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LEGAL ALERT

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Eighth Circuit Affirms Denial of Class Certification in Fixed Annuity Interest Crediting Case

On August 12, 2010, the U. S. Court of Appeals for the Eighth Circuit affirmed the denial of class certification in *Avritt v. Reliastar Life Ins. Co.*, No. 09-2843 (8th Cir. Aug. 12, 2010), a case in which Plaintiffs challenged the manner in which interest was credited to fixed annuities. (Please click here for opinion).

In *Avritt*, the annuity contracts in question provided for a guaranteed minimum interest crediting rate, with discretion for the insurer to credit additional interest. Plaintiffs alleged that the insurer's practice of paying lower interest rates on "old money" and higher rates on "new money" (i.e., banding) violated various duties of good faith, loyalty, and fair dealing. They further alleged misrepresentations and omissions in statements about the interest rate crediting practices. Plaintiffs alleged that these practices resulted in a breach of contract, a violation of the Washington Consumer Protection Act (WCPA), and a violation of the California Unfair Competition Law (California UCL).

Plaintiffs sought to certify, under Rule 23(b)(2) or 23(b)(3), a class of California residents who were purchasers or holders of or beneficiaries under relevant annuity contracts issued from 1992 to 2002. The U.S. District Court for the District of Minnesota denied class certification. *See Avritt v. Reliastar Life Ins. Co.*, No.07-1817, 2009 WL 455808 (D. Minn. Feb. 23, 2009). (Please click here for our Legal Alert on the district court decision.) The Eighth Circuit held that the district court did not abuse its discretion in denying class certification under both Rules 23(b)(2) and 23(b)(3).

With respect to Rule 23(b)(3), the Eighth Circuit held that Plaintiffs had not met their burden to establish that common questions predominated over individual questions as to any of their claims:

- *Breach of Contract/Implied Covenant Claims:* The court held that the existence of two more reasonable interpretations of the contract would require extrinsic evidence about the intent of the parties, the explanation of the contract given during sales discussions, and each purchaser's understanding of the contract. The court agreed with the district court that to establish a breach of contract, Plaintiffs would need to rely on their argument that the contractual duty of good faith and fair dealing required applying a particular formula. Because this theory was based on the expectations of the parties, separate proof of the expectations of individual class members would be required. The court further stated that whether the insurer "acted in bad faith by emphasizing its non-guaranteed interest rate for new deposits and encouraging purchasers to believe that the introductory rate was indicative of future rates is a question closely tied to the circumstances of each individual plaintiff." (Slip Op. at 11). The Eighth Circuit also rejected the holding of a Washington state court in *Curtis v. Northern Life Ins. Co.*, No. 61372-3-1, 2008 WL 4927365 (Wash. Ct. App. Nov. 17, 2008), that a breach of implied covenant claim could be based on disclosures in regulatory filings and thus could be pursued on a class basis. To the contrary, the Eighth Circuit held that Washington state law required that the duty of good faith and fair dealing must arise out of the contract itself.

- *WCPA Claim:* The court noted that under *Schnall v. AT&T Wireless Services, Inc.*, 225 P.3d 929 (Wash. 2010), WCPA actions may be brought only on behalf of persons residing within the state.

Because Plaintiffs sought certification of a class of California residents who were allegedly injured by the activities of a company based in Washington, a WCPA claim could not succeed.

- *California UCL Claim:* The court rejected Plaintiffs' reliance on the California Supreme Court's holding in *In re Tobacco II Cases*, 207 P.3d 20, 31-32 (Cal. 2009), that the California UCL's proof of injury requirement applies solely to class representatives. The court stated that *Tobacco II* does not apply in the class certification context. To the extent *Tobacco II* holds that a single injured plaintiff may bring a class action on behalf of a group of individuals who may not have had a cause of action themselves, it is inconsistent with the doctrine of standing applied by federal courts. The court also stated that even if it were not necessary to consider individual evidence of injury, the California UCL claim would require individual evidence of misconduct and reliance, further precluding class certification.

With respect to Rule 23(b)(2), the court held that Plaintiffs could not show that the primary relief sought was declaratory or injunctive; indeed, Plaintiffs had conceded that the case was primarily about money damages, not injunctive relief. Moreover, the fact that the level of disclosure and the extent of reliance varied by individual made the case inappropriate for injunctive or declaratory relief on a class basis.

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