

# Cost of Insurance Litigation Review

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As illustrated by the two examples here, recent decisions on preliminary motions seeking to dispose of or narrow the scope of claims challenging COI rate determinations suggest the industry may be enmeshed in litigation for some time. Additional clues will be revealed when motions pending in a string of other cases are decided. ***Brach Family Foundation, Inc. v. AXA Equitable Life Insurance Co., (S.D.N.Y. Dec. 19, 2016)*** While organized as a single cause of action, the plaintiff in Brach asserted AXA's COI rate increase was a breach of contract pursuant to several theories of liability. In denying AXA's motion to dismiss the claim, the court found each theory to be plausible. First, the court addressed plaintiff's allegation that the rate increase singled out a subset of policyholders (on ages 70-plus, face amount \$1 million-plus) in violation of the "equitable to all policyholders of a given class" clause. It found the clause ambiguous and construed it against AXA. The court next determined that the plaintiff's allegation that the increase was based on unreasonable assumptions about mortality and investment income (or pricing factors not in the COI change clause at all) was plausible, as the court credited the plaintiff with providing some supporting evidence. Finally, pointing to an NAIC model law on unfair discrimination within a class as a "procedure" or "standard" on file, the court found plausible the plaintiff's allegation that the increase was not determined in accordance with procedures on file with the New York Department of Financial Services. However, the court dismissed the plaintiff's claim that AXA violated New York Insurance Law § 4226, which states it is "unlawful to misrepresent the terms, benefits, advantages, of any of contracts or misrepresent the financial condition of the insurer." Specifically, the plaintiff claimed that if AXA's justification for the COI rate increase were true, it had filed false information with the Department when it suggested there were no changes in experience factors. However, the court dismissed the claim, finding that the plaintiff had not identified any specific illustration, annual statement, or interrogatory that was misleading and, thus, failed the heightened pleading standard. The dismissal was without prejudice, however, and in mid-January, the plaintiff filed a second amended complaint, re-pleading the Section 4226 claim. AXA has since moved to dismiss the second amended complaint. ***Dickman v. Banner Life Insurance Co., (D. Md. Dec. 21, 2016)*** While the case involves somewhat less traditional assertions by the plaintiffs, Banner Life's motion to dismiss effort in

*Dickman* generated a ruling with a more traditional result: a mixed bag for the insurer. As alleged in the complaint, Banner Life's policies provided guaranteed coverage for 20 years in exchange for a minimum premium, after which the policyholder could use excess cash value to extend coverage. Plaintiffs further alleged that, for years, they paid excess premiums to increase the cash value and ensure coverage beyond 20 years, but Banner Life's COI rate increase meant that the cash value was drained and the benefit of the excess premium payments was negated. Banner Life moved to dismiss the complaint's unjust enrichment, conversion and fraud claims (though not the breach of contract claim). The plaintiffs' unjust enrichment and conversion claims were dismissed for failure to state an actionable claim. However, the fraud claim, based on allegedly false financial and public statements regarding the company's financial health (which plaintiffs contend hid the eroding profitability of the policies) was allowed to stand. The court added, though, that no fraud claim could be based on the COI increase itself, since this was a matter of contract law; nor could it be based on the COI rate increase explanation letter sent to the plaintiffs, since this would not show reliance or causation. Notably, the *Dickman* complaint also asserts a pretext theory: that the COI rate increases were designed to funnel money to corporate parents as part of a so-called "shadow insurance" scheme. In the same ruling, the district court also denied Banner Life's motion to strike from the complaint (as false, and also immaterial to the plaintiffs' claims, prejudicial and scandalous) allegations regarding its captive reinsurance and dividends transactions, finding them "potentially relevant to both the contract and the fraud claim in that they provide an alternative reason for the COI increase other than the reason given by Banner."

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