

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

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WESTERN RESERVE LIFE ASSURANCE)		
CO. OF OHIO,)		
Plaintiff,)		
)		
vs.)		
)	C.A. No. 09-470-S	
JOSEPH CARAMADRE, RAYMOUR)		
RADHAKRISHNAN, ESTATE PLANNING)		
RESOURCES, INC., HARRISON CONDIT,)		
and FORTUNE FINANCIAL SERVICES,)		
INC.,)		
Defendants.)		
<hr/>)	
WESTERN RESERVE LIFE ASSURANCE)		
CO. OF OHIO,)		
Plaintiff,)		
)		
vs.)		
)	C.A. No. 09-564-S	
JOSEPH CARAMADRE, RAYMOUR)		
RADHAKRISHNAN, ESTATE PLANNING)		
RESOURCES, INC., HARRISON CONDIT,)		
and FORTUNE FINANCIAL SERVICES,)		
INC.,)		
Defendants.)		
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**PLAINTIFF’S OBJECTION TO DEFENDANT FORTUNE FINANCIAL SERVICES,
INC.’S MOTIONS FOR ENTRY OF PARTIAL
FINAL JUDGMENT PURSUANT TO FED. R. CIV. P. 54(b)**

Plaintiff, Western Reserve Life Assurance Co. of Ohio (“Western Reserve”), objects to defendant Fortune Financial Services, Inc.’s motions for entry of partial final judgment in C.A. No. 09-470 and C.A. No. 09-564, filed on April 18, 2012.

Western Reserve files herewith a supporting memorandum of law.

Respectfully submitted,

/s/ Brooks R. Magratten

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Dated: May 7, 2012

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

WESTERN RESERVE LIFE ASSURANCE)
CO. OF OHIO,)
Plaintiff,)
vs.) C.A. No. 09-470-S
JOSEPH CARAMADRE, RAYMOUR)
RADHAKRISHNAN, ESTATE PLANNING)
RESOURCES, INC., HARRISON CONDIT,)
and FORTUNE FINANCIAL SERVICES,)
INC.,)
Defendants.)

WESTERN RESERVE LIFE ASSURANCE)
CO. OF OHIO,)
Plaintiff,)
vs.) C.A. No. 09-564-S
JOSEPH CARAMADRE, RAYMOUR)
RADHAKRISHNAN, ESTATE PLANNING)
RESOURCES, INC., HARRISON CONDIT,)
and FORTUNE FINANCIAL SERVICES,)
INC.,)
Defendants.)

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S OBJECTION TO DEFENDANT
FORTUNE FINANCIAL SERVICES, INC.’S MOTIONS FOR ENTRY OF PARTIAL
FINAL JUDGMENT PURSUANT TO FED. R. CIV. P. 54(b)**

Fortune Financial Services, Inc. (“Fortune Financial”) seeks entry of partial final judgment in connection with plaintiff Western Reserve Life Assurance Co. of Ohio’s (“Western Reserve”) claims for rescission, declaratory judgment, civil liability for criminal offenses (based on insurance fraud), and fraud in the factum. The Court should decline to enter final, partial judgment pursuant to Fed. R. Civ. P. 54(b) because: a) the Court has not dismissed any claims

against Fortune Financial for rescission or declaratory judgment; b) multiple claims remain pending against Fortune Financial; c) there are no exceptional circumstances that warrant departure from the routine practice of waiting until the conclusion of the case to enter judgment; d) dismissed claims 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; e) immediate judgment will prompt an appeal of complex legal issues that may be rendered moot by subsequent events; and f) entry of judgment would prejudice other parties who do not seek certification pursuant to Rule 54(b).

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).

A. FORTUNE FINANCIAL HAS NO BASIS TO SEEK OR OBTAIN JUDGMENT IN CONNECTION WITH CLAIMS FOR RESCISSION OR DECLARATORY JUDGMENT.

Fortune Financial’s request for entry of partial final judgment in connection with claims for rescission and declaratory judgment is perplexing. Western Reserve has not asserted counts for rescission or declaratory judgment in C.A. No. 09-564. Therefore, there is no basis to enter judgment on such claims in that action.

In C.A. No. 09-470, Western Reserve initially asserted one count for rescission and a related declaratory judgment count confirming that the annuity at issue in the case had been rescinded or was void. See Complaint and Amended Complaint at Counts I and II. However, those counts were omitted from the case once Western Reserve filed its Second Amended Complaint on September 7, 2010 – after the annuity owner agreed that the annuity was rescinded. Therefore those counts are moot. Regardless, Fortune Financial was not a party to those counts and has no basis to seek or obtain judgment on them.

There is a pending declaratory judgment count against Fortune Financial in C.A. 09-470. See Third Amended Complaint, Count IV. Through this count, Western Reserve seeks a declaration that Fortune Financial is contractually obligated to indemnify Western Reserve for potential future financial losses. That count has not been dismissed, however. See Opinion and Order (filed 6/2/10) at pp. 43, n.17 and 47-48. Therefore, Fortune Financial presumably does not seek – nor could it obtain – Rule 54(b) certification in connection with that count. See DeMelo v. Woolsey Marine Indus., Inc., 677 F.2d 1030, 1032 (5th Cir. 1982).

