LIMRA/LOMA 2014 REGULATORY COMPLIANCE EXCHANGE

DEVELOPMENTS AND TRENDS IN SIGNIFICANT ANNUITY LITIGATION

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I. OVERVIEW

This paper addresses developments in notable fixed annuity litigation matters over approximately the last three years.[1] Litigation involving the sale and administration of annuity products was less active in 2013 and the early portion of 2014 than in prior years, as most of the numerous cases filed from 2005 through 2009 have now been resolved by settlement, dismissal, and/or trial. However, there were still a number of notable developments, including decisions addressing the merits of plaintiffs‘ bonus and commission ―recoupment” theories, class-certification determinations, and additional settlement activity.[2] In addition, recently initiated litigation shows that plaintiffs are pursuing increasingly expansive theories of liability. Though the theories are augmented with the atmospheric allegations of wrongdoing (*i.e.*, ―senior targeting”) and framed in the language of fraud, at bottom, the claimants are attacking the insurer‘s determination of nonguaranteed benefits.

In the first wave of national class action annuity litigation, many complaints contained sweeping product attacks, challenging the inherent worth or suitability of annuities. Seeking to identify tortious conduct by the insurer, plaintiffs often focused on the bonus enhancement features of deferred annuities (enhanced first-year interest rates and enhancements to the starting account value of annuities, often referred to as ―premium bonuses”). Although there were minor variations on the theme, plaintiffs claimed that the use of the word "bonus" to describe the initial increases in account value was ―false” because (1) the insurer in constructing the product ―traded” some other benefit the contract might have offered for the bonus and (2) the insurer ―recouped” or intended to recoup the bonus by incorporating the costs of providing the bonus in establishing target investment spread to be used to guide future decisions on nonguaranteed benefits. The gist of these cases was not that the insurer credits less interest or provides less value than promised in the contract, but that the bonus product is intended to provide, on average, no greater benefit than would have been provided by a hypothetical version of the same product sold by the same insurer without the bonus. In other words, in plaintiffs‘ view, the bonus is not a ―true” bonus.

More recently, plaintiffs also have attacked the <u>*insurer’s sales costs*</u> (producer commissions) as undisclosed and ―excessive” ―sales charges” to the policy owners. The theory is that the insurer‘s sales costs reduce the amount of money the insurer would (in the absence of any sales costs) have available to invest, which in turn will ―reduce” future nonguaranteed benefits for the insurer to pass on to policy owners. Plaintiffs‘ counsel and experts thus reason that commissions are ―deducted” from the policy owners‘ overall ―returns.” While this theory

[1] This paper is the responsibility and work product of Mr. Jorden and Mr. Willis alone, and not that of Carlton Fields Jorden Burt PA and/or their clients. A more complete history of annuity litigation can be found in other papers prepared by the authors and their colleagues. *See, e.g.,* Stephen J. Jorden, *Fixed Annuity Class Action Update*, ALI-ABA Conference on Insurance Industry and Financial Services Litigation (July 9, 2009); Waldemar J. Pflepsen, Jr., *Recent Trends in Bonus Annuity Class Action Litigation*, ALI-ABA Conference on Insurance Industry and Financial Services Litigation (April 3, 2008); James F. Jorden & Waldemar J. Pflepsen, Jr., *Class Action Annuity Litigation*, ALI-ABA 12th Annual Conference on Financial Services and Insurance Industry Litigation (May 10, 2007).

[2] The research for this paper was finalized on March 6, 2014; the summaries set forth herein reflect selected reported and certain unreported information available through that date.

typically has been framed in the language of misrepresentation (based on sales material statements that the fixed annuities contain no ―sales charges” or ―fees”), plaintiffs have also invoked the duty of good faith and fair dealing to challenge the level of commissions paid to agents, claiming that they would have received greater nonguaranteed benefits had the insurer‘s commission payments not been ―excessive.”

Initially, plaintiffs encountered little success, but in more recent year these recoupment theories have gained some traction in a few jurisdictions. The inconsistency in rulings may reflect the presiding judges‘ differing views of the legal status of a deferred annuity. A few courts seem to have accepted the notion advocated by plaintiffs‘ counsel that fixed annuities are pass-through investment vehicles in the nature of mutual funds, with the insurer accepting the role of investing each policy owner‘s money on behalf of and for the benefit of that policy owner. Many other courts approach the annuity, analytically, as a contract with promises limited to those specified in the contract—thus a bonus credit that enhances the economic value cannot actually be "recouped" unless without (at least) proof that the company credits interest (or provides some other benefit) that falls short of what was promised at the time of contracting. In other words, some courts have been unable to discern how the insurer can recoup a contractual benefit it has actually provided to the policy owner by later not providing a hypothetical benefit (―higher” nonguaranteed crediting rates for example) it never promised.

II. GENERAL LITIGATION DEVELOPMENTS

A. Abbit v. ING USA Annuity and Life Ins. Co., No. 13 CV 2310 GPC WVG (S.D. Cal.).

On February 25, 2014, the District Court for the Southern District of California addressed the viability of a putative California-only class action complaint filed in September 2013 by an annuity purchaser claiming that ING ―unlawfully targets senior citizens by advertising indexed-annuity contracts that purport to protect retirement savings while hiding an undisclosed complex, embedded derivative structure.” Although the complaint contains allegations of misrepresentations, it appears to reflect a general attack on the worth of the product. The crux of plaintiffs‘ complaint seems to be that ―ING exercised its investment discretion under the contract in a manner that ensures that its indexed annuities did not protect or build-up retirement savings.” Similarly, the plaintiff alleged that the annuities offer ―meager investment returns that lag far behind much-safer investments.” He also asserted that ING failed to train and properly supervise its agents, did not provide an immediate bonus as allegedly advertised, and incorrectly calculated credited interest. The complaint asserts causes of action for breach of contract, breach of good faith and fair dealing, breach of fiduciary duty, failure to supervise agents and violation of California‘s statutes on elder abuse, false advertising, unfair competition and concealment.

The court granted in part and denied in part ING‘s motion to dismiss. The court denied the motion as to a number of claims, including claims under California‘s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 and False Advertising Law Cal. Bus. & Prof. Code §17500, predicated on alleged misrepresentations in sales material. Among the alleged misrepresentations the Court found potentially actionable under the Rule 12(b) standard were (1) that the annuity would provide ―‘protection for principal’” and ―‘minimum guarantees‘” (2) that

―‗100% of your premium is put into the contract'" and (3) that the annuities offered a 5% bonus.[3] The court also found that plaintiffs had adequately pleaded a fiduciary duty between insurer and insured by alleging that the insurer (1) ―targets seniors with products that falsely promise security," (2) ―promises investors continued commitment, thanking them for ongoing trust and confidence in [the insurer]," (3) ―drafted all contractual materials and structured pricing parameters," and (4) had ―superior knowledge and bargaining power."

The court dismissed plaintiff‗s breach of contract claim to the extent it was based on plaintiff‗s allegation that ING failed to credit the bonus to the minimum guaranteed contract value because the express terms of the contract did not provide for any such bonus. Significantly, the court also dismissed plaintiff‗s claims for breach of implied covenant of good faith and fair dealing, recognizing that the insurer could ―not be held liable for exercising discretion expressly allowed under the contract." *Id.* at * 7; *compare Vaccarino v. Midland Nat'l Life Ins. Co*., No. CV 11-05858 CAS (MANx), 2012 WL 1247137 (C.D. Cal. Apr. 13, 2012) (plaintiffs‗ theory that excessive commissions are recouped through setting of nonguaranteed benefits stated actionable breach of duty of good faith and fair dealing). But it allowed the breach of contract claim based on plaintiffs‗ allegation that the insurer promised to provide ―daily crediting" of interest required daily compounding of interest.

