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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MICHELLE L. MORIARTY, as
12 Successor-In-Interest to Heron D.
13 Moriarty, Decedent, on Behalf of
14 the Estate of Heron D. Moriarty,
15 and on Behalf of the Class,
16 Plaintiff,
17 v.
18 AMERICAN GENERAL LIFE
19 INSURANCE COMPANY, et al.,
20 Defendants.

Case No.: 3:17-cv-1709-BTM-
WVG

**ORDER DENYING PLAINTIFF'S
MOTION FOR CLASS
CERTIFICATION AND DENYING
AMERICAN GENERAL'S
MOTION TO EXCLUDE CLASS
MEMBERS**

[ECF Nos. 132, 137]

21 Before the Court is Plaintiff's motion for class certification (ECF No. 132
22 ("Mot.)) and Defendant American General Life Insurance Company's motion to
23 exclude certain people from the class (ECF No. 137). For the reasons discussed
24 below, Plaintiff's motion for class certification is **DENIED WITHOUT PREJUDICE**
25 and American General's motion to exclude is **DENIED WITHOUT PREJUDICE**.

26 **I. BACKGROUND**

27 This case centers on whether three California Insurance Code provisions
28 apply to life insurance policies issued prior to the provisions' enactment. They

1 guarantee a 60-day grace period after nonpayment of a premium, Cal. Ins. Code
2 § 10113.71(a), the right to designate someone to receive notices of lapsed
3 payments, *id.* § 10113.72(a)–(b), and a 30-day notice of a lapsed payment to both
4 the policy owner and aforementioned designee before the policy may be
5 terminated for nonpayment, *id.* §§ 10113.71(b), 10113.72(c). These code sections
6 went into effect on January 1, 2013.

7 Heron D. Moriarty (“Mr. Moriarty”), the decedent, took out a term life
8 insurance policy with American General in 2012. (ECF No. 18 (“FAC”), ¶¶ 15.; ECF
9 No. 135 (“Def.’s MSJ”), 2:3–6.) American General did not provide Mr. Moriarty
10 with the right to designate someone other than himself to receive notices of
11 pending lapses in his policy. (FAC ¶ 25.) On March 24, 2016, American General
12 was unable to process Mr. Moriarty’s automatic monthly payment because the
13 associated bank account was closed. (FAC ¶¶ 27; Def.’s MSJ, 2:23–3:2.) On May
14 22, 2016, American General terminated the policy as of the date of the lapsed
15 payment: March 20, 2016. (Def.’s MSJ, Exh. 13.) Mr. Moriarty passed away on
16 May 31, 2016. (*Id.* at Exh. 14.) Plaintiff submitted a claim on Mr. Moriarty’s life
17 insurance policy on June 22, 2016. (*Id.* at Exh. 16.) American General denied the
18 claim on July 6, 2016 because the policy had terminated as of March 20, 2016,
19 which was prior to Mr. Moriarty’s death. (*Id.* at Exh. 17.)

20 Plaintiff sues on behalf of herself and a purported class of similarly situated
21 individuals, alleging two remaining class action causes of action against American
22 General: (1) declaratory relief, and (2) breach of contract.¹ (FAC ¶¶ 64–81.) On
23 October 2, 2020, the Court denied summary judgment for both parties on the
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26 ¹ Plaintiff also alleged a class action cause of action for violation of California’s Unfair Competition Law (“UCL”),
27 pursuant to Cal. Bus. & Profs. Code §§ 17200, *et seq.*, against both American General and Bayside Insurance
28 Associates, Inc. (FAC ¶¶ 106–117.) On October 2, 2020, the Court dismissed Plaintiff’s UCL restitution claim
against American General and reserved Plaintiff’s UCL injunction claim against American General for remand at
the end of this case. (ECF No. 184 at 13–14.) On March 27, 2020, the Court dismissed Plaintiff’s UCL claims
against Bayside Insurance Associates, Inc. (ECF No. 180 at 6.)

1 declaratory relief claim. (ECF No. 184 at 9). The Court also denied summary
2 judgment for both parties on the breach of contract claim for violations of §§
3 10113.71(b) and 10113.72 and granted summary judgment for American General
4 that it complied with § 10113.71(a)'s 60-day grace period requirement. (*Id.* at 10.)

