IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., HARRISON CONDIT, and FORTUNE FINANCIAL SERVICES, INC., Defendants.	C.A. No. 09-470-S
TRANSAMERICA LIFE INSURANCE COMPANY, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., ESTELLA RODRIGUES, EDWARD MAGGIACOMO, JR., LIFEMARK SECURITIES CORP., and PATRICK GARVEY, Defendants.	C.A. No. 09-471-S
WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., ADM ASSOCIATES, LLC, EDWARD HANRAHAN, THE LEADERS GROUP, INC., and CHARLES BUCKMAN, Defendants.	C.A. No. 09-472-S

WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., DK LLC, EDWARD HANRAHAN, THE LEADERS GROUP, INC., and JASON VEVEIROS, Defendants.	)	C.A. No. 09-473-S

PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTIONS FOR ENTRY OF PARTIAL FINAL JUDGMENT PURSUANT TO FED. R. CIV. P. 54(b)

Plaintiffs, Western Reserve Life Assurance Co. of Ohio and Transamerica Life Insurance Company (together "Plaintiffs"), object to the motions for entry of partial final judgment in favor of defendants Joseph Caramadre, Raymour Radhakrishnan and Estate Planning Resources (in C.A. No. 09-470),[1] Estella Rodrigues (in C.A. No. 09-471),[2] ADM Associates (in C.A. No. 09-472)[3] and DK, LLC (in C.A. No. 09-473).[4]

Plaintiffs file herewith a supporting memorandum of law.

Respectfully submitted,

[1] The Sponsors' motion was filed on March 19, 2012 and is docketed as Doc. 135 in C.A. No. 09-470.
[2] Rodrigues' motion was filed on March 19, 2012 and is docketed as Doc. 136 in C.A. No. 09-471.
[3] ADM's motion was filed on March 19, 2012 and is docketed as Doc. 138 in C.A. No. 09-472.
[4] DK's motion was filed on March 7, 2012 and is docketed as Doc. 162 in C.A. No. 09-473.

/s/ Brooks R. Magratten
Brooks R. Magratten, Esq., No. 3585
David E. Barry, Esq., *pro hac vice admitted*
Michael J. Daly, Esq. No. 6729
PIERCE ATWOOD LLP
Attorneys for Plaintiffs
10 Weybosset St., Suite 400
Providence, RI 02903
(401) 588-5113 [Tel.]
(401) 588-5166 [Fax]
bmagratten@pierceatwood.com
dbarry@pierceatwood.com
mdaly@pierceatwood.com

Dated: April 5, 2012

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WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., HARRISON CONDIT, and FORTUNE FINANCIAL SERVICES, INC., Defendants.	C.A. No. 09-470-S
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MEMORANDUM IN SUPPORT OF PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTIONS FOR ENTRY OF PARTIAL FINAL JUDGMENT PURSUANT TO FED. R. CIV. P. 54(b)

Plaintiffs, Western Reserve Life Assurance Co. of Ohio ("WRL") and Transamerica Life Insurance Company ("Transamerica") (together "Plaintiffs"), object to the motions for entry of partial final judgment in favor of defendants Joseph Caramadre, Raymour Radhakrishnan and Estate Planning Resources (together "Sponsors") (in C.A. No. 09-470), Estella Rodrigues (in C.A. No. 09-471), ADM Associates (in C.A. No. 09-472) and DK, LLC (in C.A. No. 09-473). The Court should decline to enter final, partial judgment pursuant to Fed. R. Civ. P. 54(b) because: a) many of the dismissed claims remain pending against other parties or raise issues related to pending claims and immediate judgment could cause the First Circuit to have to address the same or substantially similar facts and legal issues on successive occasions; b) immediate judgment will prompt an appeal of complex legal issues that may be rendered moot by subsequent events; c) the moving defendants have failed to establish exceptional circumstances that warrant departure from the routine practice of waiting until the conclusion of the case to enter judgment; and d) entry of judgment would put part of the case on an appellate

track, which would force the parties (possibly including parties who do not seek immediate judgment) to incur additional expenses, rather than avoid unfair prejudice or hardship to defendants.

I. ENTRY OF PARTIAL FINAL JUDGMENT IS STRONGLY DISFAVORED.

Rule 54(b) provides that "[w]hen an action presents more than one claim for relief… or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."

