insurance Class Actions

Life Insurance class actions have been prevalent over the past years. These class actions have included the theories of improper market conduct (vanishing premium, replacement, and retirement/investment cases), race based premiums and modal fees. Several life insurance companies have agreed to settle class actions under these theories, including New York Life Insurance Company, Franklin Life Insurance Company, American General Life Insurance Company, Principal Mutual Life Insurance Company, Massachusetts Mutual Life Insurance Company, Jefferson-Pilot Life Insurance Company and Life of Virginia. Beasley Allen has been involved in these class actions in that we represented individuals who chose to exclude themselves from the class action settlement, commonly referred to as "opt-outs." In fact, our firm represented a majority of the opt-outs in several of the aforementioned class action settlements. However, we expect these "market conduct" class action settlements to decline in the future because most life insurance companies, with the exception of Guardian Life Insurance Company and Mutual of New York Life Insurance Company for instance, have settled the vanishing premium type class actions and individual opt-outs, thereby effectively putting an end to these cases.

Emerging trends and theories against life insurance companies in the future will include cases brought under the civil RICO Act, variable life insurance policies, arbitration class actions, replacement cases and various other securities type cases involving life insurance products. Of course, any discussion of future life insurance class action trends must be tempered by the Class Action Fairness

Act. This Act will likely again become a hot political topic with the new republican-strengthen Congress. Most political pundits agree that some form of class action reform even a watered down form of the Class Action Fairness Act, will pass Congress next year.

One such replacement type class action is the case of *Onderdonk, et al., v. Conseco Life Insurance Company, et al*., in the District Court of Cameron County, Texas. More specifically, this is an "exchange" case whereby Conseco converted Massachusetts General Life Insurance Company and Philadelphia Life Insurance Company policies to Conseco policies. "The class consists of all former Massachusetts General flexible premium adjustable life insurance policy policyholders who were converted to Conseco Life flexible premium adjustable life insurance policies and whose accumulated values in the Massachusetts General policies where applied to first year premiums on the Conseco Life policies. The class complaint alleges among other things, civil conspiracy to convert the accumulated cash values of the plaintiffs and the class, and the violation of insurance laws nationwide."[1] Specifically, the complaint alleges that "sometime prior to the summer of 2000, Conseco determined to convert all Mass. General polices to a newly developed Conseco indexed UL2, which is a term Conseco used for the flexible premium policy at issue in this suit. This policy was specifically developed as a replacement for the Mass. General policy. It was designed by Conseco to provide fewer benefits at greater costs to the policyholder and to self terminate prior to the projected dates stated in the sales

[1] See Conseco, Inc.'s FORM 10-Q, filed with the United States Securities and Exchange Commission.

literature. However, Conseco…presented the CIUL2 as a superior product. The CIUL2 product was marketed in every state in which Conseco is licensed to do business."[2]

Interestingly, the Conseco class action is both a nationwide and a non opt-out class under Rule 23(b)(2). Pursuant to F.R.C.P. 23(b)(2), class certification is proper where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[3]

"In contrast to a class certified under 23(b)(3), members of a Rule 23(b)(2) class do not have the right to opt-out. However, a court may require notice and the right to opt-out under its discretionary authority provided in Rule 23(d)(2)." *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003). "In determining whether injunctive relief predominates in a 23(b)(2) class, one critical factor is whether the compensatory relief requested requires individualized damages determination or is susceptible to calculation on a class wide basis." *Coleman v. GMAC*, 296 F.3d 1443, 448 (6th Cir. 2002). In the case of *In re Monumental Life Insurance Company*, 365 F.3d 408 (5th Cir. 2004), a race based premium class action, the court examined the non opt-out scenario as follows:

> As fundamental requisites of the constitutional guarantees of procedural due process, notice and opt-out are mandatory for damage classes certified under rule 23(b)(3). Though rule 23 does not explicitly extend these safeguards to rule 23(b)(2) classes, due

[2] See Complaint, *Onderdonk, et al., v. Conseco Life Insurance Company, et al., Case No. 2003-CCL-102-C, In County Court at Cameron County, Texas.*
[3] Federal Rules of Civil Procedure, 23(b)(2)