B. *Chambers v. N.A. Co. for Life and Health Ins.*, No. 1:11-cv-03528, 2011 WL 5868214 (N.D. Ill. Nov. 18, 2011) – transferred – now No. 4:11-cv-00579 (S.D. Iowa June 2, 2012)

On May 25, 2011 plaintiff Patsy Chambers filed a putative class action complaint on behalf of herself and certain purchasers of indexed annuities from North American Company for Life and Health Insurance in the Northern District of Illinois. The plaintiff alleged a scheme in which the defendant incentivized its sales agents with ―hidden" commissions that acted as ―sales charges", purported to pay bonuses that were no more than ―an accounting trick", and imposed surrender charges that violated consumer protection statutes. The plaintiff, seeking to represent a putative class of purchasers, brought claims under the Racketeer Influence and Corrupt Organizations Act (―RICO"), 18 U.S.C. § 1962 *et seq*, and for common law breach of contract and unjust enrichment. The court subsequently transferred the case to the Southern District of Iowa, where both plaintiff and defendant resided.

On June 1, 2012, the court denied the defendant‗s motion to dismiss, finding that plaintiff‗s allegations that sales commissions were ―immediately deducted" was contrary to sales material claiming ―no initial sales charges" or ―administrative fees" when, in actuality, sales commissions were ―immediately deducted" stated a viable scheme to defraud sufficient to withstand a motion to dismiss under Rule 12(b)(6). The court also rejected the defendant‗s request to dismiss the RICO claim as time-barred by the applicable four-year statute of limitations. Noting the early juncture of the litigation, the court stated that, absent additional discovery, it could not yet determine (1) whether the plaintiff actually knew or should have known of her injury, (2) whether the plaintiff was on ―inquiry notice" of the alleged violations,

[3] The second and third alleged misrepresentations in this case suggest that the plaintiffs intend to pursue bonus and commission recoupment theories. The opinion does not make clear plaintiff‗s explanation for the alleged falsity of the principal protection and minimum guarantee statements. (Similar statements appear in most, if not all, fixed deferred annuity sales material.)

or (3) whether equitable tolling doctrines (fraudulent concealment) should apply. Finally, the court found that plaintiff‘s breach of contract and unjust enrichment claims were adequately pled.

On October 16, 2012, the plaintiff filed a first amended complaint, which the defendant answered on November 2, 2012. The parties currently are engaged in discovery.

C. *Derry v. Jackson Nat'l Life Ins. Co.*, No. 11-00343 (RNBx), 2012 WL 1997234 (C.D. Cal. June 4, 2012) – transferred – now No. 4:12-cv-01380 (N.D. Cal. Mar. 20, 2012)

On March 2, 2011, plaintiffs Maxine Derry and Russell Hemen filed a putative class action complaint on behalf of themselves and similarly situated California senior citizen purchasers of Jackson National deferred annuity products, alleging: (1) unfair, deceptive, and unlawful business practices in the marketing and sale of deferred annuities to senior citizens; (2) failures to disclose all material facts, costs, and risks associated with deferred annuity products, including commissions and ―substantial surrender penalties;" and (3) noncompliance with provisions of California‘s senior notice statute, requiring disclosure of surrender charge periods and ―associated penalties." According to the complaint, Jackson National targeted senior consumers, even though they were unlikely to receive any benefit from deferred annuities because of the long-term nature and extended maturity dates of those products. The plaintiffs also alleged that some of the features of the products penalize senior citizen purchasers who need unfettered access to their funds. Plaintiffs alleged that these and other material facts were undisclosed or not fully disclosed in Jackson National‘s marketing materials.

The plaintiffs filed an amended complaint on June 3, 2011. On October 5, 2011 the court granted Jackson National‘s motion to dismiss and strike the amended complaint, without prejudice. In the absence of any alleged tortious conduct on the part of the agents, the court determined that the plaintiffs failed to state a claim against Jackson National for aiding and abetting. The court also determined that the plaintiffs failed to establish a plausible elder abuse claim and that the plaintiffs‘ elder abuse claims were time-barred. *See* 2011 WL 7110571.

The plaintiffs filed another amended complaint on October 21, 2011. After Jackson National filed a motion to dismiss the second amended complaint, the court transferred the case to the Northern District of California pursuant to 28 U.S.C. § 1404(a) in order to ―avoid any actual or perceived inconsistencies that could arise between rulings made" in *Kennedy v. Jackson National Life Ins. Co.*, No. C 07-0371 CW, 2010 WL 412394 (N.D. Cal. Oct. 6, 2010).[4] On June

[4] In *Kennedy*, after the district court‘s certification of a nationwide class and the Ninth Circuit‘s denial of its rule 23(f) petition, Jackson National filed a motion for summary judgment and on October 6, 2010, the district court granted the insurer‘s motion, dismissing the plaintiff‘s RICO claims. No. C-07-0371 CW, 2010 WL 4123994 (N.D. Cal. Oct. 6, 2010). According to the court, the plaintiff failed to create a triable issue as to whether Jackson National engaged in a pattern of racketeering activity because, ―the evidence does not suggest that Defendant engaged in a scheme to defraud and had a specific intent to defraud." With respect to the defendant‘s alleged nondisclosure of its commissions and their effect, the court concluded that ―[a]lthough it is true that Defendant‘s expenses likely had some effect on the rate of interest it decided to pay, the minimum guaranteed interest rate, the rate at which interest would be paid each year and the withdrawal charges were disclosed to prospective purchasers, including Plaintiff." The district court also found that the plaintiff offered no authority to support her position that Jackson National could be held liable for failing to disclose the effect of the 0.005 value in the market value/excess interest feature (―MVA/EIA") formula: ―Defendant did not present a half-truth by failing to explain the 0.005 value. The lack of an

4, 2012, the transferee federal court in the Northern District of California denied the defendant‘s motion to dismiss the second amended complaint, which was predicated on statute of limitation-related arguments. After briefing on Jackson National‘s November 26, 2012 motion for summary judgment, counsel for the parties signed a term sheet for a class settlement. Consequently, the court found Jackson National‘s motion for summary judgment moot, and entered an order on November 19, 2013 granting plaintiffs‘ unopposed motion for preliminary approval of the class action settlement agreement. The Fairness Hearing is set for April 17, 2014.

D. *In re Nat'l Western Life Ins. Deferred Annuities Litig.*, No. 05-CV-1018-JLS (WVG), 2012 WL 440820 (S.D. Cal. Feb. 10, 2012)

This case involves challenges to National Western‘s sales of deferred annuity contracts, with plaintiffs‘ claims focusing on bonus and commission ―recoupment" theories. Following the July 12, 2010 class certification in this litigation, National Western filed a motion for summary judgment on March 4, 2011, and, among other bases for the relief sought, pointed to the Northern District of California‘s October 2010 grant of the defendant‘s motion for summary judgment in *Kennedy v. Jackson National* (discussed in note 4). According to National Western, ―Plaintiffs‘ same theories of liability have been presented by these same lawyers, and rejected on a motion for summary judgment by the court in *Kennedy*." In a February 2012 order, however, the district court denied the motion, claiming that the decision in *Kennedy* could be distinguished on the facts of the case.

Trial was set for early 2013. National Western filed a motion to decertify the class on December 21, 2012 based on the results of depositions taken of absent class members, which National Western argued demonstrated that those class members had not relied on the alleged misrepresentations in making their purchase decisions, thus negating the ―common sense" inference of classwide reliance the Court had originally found was available. The district court denied the motion on February 14, 2013. This decision is discussed in Section III, *infra*. National Western filed a petition for permission to appeal denial of the motion to decertify the class on February 27, 2013, and the Ninth Circuit denied the petition on April 25, 2013.

The parties subsequently settled. A discussion of the settlement can be found in Section IV, *infra*.