The First Circuit has cautioned that "the overly generous use of Fed. R. Civ. P. 54(b) by a well-intentioned district judge can create a minefield for litigants and appellate courts alike…. There are often untoward consequences when judges too readily acquiesce in the suggested entry of 'partial' final judgments." Nichols v. Cadle Co., 101 F.3d 1448, 1448 (1st Cir. 1996). Accordingly, it is universally accepted that entry of partial final judgment is "strongly disfavor[ed]" and "Rule 54(b) should be used sparingly." In re Fuentes, 417 B.R. 844, 848-49 (B.A.P. 1st Cir. 2009).

Several factors may be considered when determining if partial judgment may enter pursuant to Rule 54(b), including:

> (1) The relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obligated to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like.

Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 364 (3d Cir. 1975) (cited in Spiegel v. Trustees of Tufts College, 843 F.2d 38, 43 n.3 (1st Cir. 1988)).

> Rule 54(b) underscores the "long-settled policy against piecemeal disposition of litigation," and provides an exception to the principle that "an appeal must await the entry of a final judgment ... that fully disposes of all claims asserted in the action." Rule 54(b) "is designed to be used where the problem and circumstances are of an 'exceptional nature,' ... in order to avoid some perceptible 'danger of hardship or injustice through delay which would be alleviated by immediate appeal.' " Moreover, "[i]t has been widely recognized that orders under Fed. R. Civ. P. 54(b) 'should not be entered routinely or as a courtesy or accommodation to counsel.'" Rather, Rule 54(b) "should be used only 'in the infrequent harsh case.'"

Walden v. City of Providence, 450 F. Supp. 2d 172, 174 (D.R.I. 2006) (citation omitted). In "borderline cases," the district court is urged "to exercise restraint rather than allowing appeals to proceed in an inchmeal fashion." Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 n.4 (1st Cir. 1994).

II. PARTIAL FINAL JUDGMENT SHOULD NOT ENTER IN FAVOR OF THE SPONSORS IN C.A. No. 09-470.

In C.A. No. 09-470, WRL asserted claims against the Sponsors for fraudulent inducement and fraud in the factum. The Court dismissed those claims against them because they had no direct dealings with WRL. The Sponsors now suggest that they should obtain final judgment in C.A. No. 09-470 because there are no pending claims against them in that case. WRL, however, intends to seek leave to assert claims against the Sponsors based on their participation in a conspiracy to procure and submit a fraudulent and/or forged annuity application to WRL.[1]

[1] Although the most recent pleading in C.A. No. 09-470 does not include claims against the Sponsors for criminal liability (based on forgery) or conspiracy, the Court has held that Plaintiffs may pursue such claims against the Sponsors in C.A. No. 09-549 and C.A. No. 09-564. Therefore, WRL should be permitted to pursue those same valid legal theories under the circumstances of this case.

Therefore, the Sponsors' respite from this case likely will be short lived. "This circumstance alone counsels hesitation in the use of Rule 54(b)." Spiegel, 843 F.2d at 44 ("It will be a rare case where Rule 54(b) can appropriately be applied when the contestants on appeal remain, simultaneously, contestants below."); see also Braswell Shipyards, Inc. v. Beazer East, Inc., 2 F.3d 1331, 1335 (4th Cir.1993).

Moreover, contrary to the Sponsors' contention, the dismissed claims asserted against the Sponsors are closely related to pending claims against other defendants who currently remain in the case. The Court has ruled that the fraudulent inducement claims against Harrison Condit and Fortune Financial survive. That claim against the Sponsors was dismissed simply because they did not have a direct relationship with WRL. Even if the First Circuit disagrees with this Court's conclusion concerning that threshold issue, it may affirm "judgment for any valid reason that finds support in the record," Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 217 F.3d 8, 10 (1st Cir. 2000), in which case the First Circuit inevitably would have to address the Sponsors' fallback defenses to the merits of that claim, one of which is that the absence of a specific question renders certain information immaterial as a matter of law. That secondary issue remains a centerpiece of Condit's and Fortune Financial's defenses to the fraud claims. Therefore, regardless of the unique circumstances that led the Court to dismiss claims against the Sponsors (but not other defendants), the overlap of the legal and factual issues between the dismissed fraud claim against the Sponsors and the pending fraud claim against other defendants "militates strongly against invocation of Rule 54(b)." Spiegel, 843 F.2d 38, 45 (1st Cir. 1988). If judgment enters immediately as to the Sponsors, the First Circuit may have to address the merits of the same root claim a second time (in connection with an appeal of the currently

pending counts against other defendants), which further counsels against entry of partial judgment at this time. See Allis-Chalmers Corp., 521 F.2d 360, 364 (3d Cir. 1975).

