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COI Litigation Review – Early Dismissals Remain Elusive in Rate Increase Actions

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Suits challenging insurers' cost of insurance (COI) rate increases continue to generate much activity. In recent months, this activity has included transfers, consolidations, several actions that are inching closer to trial-readiness, and even a plaintiff's jury verdict in an individual action. Although defendants continue to seek disposal or a narrowing of the scope of claims via motions to dismiss, the most recent rulings may foreshadow protracted litigation for the industry in this area.

For example, in September, rulings were issued just days apart in actions then proceeding separately in federal court in Pennsylvania: *In re: Lincoln National COI Litigation*, a consolidated putative class action, and *EFG Bank AG, Cayman Branch v. Lincoln National Life Insurance Company*, an individual investor-initiated suit. The district court granted in part and denied in part Lincoln National's motions to dismiss the respective complaints. While the plaintiffs had asserted 11 causes of action in the consolidated class action complaint filed in *In re: Lincoln National* and the *EFG* plaintiffs asserted only four, the dismissal rulings were similar in various respects, most notably as to the plaintiffs' breach of contract claims, both of which survived Lincoln National's motion.

In both rulings, the court found plausible at this stage the theories of liability underlying the respective plaintiffs' breach of contract (and breach of the implied covenant of good faith and fair dealing) claims. These claims included contentions that: (i) the rate increase was not uniform; (ii) the rate increase was based on impermissible factors (set forth in notice letters and statements to brokers explaining the rate increases); (iii) Lincoln National's assertions regarding mortality expectations lacked credibility in light of improved mortality; and (iv) Lincoln National interpreted "interest" in the contracts to impermissibly include interest credited to the policyholders' accounts (as opposed to only the interest the company earns or expects to earn on its profits from providing insurance). Notably, as to the *EFG* plaintiffs' theory that a breach of contract was evidenced, allegedly, by the fact that the rate increase imposed "excessive costs of insurance rates," Lincoln National noted that that the contracts set forth maximum rates and that the plaintiffs had not alleged that the new rates exceeded the maximums. The court observed that "Lincoln has the better of this argument," but nevertheless ruled it "does not preclude Plaintiffs from having stated, overall, a breach of contract claim." The court, however, dismissed the plaintiffs' claims for declaratory relief in both actions, finding they duplicated the breach of contract claim.

The court's *In re: Lincoln National* decision also addressed several claims absent from the individual action, including the plaintiffs' claims, on behalf of certain putative subclasses, that Lincoln National violated state consumer protection laws in California, New Jersey, North Carolina, and Texas. The court generally rejected the insurer's contention that the plaintiffs failed to allege sufficient facts to support these claims and that the claims duplicated the breach of contract claim. For example, in sustaining the plaintiffs' claim of violation of the North Carolina Deceptive and Unfair Trade Practices Act, NC Gen. Stat. § 75-1, et seq., the court found that, at this early stage, the claims, in which the plaintiffs contended the insurer defendants "acted with the intent of abusing their discretion," went beyond merely alleging a breach. (In November, subsequent to issuing these rulings, the court consolidated the *EFG* and *In re: Lincoln National* actions.)

And in November, in *Brach Family Foundation, Inc. v. AXA Equitable Life Insurance Co.*, a putative class action suit involving a COI rate increase challenge pending since February 2016, the Southern District of New York denied AXA's partial motion to dismiss the plaintiff's second amended complaint. AXA had sought dismissal of a claim alleging misrepresentation in violation of New York Insurance Law Section 4226. Plaintiff had re-pled the claim after the district court granted the insurer's motion to dismiss it in a December 2016 order. *See Expect Focus* Volume I, March 2017. The court found plaintiff had cured the prior pleading deficiencies. Its findings included that the newly amended allegations, which, *inter alia*, "granularly describe[d] how and when AXA disseminated" the allegedly misleading materials to the plaintiff and

"specif[ied] the dates and contents" of the illustrations and interrogatories that allegedly misrepresented the policies' benefits, were "more than enough to distinguish the [second amended complaint] from complaints that this Court and other courts have found wanting under Rule 9(b)."

The court also rejected other bases for dismissal advanced by AXA (*e.g.*, plaintiff cannot pursue the claim as to illustrations it did not view) because they "would not affect the bottom line." Specifically, the court reasoned that, even if true, the Section 4226 claim would survive at least as to the illustrations the plaintiff claims to have reviewed before getting the policy. Accordingly, the court said it would reserve judgment on these arguments.

Stay tuned, however, as AXA has moved for reconsideration of the ruling, arguing that it overlooks controlling precedent regarding illustrations. For example, AXA argues that the court should have reached its previously briefed argument that the plaintiff cannot base a Section 4226 claim on an alleged violation of New York Regulation 74, which sets forth disclosure-related standards regarding the use of illustrations in the sale of life insurance policies.