Ninth Circuit Overrules Denial of Class Certification Ruling in Annuity Litigation, Adopting a De Novo Standard of Review

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On August 28, the Ninth Circuit Court of Appeals issued a decision that found the Hawaii District Court had erred in denying class certification in a case involving the sale of annuities to senior citizens. While expressing no opinion as to the merits of the case, the Court of Appeals concluded that the class in Yokoyama v. Midland National Life Insurance Company should have been certified.

According to the Ninth Circuit, the plaintiffs in *Yokoyama* limited their claim to one that specifically targeted the misrepresentations made by Midland National in its brochures that promoted the annuities as appropriate for seniors. (No actual brochure language is quoted in the case.) Significantly, the claim was alleged solely under the Hawaii Deceptive Practices Act ("DPA"), which appears to be similar to a claim under the Unfair Competition Law in California.

The District Court's opinion issued in 2007 found that each plaintiff would have to show subjective, individualized reliance on deceptive practices related to each plaintiff's purchase of an annuity, and thus class certification was denied. In contrast, the Ninth Circuit found that the District Court had erred in denying class certification, based on the fact that "this action has been narrowly tailored to rely only on Hawaii law," that the DPA only requires an objective test to determine reliance, and that the plaintiffs were not basing their claim on the individual solicitations by agents.

The Ninth Circuit concluded: "Accordingly, there is no reason to look at the circumstances of each individual purchase in this case, because the allegations of the complaint are narrowly focused on allegedly deceptive provisions of Midland's own marketing brochures, and the fact-finder need only determine whether those brochures were capable of misleading a reasonable consumer."

In addition, the Ninth Circuit opinion also rejected Midland National's argument (and the District Court's holding) that the potential existence of individualized damage assessments made the action unsuitable for class treatment. The Court of Appeals explained that "[in] this circuit, however, damage calculations alone cannot defeat certification."

Much of the Yokohama decision is focused on the standard of review for a district court's ruling as to certification, with the Ninth Circuit announcing that the standard of review is *de novo,* rather than the accepted abuse of discretion standard typically used in reviewing class certification rulings on appeal, at least in situations where the underlying issue is purely one of law. On this point, however, there was a split among the three-judge panel.

The third judge on the panel forcefully rejected this *de novo* standard and observed that it is "an assault on Ninth Circuit precedent." The Judge concluded his separate opinion by advising that it "is an en banc panel who should make this determination to depart from longstanding Circuit precedent, not two judges who would make the standard of review less deferential." The third Judge nevertheless concurred in the Court's ultimate conclusion that the denial of class

certification was to be reversed even under the de novo standard. Whether Midland National will seek en banc review in the case is presently unknown.

Ultimately, the *Yokoyama* opinion sanctions that, if plaintiff's counsel in a case can craft the claims asserted against the defendant in a narrow manner so as to avoid individual variance among the class members, then even in a situation where class certification would seem not to be appropriate due to the inherent individualized issues, certification may nevertheless be permitted on that narrowed claim.