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Recent Insurer Victories in Indexed Annuity Class Actions

October 13, 2016

Recent federal court decisions effectively terminated two class action lawsuits challenging indexed annuity sales, seemingly ending an extended wave of class litigation in the federal courts against multiple insurers predicated on allegations of inferior or misrepresented "value," "illusory" benefits, or "hidden fees" in the form of commissions. ***Chambers v. North American Co. for Life & Health*** In June, a federal court in Iowa denied *Chambers*' motion to certify two classes of North American annuity purchasers based on claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) and for breach of contract. As in most earlier filed class cases against annuity issuers, the RICO claims were premised on alleged misrepresentations about initial sales charges or fees, premium bonuses, and market interest adjustments. The breach of contract claim rested on another familiar allegation in class action annuity litigation: that the insurer violated promises to comply with state standard nonforfeiture
laws ("SNF laws") because the annuity contracts were not in fact "fixed-maturity date" annuities as claimed, and should have been treated as optional maturity date annuities under the SNF laws. The court, assuming without deciding that the plaintiffs could satisfy the requirements of Federal Rule of Civil Procedure 23(a), first analyzed Rule 23(b)(3)'s "predominance" requirement: that "questions of law or fact common to class members predominate over any questions
affecting only individual members." Initially, the court addressed plaintiffs' contention that the alleged misrepresentations in promotional material were uniform and that each class member signed a statement evidencing that he or she received and read the allegedly misleading statements. The court observed that the record left "little doubt that the content of the product brochures and disclosure statements" were "varied," pointing out, *inter alia*, that the one plaintiff's disclosure statements affirmed that she read the marketing material while the other plaintiff's certified only that he received the materials. It also remarked that agent presentations differed and that the promotional materials varied depending on product type and date prepared. The court concluded these differences likely would be sufficient to preclude certification but nonetheless, "for purposes of this motion," decided "that Plaintiffs' alleged misrepresentations [we]re not so dissimilar to preclude class certification." Ultimately, the court's decision rested on plaintiffs' failure to

demonstrate that causation could be proved without raising individualized evidentiary issues. The court first noted that causation in this case required a showing of each class member's reliance. It rejected plaintiffs' argument that the court could infer such reliance, refusing to adopt the reasoning of courts holding that payments of fraudulent invoices or charges were sufficient to create an inference of classwide reliance. Moreover, the court found that the record in the case, including one plaintiff's testimony that he did not read the materials and another plaintiff's testimony that she primarily relied on her advisor, "explicitly rebuts any inference of reliance by the named plaintiffs." According to the court: Even assuming that every class member was provided with the same misrepresentations and omissions—which the evidence demonstrates they were not—that fact alone is insufficient to establish causation in the face of evidence that named plaintiffs explicitly failed to rely on the information, if they read the information at all. The court also declined to certify the breach of contract claim. According to the court, determination of whether North American's annuities complied with SNF laws would require individualized evidence and analysis as to the different laws of 50 states over a 14-year period with respect to multiple different products. Because this evidence would vary by, among other things, type of product and the controlling SNF laws at the time of purchase, the plaintiffs failed to establish that common questions would predominate. The Eighth Circuit denied the plaintiff's petition for interlocutory review of the decision under Rule 23(f). ***Abbit v. ING USA Annuity and Life Ins. Co.*** In *Abbit*, on August 30, a federal court in California granted summary judgment for the insurer on five claims the court had recently certified for classwide resolution. Three claims—for breach of contract and violations of California's Unfair Competition Law (UCL), and Financial Elder Abuse statute—rested on allegations that ING set "the prices of … undisclosed derivative structure so low that the true values of the contracts were below" the minimum guaranteed contract values (MGCV) required under the Insurance Code. The other two claims, both for violation of California's securities laws, were predicated on allegations that indexed annuities were securities under state law because "ING's internal execution of the 'derivatives' and 'options' transfers market risks from ING to" annuity owners. The court rejected plaintiff's contract-based theories, and thus entered summary judgment as to the breach of contract, UCL, and Elder Abuse statute claims. Plaintiff's first theory was that the insurer had violated a promise that it would maintain "the 'true value' or 'economic value'" of the annuities above the MGCV. According to plaintiff, his expert's calculations showed that the "true value" of the annuities in deferral was actually below the MGCV, and that there was therefore a forfeiture of promised benefits. The court found these arguments unpersuasive because plaintiff could not identify any contract term promising a "true value" or that "ING would maintain a [MGCV] for the contract at any time other than termination." The court likewise did not accept plaintiff's second theory—based on a new argument not offered in seeking certification—that the insurer's method of index crediting was not consistent with a regulatory definition of "equity–indexed benefit." The court ruled that the provision in question was a definition, not a regulatory requirement, and decided that it would not allow plaintiff to pursue the claim on a theory that had not served as the basis for certification. The court also found that the insurer was entitled to summary judgment on plaintiff's claims for violation of California's securities laws, agreeing with defendants that it was "illogical to

argue that ING FIAs transfer market risk to Plaintiff when the Contract guarantees that Plaintiff will receive at least the amount he invested less the surrender charge." According to the court, "[t]he only market risk Plaintiff bears is ING's insolvency, and the risk of insolvency is insufficient to convert a transaction into sale of a security."

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