By Dawn Williams

Lessons from Recent Life Insurance and Annuity Cases

Class certification can be the death knell for litigation. Knowing this, plaintiffs' attorneys attempt to craft claims and damages that are "common" to an entire class. In the life insurance context, this typically results in a focus on the actions of the insurer rather than individual sales agents or purchasers. For example, complaints allege improprieties in the operation of the products, allegedly uniform sales materials, and so-called overarching "schemes."

But class-wide liability is not sufficient; plaintiffs must also allege class-wide injury. Recent examples include that the policies are worth less than promised, inherently more risky than represented, or that no rational class member would have purchased but for the alleged wrongdoing.

This article will use recent life insurance and annuity class decisions to illustrate new claims and trends in class certification and to highlight successful (and unsuccessful) defenses.

Class Members Cannot Be Ascertained

As current decisions by the Seventh and Third Circuits illustrate, "ascertainability" is an often divisive question at the class certification stage but is usually an argument worth raising. Rather than simply making generalizations about the difficulty of determining class membership, however, one successful tactic is to submit evidence quantifying that burden.

For example, the Central District of California decertified a subclass of equity-indexed universal life insurance policyholders who received illustrations in *Walker v. Life Ins. Co. of the Southwest*, No. 10-9198 JVS, ECF No. 791 (C.D. Cal. Apr. 14, 2015). The class and subclass were previously certified, and at that time, the court opined that it could ascertain the members of the subclass—*i.e.*, identify who received an illustration—through the use of a special master and a questionnaire. The defendant asked the judge to reconsider, and the court issued an order to show cause why the subclass should not be decertified.

The evidence submitted by the parties indicated that the special master would need to review approximately 42,000 policy files, which would take roughly five years, to determine subclass membership. Plaintiffs submitted numerous proposals for easing the burden of manual file review; however, the court noted that even assuming there could be some aid by computers and administrative personnel, "the individualized issues created by a review of 42,000 files predominate over the issues common to the subclass."

That ruling eviscerated plaintiffs' theories of liability based on alleged nondisclosures in the illustrations and serves as an example why evidence of burden can overcome class certification.

Lack of Standing

Another threshold question, at least in federal court, is whether the named plaintiff has standing to bring the individual and class claims. As federal courts have repeatedly held, the fact that an action is a class action does not impact the standing analysis for the named plaintiff. The representative must allege that he or she has been injured, and not just that other unnamed class members may have been. Attacking causation, injury, and damage—thus breaking the chain of traceability—is often an effective tactic to defeating a class action, either at the certification stage or before.

Two judges in New York dismissed putative class claims because the class representative was unable to allege that he had suffered an injury-in-fact. In *Ross v. AXA Equitable Life Ins. Co.*, plaintiff alleged, on behalf of a class of life insurance policyholders, a violation of a New York statute prohibiting misrepresentations of financial condition, claiming that the insurer failed to disclose various captive reinsurance transactions in its annual statements, masking financial insecurity and potential insolvency issues. 2015 WL 4461654 (S.D.N.Y. July 21, 2015). To compliment this supposed "common" claim, plaintiff claimed that the class was uniformly damaged because they "paid premiums for policies that are less financially secure than the insurer represented them to be."

The court rejected these theories. Plaintiff had no standing—the future risk of nonpayment was "too hypothetical, speculative, and uncertain" to be cognizable injury; there were no allegations that policyholders paid higher premiums; and there were no allegations that plaintiffs relied

■ Dawn Williams is a shareholder in the Washington, D.C., office of Carlton Fields Jorden Burt, P.A. She defends insurance companies in complex civil litigation and class actions in courts across the country. Combining a thorough knowledge of class action procedure with an understanding of current regulatory developments, she counsels her clients on issues pertaining to their life insurance and annuity products. Licensed and practicing in Virginia, Maryland, and the District of Columbia, Ms. Williams also represents insurers in regional matters. Ms. Williams has been involved with the DRI Life, Health and Disability Committee for a number of years.

on the company's annual filings when they purchased their policies. That fact alone, held the court, indicated there was no standing because there was no financial harm traceable to the supposed omissions or misrepresentations in the financial statements. In the similar *Robainas v. Met. Life Ins. Co.* decision, the court concurred, finding that purchasing a "riskier policy" than what was represented did not constitute an injury. 2015 WL 5918200 (S.D.N.Y. Oct. 9, 2015).

A California court, addressing California statutory and common law, reached the same conclusion. The appellate court affirmed denial of certification, holding that even though the cover page of the class annuities violated a California statute, because the named plaintiffs had not read the cover page, they did not have standing to represent the class. *Tabares v. EquiTrust Life Ins. Co.*, 2015 WL 5680393 (Cal. Ct. App. Sept. 28, 2015). Even in an unfair competition law claim, the named plaintiff must satisfy standing requirements, and where "the absence of the required information was irrelevant to the decision to purchase," there could be no link between the actions of defendant and the supposed harm of plaintiff.