> process requires the provision of notice where a rule 23(b)(2) class seeks monetary damages.
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> On the other hand, there is no absolute right of opt-out in a rule 23(b)(2) class, even where monetary relief is sought and made available. Under our precedent, should the class be certified on remand, class members must be provided adequate notice, and the district court should consider the possibility of opt-out rights.
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> *Allison*'s statement that monetary relief may predominate where notice and opt-out are necessary reflects only the inescapable fact that such safeguards are most appropriate where individual issues diminish class cohesiveness. Then, conflicts among class members and issues of adequate representation are most likely to surface. Rule 23(b)(3) is the default vehicle for certification, but only because notice and opt-out rights are mandatory components. A district court is empowered by rule 23(d)(2) to provide notice and opt-out for any class action, so rule 23(b)(2) certification should not be denied on the mistaken assumption that a rule 23(b)(3) class is the only means by which to protect class members.
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> All of this further demonstrates the futility of the district court's and dissent's inquiry as to whether the "prime goal" of the class is injunctive or monetary relief. The rule 23(b)(2) predominance requirement, by focusing on uniform relief flowing from defendants' liability, "serves essentially the same functions as the procedural safeguards and efficiency and manageability standards mandated in (b)(3) class actions." Therefore, to deny certification on the basis that the damage claims would be better brought as a rule 23(b)(3) class serves no function other than to elevate form over substance. Indeed, interests of judicial economy are best served by resolving plaintiffs' claims for injunctive and monetary relief together.

In re Monumental, 365 at 416-418 (internal citations and footnotes omitted).

Another example of a recent marketing conduct class action settlement is the case of *McBride, et al., v. Life Insurance Company of Virginia, d/b/a GE Life and Annuity Assurance Company*, Civil Action No. 4:00-CV-213-3, United States District Court for the Middle District of Georgia. This lawsuit involved "flexible premium adjustable life insurance policies designed, marketed, sold and administered by GE Life and Annuity Assurance Company, the Life Insurance

Company of Virginia and American Agency Life Insurance Company."[4] There, the court essentially gave class members four options. First, members could remain in the class and apply for settlement remedies through a "requested relief" form. Second, the class members could do nothing. Third, class members could object to the proposed settlement terms. Fourth, class members could exclude themselves pursuant to F.R.C.P. 23(b)(3). The relief form instructed class members to check a "grievance" related box under one of the following headings: level premium statement, single premium statement or vanishing premium statement. If a class member choose the vanishing premium statement, he or she had to state with specificity the "total premium payments expected to make" and/or the "number of policy years after which the premium would vanish." Class members were also given the option of checking a box for "other grievance statement." The class action notice defined the plaintiff's claims as follows:

> In this Action, Plaintiffs allege that the Defendant breached its insurance contracts with Class Members by demanding additional or higher premiums to keep Class Policies in force, and also challenge the Defendant's sales and marketing practices. Specifically, Plaintiffs allege in the Complaint that the Defendant induced Class Members to purchase Class Policies through misrepresentations, the failure to disclose certain facts, and false promises that (i) the premiums on such policies would stay level and never change over the life of the Class Policy; (ii) the premiums on such policies would stop or "vanish" after a certain period of time; and/or (iii) only one initial premium would ever be due for such policy. Plaintiffs also allege in the Complaint that the Defendant breached its insurance contracts with Class Members by allegedly failing to comply with such alleged promises and by improperly

[4] See Class Action Notice, *McBride, et al., v. Life Insurance Company of Virginia, d/b/a GE Life and Annuity Assurance Company, Civil Action No. 4:00-CV-213-3 (DF), United States District Court for the Middle District of Georgia.*

> reducing credited interest rates and increasing policy charges, including cost of insurance rates.
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> Plaintiffs also allege in the Complaint that the Defendant wrongfully designed, marketed, sold, and administered Class Policies owned by Class Members over time, and thereby caused them injury.

The Life of Virginia class action settlement included roughly 360,000 class members. Of this, 651 individuals opted out and none objected.