E. In re American Investors Life Ins. Co. Annuity Marketing & Sales Practices Litig., MDL No. 1712, 2013 WL 343503 (E.D. Pa.)

In this consolidated multi-case matter, the parties entered into a class action settlement in July 2009, before the Court addressed plaintiffs‘ motion to certify. The settlement was subsequently approved by the Court and survived objections.

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explanation does not make the information about the MVA/EIA misleading." Finally, the district court rejected the plaintiff‘s contention that the annuity‘s bonus was illusory because any benefit obtained through the higher initial interest rate would be recouped through ―internal product pricing." Looking to a dictionary‘s definition of ―bonus" as ―‗something given or received that is over and above what is expected‘ or ‗a premium ... given by a corporation to a purchaser of its securities,‘" the court found there was ―no evidence that Plaintiff understood the word differently, or misunderstood the bonus associated with her annuity."

After the settlement, 36 class members submitted claim forms seeking restitution from Aviva in a civil enforcement action brought by Pennsylvania‘s Attorney General. Aviva filed a motion under the All Writs Act asking the court to enjoin the class members from seeking or receiving restitution or monetary relief in the civil enforcement action. Pennsylvania‘s attorney general opposed the motion. On July 10, 2013, the court entered the injunction, finding that class members were properly advised in the class notice that they could not sue Aviva (or continue to sue) based on the transactions at issue in the settlement if they failed to opt out of the class. The court observed that ―[t]hese claims for restitution are in effect post-negotiation ‗collateral attacks‘ on the settlement, and, given the thousands of potential class members who could have submitted a claim, the potential for disruption to the settlement is great." Consequently, the Court was ―persuaded that the potential for disruption to the terms of the settlement overrides the Attorney General‘s need to pursue a third type of remedy in its state court proceeding."

F. *Johnson v. Bankers Life & Cas. Co.*, No. 13-cv-144-wmc, 2013 WL 5308225 (W.D. Wisc. Sept. 20, 2013)

Annuitant, Heather Johnson, brought a putative class action against Bankers Life, alleging that she and her husband purchased an annuity because it contained a rider that the agent allegedly represented ―would protect and/or exclude the assets and/or income of the deferred annuities from Medicaid eligibility and spend down provisions/requirements, thereby allowing them to take full advantage of the Medicaid and/or other governmental aide and benefits." The plaintiff seeks to represent a class of Wisconsin residents who purchased Bankers Life annuities based on representations that the annuities included an income preservation amendment rider. Plaintiff asserts claims for breach of fiduciary duty, negligent and intentional misrepresentation, civil theft, and violation of Wisconsin Organized Crime Control Act (―WOCCA"). Bankers Life moved to dismiss all of the claims.

On September 20, 2013, the court dismissed the claims for breach of fiduciary duty and WOCCA, finding that plaintiff failed to adequately allege a breach of fiduciary duty, because no ―special circumstances" existed between plaintiff and her agent. Citing federal RICO case law, the WOCCA claim also was dismissed, because the plaintiff failed to allege that Bankers Life was separate from the purported statutory criminal enterprise, which was also defined as Bankers Life. *Compare Negrete v. Allianz Life Ins. Co. of N. Am.*, 926 F. Supp. 2d 1143, 1152 (C.D. Cal. 2013) *and Migliaccio v. Midland Nat'l Life Ins. Co.*, No. CV 06-1007, 2007 WL 316873, at *3 n. 1 (C.D. Cal. Jan. 30, 2007) (finding that the insurer defendant could be separate from an enterprise defined as an insurer and agents and/or field marketing organizations) *with Marlow v. Allianz Life Ins. Co. of N. Am.*, 2009 WL 1328636, at *5 (D. Colo. May 12, 2009); *Mear v. Sun Life Assur. of Canada (U.S.)*, 2008 WL 245217, at *8-9 (D. Mass. Jan. 24, 2008); *Rowe v. Bankers Life & Cas. Co.*, 2010 WL 3699928, at *6 (N.D. Ill. Sept. 13, 2010); *Levinson v. Mass. Mut. Life Ins. Co.*, 2006 WL 3337419, at *7 (E.D. Va. Nov. 9, 2006) (all finding invalid a RICO enterprise defined as the insurer and those who distribute its products).

G. *Negrete v. Allianz Life Ins. Co. of N. Am.*, CV 05-6838, CV 05-8908 (CAS) (MANx) (C.D. Ca.); 287 F.R.D. 590 (Dec. 27, 2012); 2013 WL 753475 (Feb. 25, 2013); 2013 WL 793239 (Mar. 4, 2013).

Negrete is a long-running case involving RICO and California state law claims in which the plaintiffs substantive and certification theories have shifted over the course of several years. The court‘s original certification theory (for both a national and California class) was, as in *National Western* discussed above, premised on plaintiffs being able to show that annuities were inherently worthless, such that there was a common sense inference that no purchaser would buy them but for a misrepresentation. In 2011, the plaintiffs settled on a fraud theory that there were “specific misrepresentations” in purportedly uniform marketing material about premium bonuses, sales charges, and annuitization benefits (essentially “recoupment” theories similar to those articulated in many of the other annuity cases).

There have been several decisions issued by the court in the last twelve months. On February 25, 2013, the court granted in part and denied in part Allianz‘s partial summary judgment motion, dismissing claims of class members with respect to transactions covered by a prior class settlement, but rejecting other arguments directed to the RICO claims, including the “enterprise” element of RICO. On March 4, 2013, the court denied Allianz‘s motion for judgment on the pleadings, which sought dismissal of claims of class members in over 16 states based on the McCarran-Ferguson Act, 15 U.S.C. § 1011, et seq., and for dismissal of the claims of one of the named plaintiffs under California‘s Elder Abuse Act, Cal. Welf. & Instit. Code § 15600 et seq., for failure to plead that Allianz caused him or his fellow class members to suffer physical harm or mental suffering. .

On June 3, 2013, Allianz filed a motion to decertify the California class based on the death of the sole named plaintiff who was a California resident, plaintiffs‘ counsel‘s representation that he was incompetent at the time of his pre-certification deposition and plaintiffs‘ refusal to substitute a living class representative. The court denied the decertification motion on July 3, 2013. The decision is discussed below in Section III.

H. *People v. Neasham*, A134873, 220 Cal. App. 4th 375, 388 (2013)

Neasham is a criminal case involving an independent insurance agent who sold an annuity to an 83-year old California resident. When Mr. Neasham‘s client withdrew $175,000 from a $225,000 certificate of deposit she had at the bank, a bank employee became concerned that the 83-year old was confused and possibly being influenced by her boyfriend to withdraw the funds. The bank employee called the Department of Social Services to report potential elder abuse. After an investigation by the District Attorney‘s office that was turned over to the DOI, Neasham was charged with theft from an elder and dependent adult solely on the basis of the sale of the annuity. (He did not take any of the client‘s funds for his own use). In October 2011, Neasham was convicted. The verdict was a fairly shocking result, particularly given that the State did not prove that Neasham knew of any impairment suffered by the client, and that the client had not actually lost any money or expressed dissatisfaction with the annuity.

Mr. Neasham appealed, and on October 8, 2013 the California Court of Appeal overturned the conviction. The Court of Appeal found that Mr. Neasham‘s “acceptance of payment for the annuity cannot be considered a trespassory taking . . . [Neasham] received [his client‘s] cashier check payable to Allianz and transmitted it to the insurance company, which issued her the annuity policy. He did not take her funds or convert her property for his own use or the use of any other person; as the amici argue, he did not deprive her of any property but instead placed her funds into an investment instrument of equal value to the monies withdrawn from her certificate of deposit."

