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Life Insurance Lapse Notice Class Actions Fail to Take Root: California Court Denies Certification

May 11, 2022

California lapse notice litigation has garnered publicity ever since the California Supreme Court in *McHugh v. Protective Life Insurance Co.* held that the new insurance statutes requiring a 60-day grace period and 30-day notice before lapse, applied to all policies in force when the laws went into effect, regardless of when the policies were originally issued. Amid the wave of lapse notice lawsuits, the Northern District of California recently denied plaintiff class certification in *Siino v. Foresters Life Insurance & Annuity Co.*

In Siino, the plaintiff sought to certify a class of policyholders whose insurance policies were terminated for nonpayment without first being provided with the enhanced statutory grace period and notice of lapse. The plaintiff first sought certification under Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class" to obtain declaratory or injunctive relief. The court, however, denied certification under Rule 23(b)(2) because the plaintiff primarily sought monetary damages, not injunctive relief.

The plaintiff also sought certification under Rule 23(b)(3), which requires that questions of law or fact common to class members predominate over individualized questions to obtain monetary relief. The court denied certification under this section as well, based on its determination that the plaintiff offered no classwide damages model, required by the U.S. Supreme Court in Comcast Corp. v. Behrend, for the two forms of monetary damages sought by the plaintiff — contract damages and restitution.

The court found that the plaintiff "offered no mechanism to assess" the value of lost insurance coverage, "even for her own policy." The court rejected the plaintiff's reliance on a California Supreme Court case, Caminetti v. Pacific Mutual Life Insurance Co., which valued certain insurance

policies based on the insurer's reserves values. As the court explained, Caminetti was not persuasive because the California Supreme Court explicitly confined its holding to the facts of that case, which dealt with disability insurance coverage and valuation upon insurance insolvency. The court also distinguished another California appellate decision that used reserve values to measure damages because it also involved insolvency, and because the plaintiff here "failed to provide expert testimony of the kind considered by" that court and as "required by Comcast." The court was not persuaded that a policyholder's share of the reserves is a proper measure of damages incurred when a policy was prematurely canceled.

The court also found that the plaintiff offered no damages model to determine classwide restitution of the diminution of the value of putative class members' policies, which have "different terms, timelines, and benefits." The court rejected the plaintiff's unsupported suggestion that diminution could be valued based on a return of past premiums paid.

Although future plaintiffs' attorneys will attempt to develop a viable classwide damages model for alleged violations of the California lapse laws, Siino highlights the difficulties these plaintiffs will face in doing so.

Authored By

Michael N. Wolgin

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