Other Life Insurance Litigation Trends

One fairly recent trend implemented by the life insurance companies is to remove individual life insurance fraud cases to federal court under the guise of fraudulent joinder. This tactic has been implemented even though the plaintiff named a resident defendant, usually the agent who sold the policy at issue. However, defendants made arguments regarding the merits of the case to support the contention of fraudulent joinder. The case of *Owens v. Life Insurance Company of Georgia*, 289 F.Supp.2d 1319 (M.D. of Ala. 2003) is a prime example of such legal maneuvering. There, plaintiff filed suit against Life of Georgia and his insurance agent, alleging that the agent misrepresented how the policy would perform. Specifically, plaintiff was told he would have a "paid up" policy upon reaching age sixty-two. Plaintiff filed suit in state court. The defendant removed the case to federal court, arguing that the state court lacked jurisdiction because diversity of citizenship did not exist pursuant to fraudulent joinder. In analyzing the plaintiff's motion to remand, the court held as follows:

> Plaintiff also asserts claims of fraud and fraudulent suppression against Adams stemming from his 1984 purchase of insurance. Defendants respond that Plaintiff cannot sustain his fraud and fraudulent suppression claims against Adams because the statue of limitations has expired. Defendants argue that in accordance with

Foremost Ins. Co. v. Parham, 693 So.2d 409 (Ala. 1997), this court should determine as a matter of law that Plaintiff should have discovered the fraud or suppression, if any, when he purchased the Policy in 1984. Defendants further argue that if these fraud claims are time-barred, then there is not possibility that Plaintiff can establish a cause of action against Adams, and the court should therefore find that Adams has been fraudulently joined.

This court has consistently held that if the only claims against a resident defendant are barred by the statue of limitations, then there is no possibility the plaintiff can establish a cause of action against eh resident defendant. In such a situation, the resident defendant is deemed to be fraudulently joined. The statute of limitations for Plaintiff's fraud and fraudulent suppression claims are two years.

Here, because Plaintiff predicates liability on representations occurring at or around the date of purchase in 1984, the two year statute of limitations clearly had run on July 17, 2003, the date Plaintiff filed his Complaint. Under Alabama law, the only possibility for avoiding the statute of limitations bar on Plaintiff's fraud claims against Adams is if the statute is tolled. However, this court finds, as Defendants argue, that the Supreme Court of Alabama's interpretation of the tolling provision has foreclosed that possibility.

* * * *

In sum, under the *Foremost* objective standard, Plaintiff should have discovered the possibility of fraud and misrepresentation in 1984 when he purchased the Policy, and the two year statute of limitations commenced running at that time. ("The limitations period begins to run when the plaintiff was privy to facts which would 'provoke inquiry in the mind of a [person] of reasonable prudence, and which, if followed up, would have led to the discovery of the fraud.") (citation omitted). As such, the statute of limitations for Plaintiff's fraud claims against Adams began running in 1984 and expired no later than 1986, which is more than seven years before Plaintiff filed this action. As a result, Plaintiff's claims against Adams are barred by the two year statute of limitations. *See Bullock*, 165 F.Supp.2d at 1258. Hence, the court finds that there is no possibility that Plaintiff can establish a cause of action against Adams. Accordingly, the court concludes that Adams has been fraudulently joined and, disregarding the residency of Adams, the court determines that there is complete diversity between Plaintiff and the remaining defendant, Life of Georgia.

Owens, 289 F.Supp.2d at 1324-1327.

However, recently federal courts have thwarted these improper removals. These courts have held that a defendant may not assert a fraudulent joinder argument to the non-diverse defendant if is also applies to the diverse defendant. The opinion in *Conerly v. American General Life and Accident Insurance Company*, CV-04-J-2210-NE, *in the United States District Court for the Northern District of Alabama, Northeastern Division* (July 20, 2004), is a prime example of this rational. There, the court held as follows:

> American General asserts that plaintiff has no possibility of recovery against defendant Gamble because his claims are barred by a class action settlement to which American General was a party. However, under *Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146, 34 S. Ct. 278 (1914), "fraudulent joinder does not exist when an argument offered to prove the fraudulent joinder of non-diverse defendants simultaneously shows that no case exists against the diverse defendant or defendants." *In re New England Mutual Life Ins. Co. Sales Practices Litigation*, 2004 WL 1567871, 11 (D.Mass.); *see Boyer v. Snap-On Tools Corp*., 913 F.2d 108, 113 (3d Cir. 1990)(holding that court may not find fraudulent joinder based on a determination of the merits of a defense asserted by "diverse and non-diverse defendants alike"). Such is the case here, where American General argues that plaintiff's claims against Gamble are barred by a release of claims against American General. The defense clearly applies to American General (diverse defendant) and Gamble (non-diverse defendant) alike and, thus, fails to show why Gamble should be set apart as "fraudulently joined." *See Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146, 152-54, 34 S. Ct. 278 (1914).
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> Although American General has asserted a defense which may show that plaintiff's claims against Gamble fail, the defense applies to both Gamble and American General. Thus, this court cannot consider it in determining American General's claim of fraudulent joinder. *See Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146, 153, 34 S. Ct. 278 (1914); *Boyer v. Snap-On Tools Corp*., 913 F.2d 108, 112-13, (3d Cir. 1990). As such, this court finds that it lacks jurisdiction to hear this case because there is not complete diversity among the parties. *See* 28 U.S.C. §§ 1332 and