The Appeals Court also rejected the notion that an annuity sale is *per se* inappropriate or worth less than the premiums paid. The Court noted, *inter alia*, that (i) the policy ―is approved by the California Department of Insurance for sale to persons through the age of 85 years," (ii) ―[f]or 30 days after its issuance [the client] had the unqualified right to cancel the policy and receive back the full price paid," and (iii) the withdrawal penalty to which prosecutors and their expert objected was a ―standard term" that did not ―reduce[] the value of the policy to less than she paid for it." The appeals court also noted that whether transferring funds from a certificate of deposit to an annuity was inappropriate ―is a matter of judgment over which reasonable persons can, and the witnesses did, disagree. Whether or not in [the client‘s] best interests, the policy was approved by the California Department of Insurance for sale to persons of [the client‘s] age."

In January 2014, the California Supreme Court declined to review the decision, and the California Department of Insurance restored Mr. Neasham‘s license.

I. *Rivera v. Allianz Life Ins. Co. of N. Am.*, No. 2:10–CV–2266–RLH–GWF, 2011 WL 2608602 (D. Nev. June 30, 2011)

Plaintiffs in this case were members of a nationwide class certified in *Mooney v. Allianz Life Insurance Company of North America*, Case No. CV 06-00545 ADM/FLN (D. Minn), which was tried to judgment entered in favor of Allianz on January 29, 2010. After judgment in *Mooney*, the *Rivera* plaintiffs filed a putative class case against Allianz, an Allianz wholesale broker dealer, and a financial representative, alleging that Allianz had misstated in a disclosure statement the manner in which indexed benefits under certain annuities would be calculated. The court granted Allianz‘s motion for dismissal on all grounds. It rejected the breach of contract and breach of good faith and fair dealing claims on multiple grounds, including that the disclosure statement was neither part of, nor inconsistent with, the policy terms. The court also found that plaintiffs‘ complaint failed to state a claim for unjust enrichment or statutory consumer fraud. Finally, the court held that plaintiffs‘ claims were precluded under the doctrine of *res judicata* by the judgment in *Mooney*, finding it irrelevant that plaintiffs were suing under a different statute and alleging a different alleged misstatement with respect to the same transactions adjudicated in *Mooney*.

J. *Rowe v. Bankers Life & Cas. Co.,* No. 1:09CV00491, 2013 WL 1245555 (N.D. Ill. Mar. 26, 2013)

In *Rowe*, plaintiffs sued on behalf of ―senior" purchasers of indexed annuities, alleging that Bankers Life had conspired with its independent agents to induce elderly consumers to purchase indexed annuities that were unsuitable for those over age 65. The putative class claims were based upon the federal RICO statute and California consumer protection statutes. In a March 2012 order, the federal district court denied the plaintiffs‘ motion for class certification, finding that common issues did not predominate because there was insufficient evidence showing that putative class members saw the allegedly ―uniform" disclosure documents and sales presentations. The court also found class-wide causation lacking. It rejected the plaintiffs‘ theory that the products were inherently flawed and that no rational purchaser would purchase an annuity without having been deceived, noting the ―multitude” of rational reasons seniors purchase annuities. On April 12, 2012, the plaintiffs filed a petition for leave to appeal pursuant to Rule 23(f), but that petition was denied by the Seventh Circuit on April 17.

Plaintiffs‘ filed a renewed motion to certify the California-only class on May 29, 2012. Shortly thereafter, Bankers Life opposed certification and filed a motion for partial summary judgment arguing that the plaintiff could not prove (i) that she or her husband had relied in purchasing the annuities on the operative alleged misrepresentation – a statement in a disclosure form that Bankers did not charge policy owners for any loading—or (ii) that the representation was false or misleading or was intended to mislead. The court agreed, granting summary judgment on the California claims in a March 26, 2013 opinion. It rejected plaintiffs‘ argument that ―loading charge” meant surrender charges (which were disclosed) or the spreads between revenues collected by the insurers and amounts credited to policy owners, explaining that there was ―nothing in the record showing that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, would be mislead by the non-technical definition provided in the Disclosure Form.” The court also denied plaintiff‘s motion for class certification, which is discussed in Section III, *infra*. On October 2, 2013, pursuant to the parties‘ joint stipulation, the court dismissed the action with prejudice.

K. *Vaccarino v. Midland Nat'l Life Ins. Co.*, No. CV 11-05858 CAS (MANx), 2012 WL 1247137 (C.D. Cal. Apr. 13, 2012)

In *Vaccarino*, plaintiffs sued Midland in a putative class action on behalf of deferred annuity purchasers alleging that Midland failed to adequately disclose that the costs of the bonuses and exorbitant agent commissions would be imposed on purchasers, accompanied by unenforceable surrender charges and interest adjustments. In other words, plaintiffs claim that Midland ―recouped” its costs of sales commissions and the bonus credited to the policies by ―lowering” the nonguaranteed rates subsequently declared on the policies. Based on these allegations, plaintiffs asserted claims for violation of California‘s CULL, fraud, breach of contract, and declaratory relief.

On April 13, 2012, the court granted in part and denied in part Midland‘s motion to dismiss plaintiffs‘ second amended complaint. The court found that plaintiffs lacked sufficient factual allegations to support their ―delayed discovery” argument, and therefore dismissed plaintiffs‘ fraud, UCL and contract claims as time-barred. However, the court declined to dismiss any of these claims to the extent they are based on purported improper interest crediting that occurred within the last four years. Of particular note, the court found that plaintiffs‘ bonus and commission recoupment theories – typically brought by plaintiffs as misrepresentation-based claims – were for purposes of Rule 12 viable breach of contract theories.

The plaintiffs subsequently filed a third amended complaint, setting forth allegations related to the plaintiffs‘ discovery of the claims. Midland moved to dismiss the ―recoupment” claims asserted in the new complaint. Specifically, Midland challenged, on statutes of limitations grounds, the plaintiffs‘ bonus and commissions ―recoupment” claims, which comprise the entirety of their fraud and UCL ―fraud prong” claims. Midland also challenged the timeliness of the plaintiffs‘ contract and declaratory relief ―recoupment” claims to the extent they rely on the delayed discovery rule, but not with respect to any ―periodic breach" theory of accrual.

The motion to dismiss was denied on June 25, 2012. The court rejected Midland's argument that plaintiffs were required under the delayed discovery rule ―to plead specific facts regarding the information and circumstances that moved them to action, and why they could not have acted sooner." The court held that ―plaintiffs' allegations that they first learned of facts giving rise to their claims, including the fact that they were injured, upon consulting with counsel satisfy plaintiffs' burden at the pleading stage." The court explained that the plaintiffs' ―allegation that Midland represented that it possessed discretion to set rates does not establish that Vaccarino knew of or suspected Midland's recouping practices prior to contacting counsel in 2011. Instead, this allegation merely suggests that Midland hid its recouping practice under the guise of its rate-setting discretion." Thus, ―[i]nsofar as Midland hid its practices from public view as plaintiffs allege, Vaccarino could not have discovered Midland's practice, and Midland's inquiry notice argument fails."

Plaintiffs filed a motion for class certification on September 24, 2012, which the court denied in part on June 17, 2013. Plaintiffs renewed their certification motion and on February 3, 2014 the court certified some, but not all, of plaintiffs' claims. These decisions are discussed below in Section III.