5 II. DISCUSSION

6 Plaintiff moves for class certification on her claims for declaratory relief and
7 breach of contract against American General. Plaintiff seeks certification of the
8 following class:

9 All owners, or beneficiaries upon a death of the insured, of Defendant's
10 individual life insurance policies that were renewed, issued, or
11 delivered by Defendant in California, and in force on January 1, 2013,
12 and which underwent or will undergo lapse or termination for the non-
13 payment of premium without Defendant first providing all of the notices,
14 grace periods, and offers of designation required by Insurance Code
15 Sections 10113.71 and 10113.72.

14 (Mot. 2:12–16.)

15 The party seeking class certification bears the burden of establishing that
16 each of the four requirements of Fed. R. Civ. P. 23(a) and at least one requirement
17 of Rule 23(b) have been met. *Willis v. City of Seattle*, 943 F.3d 882, 885 (9th Cir.
18 2019). Plaintiff relies on Rule 23(b)(2) and (3).

19 With regard to Rule 23(a)(2)'s requirement that there be "questions of law or
20 fact common to the class," Plaintiff asserts that the most important legal question
21 in this case is a common one: whether the California Insurance Code provisions
22 at issue "apply to policies issued prior to 2013 but remaining in effect after the start
23 of 2013." (Mot. 12:9–11.) A federal district court may interpret state law but is
24 "bound by decisions of the state's highest court." *Ariz. Elec. Power Co-op., Inc. v.*
25 *Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995). "In the absence of such a decision, a
26 federal court must predict how the highest state court would decide the issue" or
27 certify it to the state's highest court. *In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir.
28 1990). Here, the state's highest court is already in the process of deciding this

1 issue. *McHugh v. Protective Life Ins.*, No. S259215 (reviewing whether “the
2 provisions of Insurance Code sections 10113.71 and 10113.72 . . . apply, in whole
3 or in part, to life insurance policies in force as of January 1, 2013, regardless of the
4 original date of issuance of those policies”). This Court must defer to the California
5 Supreme Court’s forthcoming decision in *McHugh*. Given the central importance
6 of this question, and its potential effect on the existence of any common questions,
7 the Court finds that it is in the interest of judicial economy to deny without prejudice
8 Plaintiff’s motion for class certification without ruling on its merits.

9 However, the Court notes its concerns about the number of factual issues
10 that may need to be tried for each potential class member. For example, in
11 Plaintiff’s case, some of the remaining individual factual issues that will need to be
12 tried include: (1) whether American General properly mailed Mr. Moriarty and
13 Plaintiff a notice of termination letter, and whether Mr. Moriarty or Plaintiff received
14 such a letter, (2) whether American General imposing an effective termination date
15 fewer than 30 days after it mailed the notice of termination letter actually caused
16 damage to Plaintiff, (3) whether Plaintiff had actual notice of a lapsed policy
17 payment, and (4) whether Plaintiff would have been Mr. Moriarty’s § 10113.72
18 designee. Similar individual factual issues will likely be present for each member
19 of the putative class, which the parties estimate to consist of more than 57,000
20 members. (See Mot. 10:20–11:9; Defendant’s Opposition to Motion for Class
21 Certification (“Def.’s Opp.”), 1:8.) The multiple factual issues that may need to be
22 tried for each of the more than 57,000 class members may affect whether the
23 commonality requirement of Rule 23(a)(2) and predominance and superiority
24 requirements of Rule 23(b)(3) can be met. In light of this concern, the Court notes
25 that issue certification under Fed. R. Civ. P. 23(c)(4) may be more appropriate than
26 certifying a class. The California Supreme Court’s forthcoming decision in *McHugh*
27 will clarify what issues might be certified under Rule 23(c)(4).

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1 **III. AMERICAN GENERAL’S MOTION TO EXCLUDE**

2 American General moves to exclude from the purported class, any
3 individuals “who were class members in the nationwide class action settlement in
4 *McNeil v. American General, et al.*, No. 3-99-1157 (M.D. Tenn. Sept. 8, 2000)
5 (*McNeil*).” (ECF No. 137, American General’s Motion to Exclude *McNeil* Class
6 Members (“Def.’s Motion to Exclude”), 1:1–6.) American General asserts that the
7 *McNeil* settlement’s class members, which includes individuals who owned
8 American General’s predecessor’s industrial life insurance policies during the time
9 period from January 1, 1982 through September 30, 1999, impermissibly overlap
10 with the purported class in the instant action. (*Id.* at 3:5–6; Exh. 2 at 14.)