Another significant factor counseling against entry of judgment is that the legal issues implicated by the claims against the Sponsors may be rendered moot if it is determined after trial against Condit and Fortune Financial that WRL's fraud claims fail on the facts. "The potential for a challenged ruling to be mooted by subsequent developments in the district court weighs against certification for interlocutory appeal." Gen. Acquisition, Inc. v. GenCorp, Inc., 23 F.3d 1022, 1031 (6th Cir. 1994) (citing Wright, Miller & Kane § 2659; 2A Federal Procedure § 3:347). See also, e.g., Brunswick Corp. v. Sheridan, 582 F.2d 175, 184-85 (2d Cir. 1978) (possibility of subsequent trial rendering appellate issue moot required denial of Rule 54(b) certification).

> The potential for mootness takes on even greater weight in the 54(b) balance when the question [the appellate court] may never have to address presents sophisticated and unprecedented questions of state law. '[I]n keeping with notions of judicial restraint, federal courts should not reach out to resolve complex and controversial questions' unnecessarily. The virtue of judicial restraint, which we find compelling enough in the face of complex *federal* questions, militates even more persuasively against expansive appellate jurisdiction in cases where federal jurisdiction is justified only by diversity of citizenship.

Gen. Acquisition, Inc., 23 F.3d at 1031 (citation omitted). Here, jurisdiction is predicated on diversity, and this Court has acknowledged that the claims implicate unsettled areas of state law. Western Reserve Life Assur. Co. of Ohio v. Conreal LLC et al., 715 F. Supp. 2d 270, 280 (D.R.I. 2010) ("the Rhode Island Supreme Court has not spoken directly to this issue"). The complex nature of the state law claims at issue further militates against entry of partial final judgment. Gen. Acquisition, Inc., 23 F.3d at 1031.

The Sponsors' desire for finality does not justify entry of partial final judgment. "While [a defendant's] personal desires to have this matter definitively closed prior to the termination of the entire case are understandable, nothing indicates that Rule 54(b) was intended to be used, or is routinely used, for this purpose." Walden, 450 F. Supp. 2d at 174. This is particularly true in these circumstances, where the Sponsors are defendants in a series of related lawsuit. As a practical matter, the Sponsors remain parties to six related case that deal with the same scheme that is at issue in C.A. 09-470. Therefore, entry of judgment in C.A. 09-470 while they remain parties to several additional related cases would not give the Sponsors a level of closure, security or finality that could ever weigh in favor of premature final judgment.

The Sponsors imply that their financial situation strengthens their right to obtain partial final judgment. Even if this were an appropriate factor to consider, entry of judgment at this time would not alleviate their financial burden. They are active defendants in six related cases, so entry of judgment in C.A. 09-470 would not relieve them of their obligation to participate in the litigation as a whole. To the contrary; because the case is stayed in the district court, the best way for them to avoid incurring significant expense at this time is by maintaining the *status quo*. Indeed, because of the effective temporary shut-down of the litigation and the lack of continuously accruing legal fees, the Sponsors' attorneys' have conceded that there is no need for the Court even to rule on their motion to withdraw their appearance. Rather than alleviate "some perceptible 'danger of hardship or injustice," Walden, 450 F.Supp.2d at 174, entry of judgment at this time would increase legal fees exponentially once the matter is appealed to the First Circuit. Therefore, certification pursuant to Rule 54(b) would not alleviate any practical or financial concerns caused by waiting until the conclusion of the case to do so.

Finally, the Sponsors contend that the stay provides a convenient window to allow the appeal to proceed and possibly be resolved before the stay is lifted and the case resumes in the district court. This argument is highly speculative. As this Court is well aware, this case raises several complex legal issues that require careful consideration and study. It is likely that appellate briefing will be protracted and would not be completed before the end of 2012. If so, an oral argument probably would not occur before February or March of 2013 and a decision may not be rendered before summer of 2013. However, this Court has estimated that the litigation in these cases may resume as early as early 2013. These cases already are over two-and-a-half years old and a detour to the First Circuit creates a significant likelihood of additional delay, which further counsels against entry of judgment.

III. PARTIAL FINAL JUDGMENT SHOULD NOT ENTER IN FAVOR OF ADM ASSOCIATES OR DK, LLC

ADM is the owner of the annuity in C.A. No. 09-472. DK is the owner of the annuity at issue in C.A. No. 09-473. In those cases, Plaintiffs asserted claims against ADM and DK for: Rescission; Declaratory Judgment (voiding the annuities); Fraudulent Inducement; Civil Liability for Criminal Acts; and Civil Conspiracy. As to ADM and DK, the Court dismissed all of those counts based on the existence of an incontestability clause in the annuities and - with respect to the rescission and declaratory judgment counts - on the Court's conclusion that there is no insurable interest requirement for the annuities.[2] In C.A. No. 09-473, WRL also asserted a claim against DK for fraud in the factum. The Court dismissed that count after concluding that the claim was legally untenable.