The Supreme Court's decision in *Spokeo, Inc. v. Robins* will likely be significant in Telephone Consumer Protection Act claims brought against insurers. The question before the high court in *Spokeo* is whether a plaintiff who suffers no concrete harm, but alleges violation of a federal statute, has standing to sue in federal court. Some of the TCPA cases, including the highly publicized *C-Mart, Inc. v. Metro. Life Ins. Co.*, 299 F.R.D. 679 (S.D. Fla. 2014), opined that the plaintiff had standing solely because the TCPA conferred the right to be free from certain conduct, which defendant allegedly violated.

No Common Proof

Whether under the rubric of predominance, commonality, or another one of the Rule 23 prerequisites, a court will not certify a class where liability depends on individualized proof. Thus, it is critical for defendants to identify and emphasize the aspects of their case that are or may be unique to each class member: shift the focus away from what plaintiff's claim is common —the actions of the company— to what is inherently unique, for example, the actions of the consumer. Convince the judge that what any person knew, relied on, and considered to be important is both critical to your case and is not susceptible to class-wide proof.

> As federal courts have repeatedly held, the fact that an action is a class action does not impact the standing analysis for the named plaintiff.

Like numerous other consumer products, one common theme in certification briefing in life insurance and annuity cases is the defense's emphasis on the face-to-face meeting between the salesperson and the potential policyholder, and the plaintiffs' attempt to distance their case from that process. The outcome is largely determined by how important the judge perceives those meetings to be.

In *Walker v. Life Ins. Co. of Southwest*, for example, the company secured a total victory on its fraud claims at trial and its California Unfair Competition Law claims in a subsequent bench decision. The certified class of universal life policyholders alleged that the insurer made the common misrepresentation that volatility in the stock market could increase the risk that their policies would lapse, causing the policies to be worth less than what was represented.

The court disagreed. It found that the claims were not susceptible to common proof: "every sale is like a snowflake." The fact that the policies were sold by thousands of agents with different sales techniques meant that there could be no common misrepresentation. Further, each customer would have their own reasons for purchasing the product, which may or may not have any relation to the challenged misrepresentations or omissions. The omission claim was similarly individualized. The court found that there were no class-wide consumer expectations that were contrary to the allegedly omitted information, and that the named plaintiffs' personal experiences, assumptions, and expectations were insufficient to establish expectations on a class-wide basis.

Similarly, a California state court denied class certification three times in *Fairbanks v. Farmers New World Life Ins. Co.*, 197 Cal. App. 4th 544 (2011) (affirmance of first certification decision). Plaintiffs in that case attempted to highlight the supposedly uniform actions of the company, alleging on behalf of a putative class of universal life insurance policyholders that the insurer designed and marketed its policies in such a way that if the policyholder only paid target premiums the policies would lapse.

One of the denials of certification was affirmed by the California Court of Appeals, which agreed that there was no common marketing scheme—individual agents marketed and sold the products differently. Moreover, each person might rely on something other than what the insurer or agent provided to them. Materiality was not subject to common proof: whether the policy would lapse "early" may not have been important to many policyholders, who did not purchase the life insurance for the death benefit. In response, plaintiffs emphasized the common nature of the contract language. But the court held, "it is still impossible to consider the language of the policies without considering the information conveyed by the Farmers agents in the process of selling them."

In breach of contract cases, one critical question that may determine whether the claims are susceptible to common proof is whether the terms are ambiguous. If the court finds that the contract provisions are not ambiguous, there is no need for extrinsic evidence and common questions likely predominate. That was the recent holding of the Indiana Court of Appeals in a challenge to an insurer's change of the cost of insurance rates for life insurance. *Lincoln Nat'l Life Ins. Co. v. Bezich*, 33 N.E.3d 1160 (Ind. Ct. App. 2015) (the opinion has technically been vacated since the Indiana

Supreme Court has accepted review, but that court has not yet issued an opinion).

The appellate court affirmed the grant of certification of one of three breach of contract theories, and held that the other two theories should have been certified as well. The court held that the language of the contract providing that the cost of insurance charges should be "based on" mortality factors was unambiguous, meaning that changes to that rate were limited to mortality factors. Because extrinsic evidence was not necessary, common questions predominated and the class was properly certified.

No Common Injury

The "worth less" theory of injury and damage has been popular in recent life insurance and annuity cases because it shifts the focus away from the individual purchaser to the supposedly uniform product. The claim is that when the product was purchased, it was worth less than either its "true value" or its represented value. A few recent opinions reject such a theory; for example, the *Walker* case simply holds that theory is not actionable. And the Ninth Circuit affirmed the grant of summary judgment for an insurer facing a putative class of annuity purchasers, finding there is no duty to disclose internal pricing policies, thus undercutting the premise of the worth less theory. *Eller v. EquiTrust Life Ins. Co.*, 2015 WL 756064 (9th Cir. Feb. 24, 2015).