11 American General argues that Plaintiff’s allegations—that American General
12 failed to comply with Cal. Ins. Code §§ 10113.71 and 10113.72—fall within the
13 *McNeil* settlement’s definition of “Released Transactions,” which include the
14 “operation,” “administration,” and “servicing” of American General’s life insurance
15 policies. (*Id.* at 4:1–15; Exh. 2 at 54.) Accordingly, American General argues that,
16 under the terms of the settlement, the *McNeil* class members agreed to resolve
17 any future claims involving the “operation, administration, and servicing” of their
18 industrial life insurance policies, “solely through [the settlement’s] ADR process
19 and ‘in no other Court, tribunal, arbitration, proceeding or forum.’” (*Id.* at 3:17–21;
20 Exh. 2 at 24.) American General also points to the *McNeil* court’s issuance of a
21 permanent injunction, which “permanently barred” *McNeil* class members from
22 “filing, commencing, prosecuting, intervening in, participating in as class members
23 or otherwise, or receiving any benefits or other relief from, any other lawsuit . . .
24 based on or relating to the claims and causes of action, or the facts and
25 circumstances relating thereto, in this Action and/or the Released Transactions . . .
26 . as to that Policy.” (*Id.* at 10:10–19; Exh. 2 at 25-26.)

27 Plaintiff, in opposition, contends that American General’s interpretation of the
28 *McNeil* settlement is overbroad—particularly because the case involved allegedly

1 discriminatory sales practices against African Americans—and that the *McNeil*
2 parties “never could have intended to release or otherwise shuttle into arbitration
3 claims in another state, brought against another insurer, which would not exist as
4 a matter of California law for another 13 years.” (ECF No. 149, Plaintiff’s
5 Opposition to American General’s Motion to Exclude (“Plaintiff’s Opp.”), 11:21–25;
6 Def.’s Motion to Exclude, Exh. 2 at 34-35.)

7 The Court takes note of the *McNeil* Court’s retention of jurisdiction, which
8 American General also highlights, in which the *McNeil* court:

9 expressly retain[ed] jurisdiction as to all matters relating to the
10 administration, consummation, enforcement and interpretation of the
11 Settlement Agreement . . . and for any other necessary purpose,
12 including, without limitation, enforcing the terms and conditions of the
13 Settlement Agreement and resolving any disputes, claims or causes of
14 action that, in whole or in part, are related to or arise out of the
15 Settlement Agreement . . . including, without limitation, whether a
person or entity is or is not a Class Member; whether claims or causes
of action allegedly related to this Action are or are not barred by the
Final Judgment or Release, etc.

16 (Def.’s Motion to Exclude, 11:21–12:6; Exh. 2 at 29.) American General’s Motion
17 to Exclude requires resolution of the following question: Whether any alleged
18 *McNeil* class members identified by American General would be barred by the
19 settlement from participating in Plaintiff’s class claims against American General?
20 The Court finds that this question falls within the *McNeil* court’s retained jurisdiction
21 to determine “whether a person or entity is or is not a [*McNeil*] Class Member” or
22 “whether claims or causes of action allegedly related to [the *McNeil*] Action are or
23 are not barred.” (See *id.*, Exh. 2 at 29.) American General may move the *McNeil*
24 court for such a determination.

25 Accordingly, the Court denies American General’s Motion to Exclude *McNeil*
26 Class Members without prejudice.

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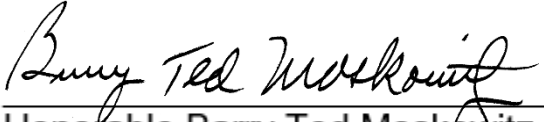
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1 **IV. CONCLUSION**

2 Based upon the foregoing, Plaintiff's Motion for Class Certification is
3 **DENIED WITHOUT PREJUDICE** and American General's Motion to Exclude
4 McNeil Class Members is **DENIED WITHOUT PREJUDICE**. The parties may
5 renew these motions after the California Supreme Court renders an opinion in
6 *McHugh* or after the *McNeil* court renders a decision.

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8 **IT IS SO ORDERED.**

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10 Dated: November 25, 2020

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12 Honorable Barry Ted Moskowitz
13 United States District Judge
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