III. Class Certification Developments

A. *Krueger v. Northwestern Mut. Life Ins. Co.,* No. 1:10-CV-00128-SPM, 2011 WL 2938273 (N.D. Fla. Jul. 21, 2011)

On June 8, 2010, the plaintiff commenced a civil action in Florida state court on behalf of a putative class of annuity policyholders, alleging that Northwestern Mutual had unilaterally altered certain participating annuity contracts to provide for a different methodology for the payment of dividends and was, therefore, in breach of its contracts and its fiduciary duty. Pursuant to the Class Action Fairness Act (―CAFA"), Northwestern Mutual removed the case to federal court; thereafter, the plaintiff moved to remand the case, arguing that the ―internal affairs" exception to CAFA, which applies where the class action solely involves a claim that relates to corporate internal affairs and that arises under the laws of the state where the company is incorporated, specifically excluded federal jurisdiction over this action. The plaintiff argued that her lawsuit solely involves a claim that arises under the laws of Wisconsin because (1) the defendant, as a Wisconsin mutual company, must comply with Wisconsin statutes, (2) provisions of Wisconsin statutes are the basis for receiving a share of the insurer's divisible surplus, and (3) the defendant's obligations under annuity contracts also arise under Wisconsin insurance laws.

In a November 9, 2010 order the district court denied the plaintiff's motion to remand upon concluding that multiple state laws might apply to the claims asserted by the plaintiff on behalf of a national class. Specifically, perhaps foreshadowing how it would later resolve class issues, the district court noted that ―under identical circumstances, the courts in Wisconsin, the state with the interest in Defendant's internal affairs, have already determined that state laws other than Wisconsin apply to this dispute."

The court later denied a motion for class certification, finding that a nationwide class would necessarily implicate the laws of multiple states, thus rendering the action unmanageable, specifically noting that the breach of fiduciary duty laws of Wisconsin did not clearly apply to all national class members‘ claims and that multiple states‘ laws may apply to the breach of contract claims asserted on behalf of a putative national class. The plaintiff subsequently sought certification of a class of people that either bought in Florida or were current Florida residents. The district court, however, found that typicality, predominance and superiority were not satisfied. The court found that the law of different states still would apply, depending on where the contract was purchased, rendering the case unmanageable. Because class members purchased annuities from sales agents across the country, facts relating to the understanding of the contract and the purchase decision might be important under some states‘ laws, defeating Rule 23(b)(3)‘s predominance requirement. (See the discussion of *LaPlant v. Northwestern Mutual Life*, infra at C.3. in which a Wisconsin State Court certified and tried to verdict a similar contract claim.)

B. *In re National Western Life Ins. Deferred Annuities Litig.*, No. 05-CV-1018-JLS (WVG), 2013 WL 593414 (S.D. Cal. Feb. 14, 2013)

The background of this case, which involves nationwide RICO and California state law claims predicated on alleged misrepresentations about premium bonuses and commissions, is discussed above in Section II. In 2010, the district court certified nationwide and state classes. The court found the materiality of the alleged representations and the declarations of the named plaintiffs that they relied on the representations were sufficient to support a ―common sense" inference of reliance, stating that the alleged misrepresentations ―are of the type of statement upon which a buyer would almost certainly rely in making an annuity purchase. And, in fact, the Named Plaintiffs‘ declarations make clear that they actually relied on these statements." 268 F.R.D. 652, 665. Although the court cited to the *Negrete* decision, it did not appear that plaintiffs were required to present any evidence, expert or otherwise, that no rational purchaser would buy the annuities in question. The court also found that plaintiffs‘ deposition testimony suggesting that they had not relied on the alleged misrepresentations was overcome by contrary declarations and was, in any event, not sufficient to overcome the ―inference" the court had recognized because the court could *not* ―find that *none* of the Named Plaintiffs relied on the alleged misrepresentations." *Id.* at 666 (emphasis supplied).

Based on recent case law, including the Supreme Court‘s decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and developments in the facts—particularly the depositions of fifteen randomly selected class members who provided testimony indicating that they had not relied on the alleged misrepresentations--National Western moved to decertify the class on December 21, 2012, after the case had been reassigned multiple times. Relying on decisions in *Negrete* and the prior decisions (of other judges) in the same case, the district court denied the motion, stating that ―the prominent nature of the alleged misrepresentations" in the sales material, the fact that purchasers had to sign an acknowledgment of reading and understanding that material, and the availability of the ―no reasonable purchaser" causation inference were sufficient to maintain class certification. The court distinguished the decision in *Rowe,* which rejected the no rational purchaser theory articulated in *Negrete* (discussed below and in Section II *supra*), on the ground that the plaintiffs there had not presented evidence of uniform representations made to the entire class. With respect to the class member testimony that contradicted plaintiffs' asserted inference of reliance, the court, relying primarily on securities cases and the court's earlier decision, seems to have shifted the burden to National Western to *disprove* reliance on a classwide basis, finding that the fifteen classmember depositions evidence ―cannot be properly generalized to the class."

As discussed above in Section II, the parties recently settled the matter and a final order approving the settlement was entered on February 11, 2014.

C. *LaPlant v. The Northwestern Mutual Life Ins. Co.*, No. 08-CV-11988 (Wisc. Cir. Ct., Milwaukee Cty. March 7, 2011); 701 F.3d 1137 (7th Cir. 2012)

On March 7, 2011, after a two-week bench trial that had commenced on November 8, 2010, a Wisconsin state court judge entered a declaratory judgment against Northwestern Mutual in a class action lawsuit pertaining to the insurer's 1985 change in the method of payment of dividends on certain participating annuity contracts. Specifically, the plaintiff alleged that prior to the change, the payment of dividends to the plaintiff class was solely from the earnings (divisible surplus) produced by Northwestern Mutual's general account portfolio, which was managed pursuant to a long-term growth strategy; plaintiff contended that the 1985 change to backing the annuities with a segmented fund within the general account portfolio, that included shorter-term investments/bonds, was a substantial and material change to the contracts, in conflict with the insurer's marketing of the annuity to the class as long-term, growth, retirement investments, and resulted in a substantial and material reduction in dividend earnings. In its defense, *inter alia*, Northwestern Mutual pointed to the business judgment rule as protective of its discretion to annually determine, modify and allocate dividends among its policyholders, and its disclosure of the 1985 change to regulators, and their subsequent approval.

The court, in a sharply worded opinion, sided squarely with plaintiffs on all counts and issues, holding that ―[b]y basing the [annuity] dividends for all years since 1985 on the interest earned by the segmented account [] rather than from NWM's general account portfolio, NWM breached its contractual duties to determine, allocate and credit to Plaintiff Class their equitable and proper share of the company's divisible surplus as required by the contract and law."

After trial, an amended complaint was filed seeking damages for all annuitants in every state. Northwestern Mutual asserted that the amendment brought the suit within the purview of CAFA, and removed the action to federal court. The plaintiff filed a motion to remand the case back to state court, arguing that the ―internal affairs" exception to CAFA specifically excluded federal jurisdiction over the action. The federal district court for the Eastern District of Wisconsin agreed with the plaintiff and remanded the action back to state court. However, the Seventh Circuit accepted NWM's petition for remission to immediately appeal the district court's remand decision, pursuant to 28 U.S.C. § 1453(c), and reversed the remand ruling: ―This is a contract case, not a corporate-governance case. And multiple states' law applies to these contracts. Every state enforces promises, but states differ in how they calculate damages and when (if ever) punitive damages are available for breach of contract (which the plaintiffs want to recast as a tort claim for breach of fiduciary duty). Section 1453(d)(2) therefore does not permit a remand, and this class action must be finally resolved in federal court." The Seventh Circuit ruled that the ―district judge must determine whether to certify a nationwide class for damages and, having resolved that and any other procedural issue, must decide the case on the merits."

On March 4, 2013, plaintiffs filed a motion for an order redefining the class. Northwestern Mutual opposed on July 1, 2013 by filing an opposition to the motion to redefine the class, a motion to decertify the Wisconsin-only class, and a motion to strike certain expert reports. The motions have not yet been decided.