> 1441(b)("Any other such action shall be removable only if non of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought"). It is therefore ORDERED that this case be and hereby is REMANDED to the Circuit Court of Madison County, Alabama.

Another emerging issue in life insurance fraud cases is the interplay between the Gramm-Leach-Bliley Act (GLBA) and the production of customer lists to plaintiffs. In many states, plaintiffs are entitled to a customer list from defendant insurance companies in order to explore whether the defendants intentionally entered into a fraudulent plan or scheme regarding a particular sales practice. Additionally, Rule 404(b) of the Federal Rules of Evidence allows for this type of evidence as follows:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

In the case of *Duran v. City of Maywood*, 221 F.3d 1127, 1132-33 (9th Cir. 2000), the court noted that "we have held that other act evidence is admissible under 404(b) if the following test is satisfied: (1) there must be sufficient proof for the jury to find that the defendant committed the other act; (2) the other act must not be to remote in time; (3) the other act must be introduced to prove a material issue in the case; and (4) the other act must, in some cases, be similar to the offense charged. Even if all four conditions are met, the evidence may still be excluded under 403, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *See also Duckworth v. Ford*, 83 F.3d 999 (8th Cir. 1996).

However, since the passage of the GLBA, defendants argued that the Act protected these documents as confidential. The Supreme Court of Alabama recently analyzed this issue in the case of *Ex parte Mutual Savings Life Insurance Company*, 2004 WL 2260475 (Ala. October 8, 2004). There, the court relied on a previous district court opinion from West Virginia and held as follows, allowing the production of the customer list:

> In *Marks v. Global Mortgage Group, Inc.*, 218 F.R.D. 492 (S.D.W.Va. 2003), the United States District Court for the Southern District of West Virginia held that 15 U.S.C. § 6802(e)(8) permits a financial institution to disclose a customer's nonpublic personal financial information to comply with a discovery request in a federal civil action. To support its holding, the district court reasoned that Congress included in the GLBA the "syntactically separate and distinct" phrase "to respond to judicial process" to accommodate civil discovery. The court further noted that the legislative history of the House Bill that became the GLBA indicated that Congress "envisaged an independent judicial process [i.e., civil discovery] exception." 218 F.R.D. at 496. The court explained that "even if the GLBA included no exception for civil discovery, the mere fact that a statute generally prohibits the disclosure of certain information does not give parties to a civil dispute the right to circumvent the discovery process." Lastly, the court noted that Congress, when drafting the GLBA, incorporated language similar to the Privacy Act, see 5 U.S.C. § 522a(b), and the Commodity Exchange Act, see 7 U.S.C. §§ 1 to 17, which the court interpreted as reflecting a concern with the widespread dissemination of nonpublic information and not with disclosure of nonpublic information in a judicial proceeding.
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> The interpretation of the GLBA by the United States District Court in *Marks* is reasonable. We hold that by incorporating the phrase "to respond to judicial process," see 15 U.S.C. § 6802(e)(8), Congress created an exception applicable to situations in which the trial court orders the disclosure of a customer's nonpublic personal information during discovery in a civil action. A plain reading of the GLBA reveals that the phrase "to respond to judicial process" is

independent from the phrase “to respond to…government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes authorized by law.” See 15 U.S.C. § 6802(e)(8). Clearly, when a party discloses information pursuant to a court order, the party engages in a judicial process. Therefore, we hold that under the expressed “judicial process” exception, the trial court did not exceed the scope of its discretion when it ordered Mutual Savings to disclose its customers’ nonpublic personal information without providing notice to those customers engaging in the opt-out requirement.