

Sticking Firmly to Contract Terms, Court Dismisses Premium and COI Overcharge Claims

COST OF INSURANCE AND OTHER CHALLENGES TO NON-GUARANTEED ELEMENT DETERMINATIONS | LIFE, ANNUITY, AND RETIREMENT LITIGATION | FINANCIAL SERVICES REGULATORY | LIFE, ANNUITY, AND RETIREMENT SOLUTIONS | SEPTEMBER 26, 2017

In July, in *Hancock v. Amerigo Financial Life & Annuity Co.*, Amerigo achieved a total victory on its motion to dismiss a putative class action in the Eastern District of North Carolina that challenged its premium and COI charges. *Hancock v. Amerigo Financial Life & Annuity Co.* The putative class representative purchased a flexible premium adjustable life insurance policy in 1985, and claimed that defendant breached the policy by raising his premiums. These raises, plaintiff alleged, began about a decade earlier, and led defendant to take money out of the cash value of the policy to cover the difference between the monthly premium paid and the increased premiums being charged. For an additional breach of contract claim, plaintiff alleged that defendant assessed cost of insurance (COI) charges that exceeded those the policy permitted. Attendant to these allegations, plaintiff also brought implied covenant and several tort claims.

The first breach claim, based on premium overcharges, failed because the policy allowed for increased premiums, and set out the circumstances in which those increased premiums would be necessary to keep the policy active. The court looked at multiple provisions and read them as a whole, including the "flexible premium adjustable life insurance" title and the clauses requiring premium payments to meet levels sufficient to keep the cash value above cost of insurance deductions. The court concluded: "premium increases were allowed and nearly inevitable based on the terms of the policy and the interest rates applicable to the policy." The court noted that the table of insurance rates in the policy plainly showed the COI increasing significantly and steadily each year, preventing any argument that the policy was ambiguous or gave the impression COI charges could go down.

Plaintiff's second breach claim argued that defendant assessed COI charges in excess of those permitted by mortality tables (the contract permitted COI rates to be based on expectations as to future mortality). The court saw no facts permitting "a plausible inference that defendant charged a [COI] rate any different from what was specified in the policy." Plaintiff's second COI-based argument, that defendant failed to follow "regulatory or industry standards" in charging COI, was also dismissed as extra-contractual.

Plaintiff's implied covenant and tort claims fared no better. According to the court, the implied covenant claim failed to allege defendant took any action to prevent plaintiff from receiving the benefits of the policy, and the tort claims of fraud, unfair and deceptive trade practices, and RICO were all "premised upon the terms contained in the policy" and thus a matter for contract law alone. Any concealment and misrepresentation claims that were not grounded in contractual duties failed anyway for lack of particularity.