D. *Negrete v. Allianz Life Ins. Co. of N. Am.*, CV 05-6838, CV 05-8908 (CAS) (MANx) (C.D. Ca.); 287 F.R.D. 590 (Dec. 27, 2012); 2013 WL 3353852 (July 3, 2013)

As noted above in Section II above, *Negrete* was certified in 2006 on the premise that classwide proof of causation was facially plausible, at this point in the proceeding, based on the allegation that no rational consumer would purchase an Allianz annuity knowing that its ―true value" was less than the premium paid. Moreover, this causation theory was tethered to the allegation that class members received ―standardized written presentations." After the court in an October 2011 ruling found that disputed issues of individualized fact prevented the entry of summary judgment for one of the named plaintiffs and after plaintiffs announced at the hearing on summary judgment that they were no longer proceeding with the originally certified theory but were pursuing a case based on specific misrepresentations provided to policyowners, Allianz moved to decertify.

In a December 27, 2012 decision, the court denied Allianz‘s motion. Among other noteworthy aspects of the decision, the court made clear that proof of misrepresentations that were uniformly distributed was not sufficient to show classwide causation. According to the court, reliance was required in the case, notwithstanding plaintiffs‘ argument that the Supreme Court‘s decision in *Bridge v. Phoenix Bond & Indem. Co.*, 552 U.S. 639 (2008) dispensed with the requirement of reliance in RICO cases. According to the court,

> [a] classmember generally has not suffered any misrepresentation-related injury unless they actually relied on the misrepresentation—at least in some fashion—when making their purchasing decision. Reliance is the ‗glue‘ that is necessary for plaintiffs‘ original theory of causation.

Notwithstanding Allianz‘s arguments, the court held that ―resort to the ‗common sense‘ inference for proving class-wide reliance remains appropriate in this case." The court thus concluded that plaintiffs could still pursue a case premised on sufficient proof to the jury of the no-rational-purchaser theory.

Perhaps most notable about the decision is the court‘s finding that an ―alternative theory" of causation pressed at oral argument by plaintiffs counsel was an ―acceptable way to prove RICO causation and injury—absent class-wide reliance—after *Bridge*." The court summarized this theory as follows: ―because *at least some* members of the class ‗logically relied‘ on defendant‘s alleged misrepresentations, plaintiffs can demonstrate causation by way of an across-the-board price increase that class members suffered as a result of the misrepresentations." The court did not cite to any supporting or analogous judicial decisions accepting such a theory.

After learning that Mr. Ow passed in October 2012 and plaintiffs‘ counsel‘s statement at a November 2012 oral argument that Mr. Ow was incompetent at the time of his deposition in 2006, Allianz moved to decertify the California-only subclass. Allianz argued: 1) that neither a deceased person nor the executor of his estate is an adequate class representative; 2) absent class members have a right to competent representation by a living annuity purchaser; and 3) Allianz had a due process right to defend the case against an actual purchaser, not a composite plaintiff. The court disagreed, holding that Vida Negrete, Mr. Ow's former conservator and now executor of his estate, “has been the named class representative from the inception of this litigation.” Accordingly, the court found that “[h]er change in status, from that of conservator to executor, does not transform her into an inadequate representation for the California class.”

E. *Rowe v. Bankers Life & Cas. Co.,* No. 1:09CV00491, 2013 WL 1245555 (N.D. Ill. Mar. 26, 2013)

As discussed in Section II above, the court granted Bankers Life's motion for summary judgment on March 26, 2013, rejecting plaintiff's argument that a statement that there were no “loading charges” meant or was intended to mean that there were no surrender charges (which were disclosed) or constituted a representation about the spreads between revenues collected by the insurers and amounts credited to policy owners (*i.e.*, nonguaranteed benefits). In the same opinion, the court also denied plaintiff's motion for class certification, finding that the sole question common to the class—whether statements about loading charges were misrepresentations—had already been resolved against plaintiffs. The court also held that plaintiff was not an adequate representative under Rule 23(a)(4) because she never read the allegedly misleading disclosure statement, making her claims subject to an individual defense not applicable to the entire class.

As discussed above in Section II, this action was dismissed with prejudice on October 2, 2013, pursuant to the parties' joint stipulation.

F. *Vaccarino v. Midland Nat'l Life Ins. Co.*, No. CV 11-05858 CAS (MANx), 2012 WL 1247137 (C.D. Cal. Apr. 13, 2012)

Plaintiff filed a motion for class certification on September 24, 2012, which the court denied in part on June 17, 2013. Although the court found that “plaintiffs have demonstrated that all of the Rule 23 requirements as to liability are met for all of the claims” asserted, plaintiffs failed to offer “a damages model that tethers their theory of liability to the injuries allegedly suffered by each class member.” But the court stated that plaintiffs could renew their motion and offer a plausible, classwide method of proving damages as well as restitution.

On July 25, 2013 plaintiffs renewed their motion for class certification. On February 3, 2014 the court issued an order, certifying the class in part. The court certified a class with respect to plaintiffs' claim that the recoupment of the bonus and commissions was a breach of contract, but declined to certify a class under the same recoupment theory based on the fraud and UCL claims. The court reasoned that Plaintiffs' damages model determined damages under a benefit-of-the bargain theory. Plaintiffs could therefore sufficiently tie their breach of contract theory to this damages model, but benefit-of-the-bargain damages are not recoverable under UCL and fraud claims. The court also certified plaintiffs claims that Midland improperly deducted interest adjustments from surrendering policyholders, and a senior subclass with respect to Plaintiffs' claim that Midland did not disclose the surrender penalty in violation of California Insurance Code § 10127.13.

Midland filed a 23(f) petition with the Ninth Circuit on February 26, 2014. The petition raises two issues. The first issue is how rigorously expert testimony should be evaluated at the certification stage under the Supreme Court‘s decisions in *Comcast* and *Daubert*. Midland argued that ―[a] court should not be permitted to admit expert testimony to support class certification where it suffers from multiple methodological flaws that compel its exclusion under *Daubert*.” Midland also argued that the court‘s certification of classes comprised largely of non-injured individuals exposes a deep conflict among district courts in the Ninth Circuit. The classes consist of individuals that (1) have not surrendered their annuities (and may never do so) and therefore have not sustained (and may never sustain) a surrender charge or interest adjustment; or (2) if they have surrendered, experienced positive interest adjustments that partially or fully offset the surrender charges. Midland asked the Ninth Circuit to determine whether the action can proceed as a class action since the class is largely comprised of non-injured individuals.

IV. Settlement Developments

Most of the major annuity cases have been settled or otherwise resolved over approximately the last four years. While it is beyond the scope of this paper to describe the terms of the settlements, this paper notes which cases have settled in the event that readers wish to explore further the details of settlements in individual cases. Additional information about these settlements is available from the authors.

A. *Derry v. Jackson National Life Ins. Co*., No. 11-00343 (RNBx), 2012 WL 1997234 (C.D. Cal. June 4, 2012) – transferred – now No. 4:12-cv-01380 (N.D. Cal. Mar. 20, 2012)

On April 30, 2013, after initial briefing on Jackson National‘s motion for summary judgment, but before a decision, counsel for the parties signed a term sheet for a class settlement. Consequently, the court found Jackson National‘s motion for summary judgment moot, and entered an order on November 19, 2013 granting plaintiffs‘ unopposed motion for preliminary approval of the class action settlement agreement. The Fairness Hearing is set for April 17, 2014.

B. In re American Equity Annuity Practices and Sales Litigation, CV 05-6735 (CAS) (MANx) (C.D. Cal.)

This case is a putative class action on behalf of senior citizens that purchased deferred annuities from American Equity. Multiple complaints were filed in this consolidated action, but the crux of the allegations was that American Equity misrepresented and/or failed to disclose to consumers facts concerning the costs associated with its annuities, including sales commissions, the interest credited to the annuities, the bonus features of certain of its annuities, the surrender penalties and withdrawal provisions of the annuities, the fixed maturity dates of the annuities and other material facts. The case was stayed (or otherwise inactive) for many years pending resolution of issues in other similar annuity litigation before the same Judge. Although no class was certified in this action, the parties reached an agreement and filed a motion for preliminary approval of a class action settlement on August 16, 2013. The Fairness Hearing was set for January 27, 2014, and a final order approving class settlement was issued on January 29, 2014. But on February 27, 2014 a notice of appeal was filed by objector with the Ninth Circuit.

