

Class Certified in Unique Fixed Indexed Annuity Case

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The creative theories of liability and damages on display in the recent certification of multiple classes suggest that the long run of annuity class actions is not over yet. Plaintiff in *Abbit v. ING USA Annuity and Life Insurance Company* offered multiple theories of liability, asserting 11 causes of action with respect to ING's marketing and administration of fixed index annuities (FIAs), including breaches of contractual and fiduciary duties, fraud, failure to supervise, and four statutory claims. Plaintiff claimed that ING "surreptitiously embedded ... structured financial derivatives" in its FIAs, without explaining whether this fact distinguishes ING's FIAs from other FIAs or, if not, how the "structured financial derivatives" were hidden. He further alleged that ING abused its discretion in the manner it adjusted caps on investment returns, which were allegedly set too low for the FIAs to perform as represented. Additionally, plaintiff contended that a premium bonus feature of certain FIAs makes them securities, because the bonus is "not included in the contract's guaranteed values," thus putting these products "in an unregulated 'no-man's land.'" Finally, plaintiff asserted that his FIA was worth only 73 cents per dollar of premium paid on the date of purchase and that other FIAs were similarly affected by ING, arguing that this purported ability to assess the "purchase date value" of the FIAs will allow damages to be calculated on a class-wide basis. In its opinion partially granting class certification, the California federal court recognized that treating FIAs as securities was a "novel theory" and expressed reservations about the methodology plaintiff used to calculate the value of these FIAs, but found enough common issues to certify some of plaintiff's claims. The Ninth Circuit has rejected ING's petition for permission to appeal this order, and briefing has begun on ING's motion for summary judgment on the class claims.

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