CARLTON FIELDS

Cost of Insurance and Other Challenges to Non-Guaranteed Element Determinations

Overview

Our extensive experience defending the life insurance industry in significant litigation includes many matters involving challenges to insurers' determinations regarding the cost of insurance (COI) rates in fixed and variable universal life insurance policies, including COI rate increases, and challenges to insurers' exercises of discretion with regard to other non-guaranteed elements, such as interest/dividend crediting and expense allocation-related claims. For example, *Baymiller v. Guarantee Mutual Life Insurance Co.*, in which we obtained the complete dismissal of a putative nationwide class action challenging the setting of non-guaranteed charges and rates, including COI rates, in federal court in California, continues to be a leading case in this area. Our successes in this regard are owed not only to our skills as litigators but also to our intimate knowledge of and appreciation for the life insurance business, including product pricing, policy forms and provisions, advertising and distribution practices, business policies and processes, and insurance regulation. Our deep knowledge developed as a result of our decades of working with life insurance companies, including experience assisting corporate counsel and company management in analyzing litigation risks and evaluating litigation exposure in a variety of contexts, including non-guaranteed element determinations.

Experience

- *Baymiller v. Guarantee Mut. Life Ins. Co.*, No. 99-cv-1566, 2000 WL 1026565 (C.D. Cal. May 3, 2000); 2000 WL 33774562 (C.D. Cal. Aug. 2000) – Dismissal of nationwide class action alleging improper interest crediting and charging of cost of insurance/expenses under universal life insurance contracts.
- *Finnan v. Pan-American Assurance Co.*, No. 2000-19282 (La. Civ. Dist. Ct. Orleans Parish Apr. 9, 2009) – Obtained summary judgment on nationwide class action representative's claims that insurer wrongfully charged juvenile insureds "smoker" cost of interest rates.

- *Fleisher v. Phoenix Life Ins. Co.*, 18 F. Supp. 3d 456 (S.D.N.Y. 2014) – Defended class action by trustees of irrevocable insurance trusts challenging the defendant life insurer's cost of insurance rate adjustments, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, violations of New York's General Business Law Section 349, and for declaratory relief. Moved for dismissal of all claims except breach of contract, which the court granted in its entirety, with prejudice. Subsequently, in resolving the parties' cross motions, the court granted in part and denied in part Phoenix's motion for summary judgment and denied the plaintiff's motion for summary judgment. Specifically, the court rejected the plaintiffs' claim that the rate adjustment had been based on impermissible factors: "[b]y taking Policy Values into account in its calculation of its 'expectations of … investment earnings,' Phoenix did not rely on impermissible factors; Policy Values are a logical thing to consider when predicting expected investment earnings. Thus, Phoenix did not breach the policy language … and it is entitled to summary judgment dismissing Plaintiff's breach of contract claim on this theory." The case subsequently settled.

- *Jones v. GE Life & Annuity Assurance Co.*, No. 1:03-cv-00241, 2004 WL 691749 (M.D.N.C. Mar. 17, 2004) – Judgment on the pleadings granted in nationwide class action alleging improper increase in cost of insurance charge for universal life insurance policies.

- *Kriegman v. Transamerica Life Ins. Co.*, No. 1:16-cv-21074 (S.D. Fla. 2016) – Putative class action alleging breach of contract and breach of the implied covenant of good faith and fair dealing in connection with the setting of initial monthly deduction rate, voluntarily dismissed by the plaintiff in May 2016, less than 24 hours after the filing of Transamerica's opposition to the plaintiff's motion for preliminary injunction.

- *Levin v. Minn. Life Ins. Co.*, No. 4:07-cv-01330, 2008 WL 2704772 (S.D. Tex. July 7, 2008) – Successful defense of putative class action asserting that: (i) the primary plaintiff, an infant when the policy was purchased, was charged a "smoker" life insurance premium rate; and (ii) the policy failed to become "self-sustaining" after a certain number of years (i.e., vanishing premium allegations).

- *Tiger Capital, LLC v. PHL Variable Ins. Co.*, No. 1:12-cv-02939 (S.D.N.Y. 2014) – Defended action by plaintiff, a company formed for the purpose of acquiring life settlement contracts and the owner of 100+ UL policies issued by the defendant, in which the plaintiff alleged defendant increased COI rates and failed to provide any basis that it did so in accordance with the terms of the policy contracts, and failed to provide any basis that the COI increases did not discriminate unfairly within any class of insureds. The case was assigned to the same judge as the *Fleisher* matter and, after similar rulings on the parties' cross motions for summary judgment, settled.