C. *In re Nat'l Western Life Ins. Deferred Annuities Litig.*, No. 05-CV-1018-JLS (WVG), 2012 WL 440820 (S.D. Cal. Feb. 10, 2012)

As discussed above in Section II, this certified class action involved RICO claims against the insurer based on bonus and commission recoupment theories. The parties were ready for trial but settled. Plaintiffs filed a motion for preliminary approval of the class action settlement agreement on August 22, 2013. The Fairness hearing was held on February 7, 2014 and the court issued a final order approving the settlement on February 11, 2014.

D. *In re Conseco Ins. Co. Annuity Mktg. & Sales Practices Litig.*, No. C-05-04726 RMW (N.D. Cal. Aug. 12, 2011)

The plaintiff alleged that Conseco sold deferred annuities to seniors in violation of RICO, California state statutes, and California common law. According to the plaintiff, the sale of the defendant‘s annuities to seniors was inappropriate because their life expectancy was shorter than the surrender charge periods. The plaintiff also contended that he would not have purchased the annuities if the defendant had adequately disclosed their terms and other allegedly material facts prior to purchase, including the annuities‘ alleged illiquidity, Conseco‘s ―precarious financial position," and the ―questionable value of their underlying investments." The district court granted in part and denied in part the defendant‘s multiple motions to dismiss, denying the motions as to the RICO cause of action, but dismissing several state law causes of action, including fiduciary duty claims. The plaintiff filed a motion for class certification in June 2010, and a hearing on that motion was to be held after October 2011. The parties, however, entered into a settlement agreement in January 2011. The court issued a final order approving the settlement on August 12, 2011.

E. *Curtis v. Northern Life Ins. Co.*, No. 61372-3-I (Wash. Ct. App. Sept. 15, 2011)

In *Curtis*, plaintiffs claim that Northern Life failed to disclose that it inappropriately reduced credited interest rates on older annuities. While a Washington state trial court dismissed the plaintiffs‘ claims and denied the plaintiffs‘ motion for certification of a nationwide class, the Washington Court of Appeals reversed both determinations in November 2008 (*see* 2008 WL 4927365). Specifically, the appellate court found that questions of fact remained as to whether the defendant acted reasonably and in good faith when setting its renewal interest rates; the court also found that individualized issues of reliance would not arise because the plaintiffs had asserted an omission claim, thus, as long as there was damage as a result of the interest crediting mechanism, plaintiffs could succeed. Review by the Washington Supreme Court had been stayed pending its ruling in *Schnall v. AT&T Wireless Services, Inc.*, No. 80572-5, which was issued by that court on January 21, 2010.[5] The defendant subsequently moved to lift the stay, but

[5] In *Schnall*, AT&T Wireless was sued and accused of misleading consumers when it billed them for a charge that was not included in advertised monthly rates and was not described clearly in billing statements. The trial court denied class certification on predominance grounds, but the Washington Court of Appeals reversed and certified a nationwide class under Washington law. In its January 2010 order, the Washington Supreme Court reversed the Court of Appeals upon finding that the certification of a nationwide class was inappropriate, and that the application of Washington law to claims of residents of other states was inappropriate. With respect to a possible state-wide class, the Washington Supreme Court noted that the trial court had held that certification of a nationwide class was inappropriate, in part, because there was a need for individualized analysis of whether the alleged misrepresentations caused loss to each putative class member. The Washington Supreme Court remanded the case so that the trial court could conduct a similar analysis with respect to a possible state-wide class.

the motion was denied on July 7, 2010. Thereafter, the parties engaged in settlement talks and on January 6, 2011, the parties filed a joint motion for limited remand seeking to have the Washington Supreme Court relinquish jurisdiction of the appeal so that the trial court could preside over class action settlement approval proceedings. That motion was considered by the court on March 1, 2011, and subsequently granted. A final approval order for a settlement was entered on September 15, 2011.

F. *In re Midland National Life Ins. Co. Annuity Sales Practices Litig*., MDL No. 07-1825 (C.D. Cal. Feb. 28, 2011)

In this MDL, the plaintiffs allege that the sale of deferred annuities to seniors is a violation of RICO, California state statutes and California common law. According to the plaintiffs, the annuities are "high-cost, illiquid, poor performing, laden with hidden charges and phony bonuses, and tax-disadvantaged." While the federal district court presiding over the MDL appointed its own expert to analyze class certification and summary judgment briefing, the parties began settlement negotiations in October 2009, prior to either motion being decided. On October 12, 2010, the parties filed a motion for preliminary approval of a settlement class, which the court granted on October 25. Final approval of the class settlement was obtained via an order by the court dated February 28, 2011. In March 2011, an objector appealed the final approval order to the Ninth Circuit (11-55432), challenging the sufficiency of the class notice, the approval of the settlement, and the award of attorneys fees. On January 7, 2013, however, the Ninth Circuit granted the parties‘ stipulated voluntary dismissal and dismissed the case with prejudice pursuant to Federal Rule of Appellate Procedure 42(b).

However, the Washington Supreme Court then granted the plaintiffs‘ motion for reconsideration on February 17, 2011, and withdrew its January 2010 opinion. *See Schnall*, 259 P.3d 129 (Wash. April 14, 2011). On reconsideration, the Court affirmed in part and reversed in part the Court of Appeals‘ earlier decision, ultimately remanding the case for further proceedings (1) to determine whether to certify a state-wide class and (2) to apply the correct causation standard to the Consumer Protection Act (CPA) claim.

The court prefaced its breach of contract claim discussion by reiterating its duty to afford substantial deference to the trial court assuming the record demonstrates that the court properly considered all Washington Court Rule (CR) 23 class action criteria. After reviewing the CR 23 treatment at the trial level, the court observed that the trial court had performed a thorough and competent review and rightly decided that individualized issues predominated the prospective class‘s issues as a group. In contrast, the Court of Appeals had applied a misguided commonality test while purporting to apply a predominance test and it had also given short-shrift to the principle that a choice-of-law inquiry that yields unwieldy variation in states‘ contract interpretations may trump the predominance analysis. The court also noted that nationwide contract claims present special concerns because of the varying availability of affirmative defenses in different states, such as, *e.g.*, Illinois‘ voluntary payment doctrine as a contract claim defense, which prohibits a contract claim for refund of a sum voluntarily paid. The court further held that a nationwide breach of contract class action was not superior to other available remedies such as joinder, intervention, consolidation, or state-wide class actions, as CR 23(b)(3) requires. The court then examined the trial court‘s CPA claim analysis, holding that it had failed to apply the appropriate "but for" standard of proximate causation under Washington rules and *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 170 P.3d 10 (Wash. 2007). Instead, it overemphasized the importance of reliance as a component of causation. Additionally, because the trial court performed its CR 23 analysis with a focus on nationwide class actions, its analysis as to a state-wide class fell short, thereby requiring a remand to apply the correct causation law.

G. *Rand v. American National Ins. Co.*, No. 09-cv-00639 SI (N.D. Cal. Sept. 22, 2011)

Rand was a putative class action that alleged American National‘s violation of California statutes, including certain provisions of the state‘s senior notice statute relevant to surrender charge periods and “associated penalties,” by not properly disclosing material facts and risks, participating in deceptive or misleading advertising, and elder abuse in the sale of deferred annuities. After the district court issued a September 29, 2010 order granting in part and denying in part the parties‘ cross-motions for summary judgment (*see* 717 F. Supp.2d 948),[6] the parties reached the terms of a class settlement, as reflected in an agreement filed on May 26, 2011. On June 8, 2011, the court issued an order preliminarily approving the settlement, final approval was granted on September 22, 2011.