[2] In other cases, Plaintiffs did not assert damages claims against the annuity owners. Plaintiffs asserted claims against ADM and DK, however, because Mr. Caramadre has an ownership interest in those closely held entities, which Plaintiff believes renders them complicit and culpable.

Although dismissed against ADM and DK, the fraud and conspiracy counts remain pending against the Agents, Brokers and Sponsors.[3] The fraud and conspiracy claims against ADM and DK were dismissed because of a threshold argument (incontestability clause) that obviated the need to address the merits of the claims in the context of ADM and DK. Therefore, as discussed above, if the First Circuit disagrees with this Court about the threshold issue concerning the scope of protection provided by the incontestability clause, then ADM and DK surely will advance their fallback arguments to affirm dismissal. See Ross-Simons of Warwick, Inc., 217 F.3d at 10. This will require the First Circuit to consider complex substantive issues that remain pending before this Court in the context of claims against parties who are still defending those claims and have not sought partial final judgment. The legal issues implicated by the dismissal of the claims against ADM and DK are closely interrelated to claims and issues still pending before this Court and could be rendered moot depending on the outcome of the trials against the currently remaining defendants. Spiegel, 843 F.2d at 45; Allis-Chalmers Corp., 521 F.2d at 364.

Moreover, Plaintiffs' claims for rescission and declaratory judgment are based largely on the applicability of the insurable interest doctrine. This issue is a focal point of all seven of these related cases. Although the matters are not technically consolidated, they are progressing together. Parties in all cases have an interest in obtaining a favorable ruling on this issue, but not all parties have requested partial final judgment or otherwise expressed their desire to leave the financial shelter of the ongoing stay and devote significant resources to address the insurable interest issue on appeal at this time. And unless the Court enters partial final judgment on all insurable interest-related counts in all cases, then not all interested parties will have the

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opportunity to advance their respective positions before the appellate court. Rather, they will have to wait until the appropriate time in other cases before making their arguments to the First Circuit, which would be hearing the same issue for a second time. This staggered approach is unworkable to the parties, and creates a significant likelihood that the First Circuit will have to address the same legal issue on multiple occasions. To avoid this unwelcome scenario, Plaintiffs respectfully request that the Court decline to enter final judgment at this time.

IV. PARTIAL FINAL JUDGMENT SHOULD NOT ENTER IN FAVOR OF RODRIGUES

Estella Rodrigues is the annuity owner in C.A. No. 09-471. She has been named only in connection with the rescission and declaratory judgment counts asserted by Transamerica in that case. As discussed above, the rescission and declaratory judgment counts address the insurable interest doctrine, which is a common theme in all seven cases. In order to streamline appellate consideration of this important, unsettled, and complex issue, Transamerica respectfully requests that the Court decline to enter final judgment at this time so the First Circuit can address the issue one time at the conclusion of the case, along with any other issues that warrant appellate consideration.

CONCLUSION

The circumstances of this case are not of an "exceptional nature" and entry of partial final judgment will not alleviate any "hardship or injustice," Walden, 450 F. Supp. 2d at 174, that would otherwise inure to the Sponsors, Rodrigues, ADM or DK if judgment entered in the normal course. Entry of partial, final judgment at this time would create the "untoward consequences" and "minefield for litigants and appellate courts" about which the First Circuit

warned in Nichols, 101 F.3d at 1448. Accordingly, Plaintiffs respectfully request that defendants' motions for entry of partial final judgment be denied.

Respectfully submitted,

/s/ Brooks R. Magratten

Brooks R. Magratten, Esq., No. 3585
David E. Barry, Esq., *pro hac vice admitted*
Michael J. Daly, Esq. No. 6729
PIERCE ATWOOD LLP
Attorneys for Plaintiffs
10 Weybosset St., Suite 400
Providence, RI 02903
(401) 588-5113 [Tel.]
(401) 588-5166 [Fax]
bmagratten@pierceatwood.com
dbarry@pierceatwood.com
mdaly@pierceatwood.com

Dated: April 5, 2012

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing motion and memorandum to be electronically filed with the Clerk of the Court on April 5, 2012 and that the documents are available for viewing and downloading from the Court's CM/ECF system. All counsel of record have been served by electronic means.

/s/ Michael J. Daly