B. JUDGMENT SHOULD NOT ENTER ON WESTERN RESERVE’S CLAIMS FOR NEGLIGENCE, FRAUD IN THE FACTUM OR CIVIL LIABILITY FOR CRIMINAL ACTS.

Fortune Financial also seeks entry of judgment based on the Court’s dismissal of Western Reserve’s claims against Fortune Financial for negligence, fraud in the factum, and civil liability for criminal insurance fraud (hereafter “criminal acts count”). Despite dismissal of these claims, multiple counts remain pending against Fortune Financial in C.A. No. 09-470 and C.A. No. 09-564.¹ “This circumstance alone counsels hesitation in the use of Rule 54(b).” Spiegel, 843 F.2d

¹ Fortune Financial is still defending claims for breach of contract, fraud, breach of the duty of good faith and fair dealings, civil liability for criminal acts based on forgery (in C.A. No. 09-470

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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).

There is nothing exceptional about these cases that warrants entry of partial final judgment at this time. Fortune Financial does not contend that Rule 54(b) certification is necessary to avoid hardship or injustice to it. The only arguably unusual circumstance associated with these cases is that discovery has largely been stayed while a criminal action against defendants Joseph Caramadre and Raymour Radhakrishnan plays out. It has been suggested that by entering partial final judgment at this time, it is possible that an appeal may be taken and concluded in time to avoid the potential of having multiple trials if Western Reserve prevails in the First Circuit following trial on counts that have not been dismissed. However, this

concern ... i.e., to avoid piecemeal trials, would be present in virtually any case in which the district court dismisses some of the parties [or claims] from the case and proceeds to trial with respect to others. To deem sufficient under Rule 54(b) a finding simply that an immediate appeal might avoid the need for a retrial ... could only contravene the federal policy against piecemeal appeals.

Hogan v. Consolidated Rail Corp., 961 F.2d 1021 (2d Cir. 1992).

Moreover, the dismissed criminal acts count is closely related to the pending claims against Fortune Financial (and other defendants in other related cases) for common law fraud and conspiracy. The Court dismissed the criminal acts counts (based on insurance fraud) on the grounds that the annuities were not subject to the insurance fraud statute. See Opinion and

and C.A. No. 09-564), declaratory judgment (in C.A. No. 09-470), and conspiracy (in C.A. No. 09-564).

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Order, filed 6/2/10, at p. 41.² 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 fallback defenses to the claim that defendants committed insurance fraud, 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 (and other defendants in other related cases) defenses to the common law fraud and conspiracy claims. Therefore, regardless of the unique circumstances that led the Court to dismiss the criminal acts count, the overlap of the legal and factual issues between the dismissed and pending claims “militates strongly against invocation of Rule 54(b).” Spiegel, 843 F.2d at 45. If judgment enters immediately on the criminal acts count, the First Circuit may have to address the merits of the underlying theory of fraud a second time in connection with an appeal of the still pending counts, which further counsels against entry of partial judgment at this time. See Allis-Chalmers Corp., 521 F.2d at 364.

Another significant factor counseling against immediate entry of judgment is that the legal issues implicated by the claims against Fortune Financial may be rendered moot if it is determined after trial that Western Reserve’s pending fraudulent inducement 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

² The criminal acts counts were revived in the Second Amended Complaint, to the extent the counts was based on an underlying crime of forgery. See Opinion and Order, filed 2/7/12, at p. 39.

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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 dismissed claims raise complex issues of state law, which further militates against entry of partial final judgment. Id.

Finally, Fortune Financial’s desire for final judgment is not unanimous. Although defendant Harrison Condit also obtained dismissal of Western Reserve’s counts for negligence, fraud in the factum, and criminal acts, he has not requested that judgment enter in his favor immediately. And unless the Court enters partial final judgment in his favor despite the absence of his request, then he will not have the opportunity to advance his respective position before the appellate court. Duke & Co. Inc. v. Foerster, 521 F.2d 1277, 1278 n.4 (3d Cir. 1975) (“The district court did not direct the entry of final judgment with respect to defendant County Commissioner. He therefore could not be a party to this appeal.”) abrogated on other grounds by City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991).³ Rather, he will have to

³ Entry of judgment on these claims also would be prejudicial to defendants who secured dismissal of claims in the related actions, but do not seek immediate final judgment. If judgment enters as Fortune Financial requests, then other defendants will face the Hobson’s choice of either seeking immediate judgment and incurring the cost of an immediate appeal, or not being

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wait until the conclusion of the case before making his arguments to the First Circuit, which would be hearing the same issues 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, Western Reserve respectfully request that the Court decline to enter final judgment at this time.

CONCLUSION

The circumstances of these cases 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 Fortune Financial 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, Western Reserve respectfully requests that Fortune Financial’s motions for entry of partial final judgment be denied.

Respectfully submitted,

/s/ Brooks R. Magratten

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heard in the First Circuit on matters that apply directly to claims asserted against them. See Duke & Co. Inc., 521 F.2d at 1278 n.4.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing objection and memorandum to be electronically filed with the Clerk of the Court on May 8, 2012, 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