- *U.S. Bank, N.A. v. PHL Variable Ins. Co.*, No. 1:13-cv-01580, 2014 WL 2199428 (S.D.N.Y. May 23, 2014) –Plaintiff bank, the securities intermediary of a hedge fund affiliate, challenged the defendant life insurer's cost of insurance rate adjustments, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, violations of California Business and Profession Code Sections 17200 and 17500, and for declaratory relief. Insurer moved for dismissal of all claims except the breach of contract claim. The court granted the motion to dismiss, except as to portions of the implied covenant claim and portions of the claim for declaratory relief. Subsequently, in resolution of the parties' cross motions, the court granted in part and denied in part PHL's motion for partial summary judgment and denied the plaintiff's motion for partial summary judgment. The court concluded that "the phrase 'expectations ... of investment earnings' can (indeed, must) be interpreted to incorporate Policy Values, which means that PHL did not rely on impermissible factors in reaching its decision to implement the 2011 COI Rate Adjustment." The case subsequently settled.

Other Non-Guaranteed Element Cases: Interest/Dividend Crediting; Expense Allocation

- *Berardinelli v. Gen. Am. Life Ins. Co. (In re Gen. Am. Life Ins. Co. Sales Practices Litig.)*, 357 F.3d 800 (8th Cir. 2004) – Plaintiff's action challenging "modal premium" charges assessed when policy premiums were paid on a basis other than annually barred by participation in settlement of previous class action, which had involved allegations of failure to disclose premium, policy, and administrative charges.

- *Bowers v. Jefferson Pilot Fin. Ins. Co.*, 219 F.R.D. 578 (E.D. Mich. 2004) – Decertification of nationwide class action challenging interpretation of policy provisions relating to policy expenses; summary judgment obtained on the merits.

- *Burstein v. First Penn-Pacific Life Ins. Co.*, 209 F.R.D. 674 (S.D. Fla. 2002) – Putative nationwide class action based on "gap premium" theory; RICO class denied because of individual reliance issues (claims also rejected on the merits).

- *Feldman v. Jefferson Pilot Fin. Ins. Co.*, No. 2:02-cv-4332 (C.D. Cal. 2003) – Nationwide class action settlement (with no opt-out rights) of "gap premium" claims with respect to universal life insurance policies, with relief restricted to limited equitable reformation of policies and $500,000 in class counsel fees.

- *In re Am. Inv'rs Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, No. 2:05-md-01712, 2008 WL 2246989 (E.D. Pa. 2008) – Dismissal of putative class of annuity beneficiaries.

- *In re Life USA Holding, Inc.*, 242 F.3d 136 (3d Cir. 2001) – Decertification of nationwide class of insureds asserting claims of fraud in connection with the sale and administration of bonus annuities.

- *Mentis v. Del. Am. (AIG) Life*, No. C.A.98C-12-023WTQ, 2000 WL 973299 (Del. Super. Ct. May 30, 2000) – Class certification denied to putative nationwide class of insureds asserting claims in connection with the interest crediting and expense charges in connection with universal life policies.
- *Smith v. John Hancock Ins. Co.*, No. 2:06-cv-03876, 2008 WL 4145709 (E.D. Pa. Sept. 3, 2008) – Class certification denied in case involving deferred bonus annuities.
- *Davis v. John Hancock Viable Life Ins. Co.*, 295 F. App'x 245 (9th Cir. 2008) – Variable life insurance class action filed in state court successfully removed and dismissed under SLUSA.
- *Zarrella v. Minn. Mut. Life Ins. Co.*, 824 A.2d 1249 (R.I. 2003) – Affirming denial of certification of class of insureds asserting dividend crediting claims under life insurance policies.

Insights

09.26.2017
Sticking Firmly to Contract Terms, Court Dismisses Premium and COI Overcharge Claims

04.10.2017
Cost of Insurance Litigation Review

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Related Capabilities

Practices

- Financial Services Regulatory
- Life, Annuity, and Retirement Litigation
- Litigation and Trials
- Sales Practices – Market Conduct Litigation
- ERISA Employee Benefit Plan Litigation
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Industries

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