A case in the Ninth Circuit decided after *Walker* and *Eller*, however, accepted this theory in deciding to certify the class without discussing those cases. *Abbit v. ING USA*, 2015 WL 7272220 (S.D. Cal. Nov. 16, 2015). In a multi-state class alleging various state common law, statutory, and securities violations in connection with the sale of annuities, the court certified the breach of contract claim. The complaint contended that the insurer represented the annuities as secure retirement vehicles, but embedded derivatives into the annuities ensuring that the annuities did not protect class members' savings. The claimed damage is that the customers overpaid for their annuities because their annuities were worth less at the time of issuance. While the court had some reservations about the expert's opinion, it decided that at the certification stage it was sufficiently plausible.

Exclude Plaintiffs' Experts

Plaintiffs often attempt to convince the court that damages or other elements of their claim can be proven class-wide through the use of expert opinions. Excluding or discrediting the expert can be a decisive factor in whether a class is certified.

> If the court finds that the contract provisions are not ambiguous, there is no need for extrinsic evidence and common questions likely predominate.

The *Walker* case is again instructive. The court found that the plaintiffs' expert's opinion, which involved a sample of approximately 300 policies and Monte Carlo simulations to predict future performance, was inadmissible and irrelevant notwithstanding. The court faulted the sample, finding that it was not representative; questioned the conclusion of common injury, since 5–10 percent of policyholders in the simulations fared better with the challenged policy provision than without; and decided his opinions were not grounded in class member expectations. Contrasting a hypothetical expert opinion with concrete real life examples is often a winning strategy, as emphasized by this case.

In contrast, the District of New Jersey certified a securities class action brought against a life insurer, claiming that the company inflated its financial results because it knowingly or recklessly failed to account for life insurance policies that were eligible for payment to a beneficiary or escheatment to the state, largely because the court considered the expert's opinion. *City of Sterling Heights Gen. Employees' Retirement Sys. v. Prudential Financial, Inc.*, 2015 WL 5097883 (D.N.J. Aug. 31, 2015). The court overruled the company's challenges to the expert and found that he had adequately established loss causation and market efficiency—meaning that absent proof of a lack of price impact by defendants, reliance could be proven through class-wide proof.

Damages: Worth the Effort?

The familiar mantra "individualized damages do not preclude certification" does not seem to have changed post-*Comcast*. Courts may even entirely ignore arguments that damages would require individual proof, as the District of New Jersey did in finding that where all other issues were provable by common evidence, a denial of class certification solely on the basis of individual damage calculations would be an "abuse of discretion." *City of Sterling Heights*, 2015 WL 5097883.

If a court is inclined to grant certification, it will likely characterize *Comcast* as limited to antitrust actions, "not stand[ing] for the general proposition that in all class actions a plaintiff must prove that damages are calculable on a class-wide basis." *Id*. Or it may fail to address *Comcast* altogether: in *Abbit* the defendants pointed out that the expert's damage model measured contract returns against mutual funds but the plaintiff had been very explicit that he did not want to invest in the stock market, and argued that *Comcast* forbade such a disconnect. The court chose not to address *Comcast*, simply stating that at this stage the expert's opinions were sufficiently plausible to support certification.

Think Outside the Box

The final point is an obvious yet challenging one. After practicing in an industry for long enough, an attorney may feel comfortable that he or she knows the strongest arguments to make and which to avoid when opposing certification or moving to decertify. For example, in the sale of life insurance and annuities, litigants and courts often focus on the agent-consumer interaction, and particularly focus on the product that is at issue. But it is important and worthwhile to thoroughly analyze and pursue all potential arguments against certification because some might be dispositive.

Insurance ❯ page 71

Insurance « page 35

An opinion from the District of Minnesota highlights the significance of thinking outside the box. *Ruud v. Friendshuh,* 2015 WL 868039 (D. Minn. Feb. 27, 2015). *Ruud* was seemingly a typical sales practices class case, alleging various improprieties in the sale of fixed annuities. One of the allegations by the named plaintiff, however, was that the fixed annuity he purchased was an improper replacement of a variable annuity. The court found that SLUSA preempted the class claims because the replacement of the variable annuity was a part of the transaction; thus, the class action alleged misrepresentations or omissions "in connection with the purchase or sale of a covered security." While *Ruud* was decided on a motion to dismiss, the holding is helpful on class certification: if there is any evidence that some but not all putative class members replaced variable annuities to purchase the products at issue, that fact could potentially be used to defeat predominance.

Putting It All Together

Insurance transactions are not unique—they involve many attributes that are similar to other types of class actions. They involve the sale of a product, a contract, and an ongoing relationship between the company and the consumer, among other things. The lessons from these recent life insurance and annuity cases can thus be applied in other contexts. Quantifying the burden of ascertainability, for example, may be a useful tactic in a product case.

The lessons from these cases, all decided in approximately the last year, are that in-house counsel and defense counsel should:

- quantify the burden of ascertaining class members;
- provide evidence why the named plaintiff lacks standing;
- challenge plaintiffs' class certification experts;
- shift the focus away from the lens that plaintiff has used to the supposedly common features of the case, such as the actions or inactions of the company, to the individualized features of the case, such as the expectations and reliance of the customer;
- illustrate how injury and damage are individualized; and
- think outside the box.