H. *Yokoyama v. Midland National Life Ins. Co*., No. 1:2005-cv-00303 (D. Haw. May 5, 2011)

In this litigation concerning the suitability of annuity sales, the plaintiffs claimed the sale of deferred annuities to seniors was a violation of Hawaii‘s Unfair and Deceptive Trade Practices Act. In 2006 and 2007, despite a Magistrate Judge having twice recommended (first in connection with the original complaint, and later in connection with an amended complaint) that the suit be certified for class adjudication, the district court twice denied class certification because of the plaintiffs‘ need to demonstrate individualized reliance. In 2010, however, after the district court‘s second rejection of the plaintiffs‘ class certification effort, the United States Court of Appeals for the Ninth Circuit granted the plaintiffs‘ Rule 23(f) petition and reversed the class certification denial. 594 F.3d 1087 (9th Cir. 2010). The Ninth Circuit found that: (1) under Hawaii substantive law, the question of whether a representation is misleading is an objective inquiry; (2) because the allegations concern uniform non-disclosure in form documents, what any agent said to any consumer will not matter; and (3) the potential existence of individualized damages does not mean the case should not be certified. Midland‘s petition for rehearing *en banc* was denied. A settlement conference was subsequently held and, on November 1, 2010, a motion for preliminary approval of a class settlement was filed, and the district court granted it on November 17, 2010. The final order approving class settlement and class counsel‘s fees was entered on May 5, 2011.

V. Stranger Originated Annuities Developments

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[6] The Northern District of California‘s September 29, 2010 order in *Rand* remains noteworthy for its strict interpretation of certain provisions of the California Insurance Code senior notice provisions, specifically §§ 10127.13 and 10127.10, which, collectively, are intended to protect seniors through mandatory language regarding the surrender charge period as well as what are termed “associated penalties.” The provisions require this information to be stated “clearly” in “bold, 12 point print on the cover page” of a policy. The defendant purported to comply with the statute by setting forth notice language on stickers affixed to the inside of policy jackets of both policies purchased by the 86-year old. However, the plaintiff alleged and, upon consideration of the parties‘ competing motions for summary judgment, the court ultimately agreed that the notice (1) failed to adequately reference or disclose a market value adjustment (or MVA), that was essentially a surrender charge; (2) failed to adequately disclose surrender charges associated with death benefit payments when the policyholder dies within the surrender period; and (3) failed to adequately disclose where the surrender period information could be found in the policy.

A. *Hartford Life & Annuity Ins. Co. v. Doris Barnes Family 2008 Irrevocable Trust, No. CV 10-7560, 2012 WL 688817, PSG (DTBx) (C.D. Cal.), aff'd., 2014 WL 107790 (9th Cir. Jan. 9, 2014)*

Hartford sued Doris Barnes Family 2008 Irrevocable Trust, alleging that the insurance policy purchased on the life of Doris Barnes was procured through fraud and therefore void. The crux of the case is that shortly after Donald Barnes, the husband of Doris, paid the premium for the policy, it was transferred from the Trust to a hedge fund. Hartford asserted a claim that that the policy was void ab initio, because Doris and Donald intended to transfer the policy even before they purchased it. Hartford also asserted claims for fraud, fraudulent inducement, negligent misrepresentation, and civil conspiracy.

Hartford moved for summary judgment on all claims and the Trust responded by filing a cross motion for summary judgment on all claims. On February 3, 2012, the court issued an order granting the Trust's cross motion on all claims. The court held that policy was not void, because under California's insurance code ―every person with an interest in the policy when it took effect had an insurable interest. And, under the Insurance code, the transfer on August 7 to one without an insurable interest was altogether proper[,]" because the transfer occurred after the insurance took effect. In other words, it is permissible to transfer a policy to a person or entity with no insurable interest after the policy is in effect, but such person or entity cannot be involved when the policy goes into effect. Likewise, the conspiracy claim failed, because the sale of the policy did not violate California law. The court also found that new California statutes addressing life settlement contracts did not have retroactive application. Moreover, because two years had expired since the issuance of the policy, the incontestability clause barred Hartford's claims for fraud, fraudulent inducement, and negligent misrepresentation. The Ninth Circuit affirmed the district court's order on January 13, 2014.

B. ***Met Life Investors USA Ins. Co. v. Zeidman*, No. 09-2596, 734 F. Supp. 2d 304 (E.D.N.Y.), *aff'd.*, 442 Fed.Appx. 589, 2011 WL 4347182 (2d Cir. Sept. 19, 2011)**

Met Life Investors brought an interpleader action against the trustee, who sought benefits under a variable annuity, and the personal representative of the estate, who Met Life Investors contended was due the proceeds of the annuity as it was attempting to rescind the annuity for fraud. The personal representative filed a cross claim against both other parties, claiming that they violated the Illinois Right of Publicity Act by using the deceased's identity impermissibly. Met Life Investors moved to be discharged, as it deposited the funds in the court's registry, and to dismiss such cross claim because there was no ―public use or holding out" of the deceased's name. The estate also moved to dismiss, and moved to transfer venue to Illinois. In an August 31, 2010 order granting Met Life Investor's motion, the court found that the insurer had satisfied its obligations, that the premium amounts were properly before the court, and, thus, the insurer was dismissed. The Second Circuit affirmed in September 2011.

C. ***Western Reserve Life Assurance Co. of Ohio v. Caramadre*, No. 09-470, 715 F. Supp.2d 270 (D.R.I. June 2, 2010) and 2012 WL 399184 (Feb. 7, 2012)**

Western Reserve Life Assurance Company and Transamerica Life Insurance Company sued defendants – alleged STOA sponsors, annuity brokerage companies, annuitants and owners

– for a variety of claims related to the defendants‘ alleged role in the procurement of annuities through fraud. According to the insurers, one of the defendants, an attorney, publicized a ―Program for the Terminally Ill" to hospice patients and workers, and arranged for investors and insurance agents to work with him in the completion of applications for annuities. The defendants moved to dismiss the insurers‘ claims, and made three primary arguments: the insurable interest requirement does not apply to annuities, the incontestability clause in the policies prevents plaintiffs from litigating, and defendants did not make any actionable misrepresentations or omissions. In a June 2, 2010 order, the court dismissed Western Reserve‘s rescission and declaratory judgment claims, finding that the insurable interest requirement does not apply to annuities and plaintiffs cannot claim they were defrauded because of the incontestability clauses. The court found the incontestability clauses similarly defeated the plaintiffs‘ claims of fraud and derivative claims against the policy owners, and that the negligence claim was barred by the economic loss doctrine. The court rejected the defendants‘ remaining arguments, however, stating that the incontestability clauses would not protect strangers to the contracts (*e.g.*, agents, brokers); that the allegations of fraud were sufficiently pleaded; and that the alleged omissions/misrepresentations were material.

On April 4, 2011, the owner of the annuity filed a motion to dismiss, arguing that the Third Amended Complaint filed by the insurer should be dismissed because it essentially raised the same legal theories alleged in the previously dismissed complaints. The court granted the motion in part and denied it in part. The following claims were left pending: fraud; breach of contract and conspiracy against the agents; claims against the agents, sponsors and brokers arising out of alleged forgeries on annuity applications; and unjust enrichment.

On March 19, 2012, three of the defendants who were sponsors of the annuities filed a motion for final judgment pursuant to Federal Rule 54(b). After a court hearing, the court denied those defendants‘ motion for final judgment, refusing to release those defendants from the case.