Beller v William Penn Life Ins. Co. of N.Y.
2005 NY Slip Op 30635(U)
October 26, 2005
Supreme Court, Nassau County
Docket Number: 004845/2002
Judge: Ira B. Warshawsky
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.
TRIAL/IAS PART 16

LAUREN BELLER, as Successor Trustee under the D. Gruber Trust, on behalf of herself and all persons similarly situated,

Plaintiff,

INDEX NO.: 004845/2002
MOTION DATE: 08/09/2005
MOTION SEQUENCE: 003

-against-

WILLIAM PENN LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed.......... 1
Memorandum in Support of Plaintiff's Motion for Class Certification.......... 2
Memorandum of Law in Opposition to Motion for Class Certification of Plaintiff Lauren Beller.......... 3
Reply Affirmation of James G. Flynn in Further Support of Plaintiff's Motion for Class Certification & Exhibits Annexed.......... 4
Reply Memorandum in Support of Plaintiff's Motion for Class Certification.......... 5
Supplemental Memorandum in Support of Plaintiff's Motion for Class Certification.......... 6
Supplemental Affirmation of James G. Flynn in Support of Plaintiff's Motion for Class Certification & Exhibits Annexed.......... 7
Affirmation of Kelly H. Tsai in Opposition to Plaintiff's Motion for Class Certification... 8
Supplemental Memorandum of Law in Opposition to Motion for Class Certification of Plaintiff Lauren Beller.......... 9
Supplemental Reply Memorandum in Support of Plaintiff's Motion for Class Certification.......... 10

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Plaintiff filed a complaint on or about March 21, 2002 on behalf of herself and all others similarly situated (a class action). The complaint alleges that plaintiff is the owner of a flexible premium adjustable life insurance policy (FPALIP) issued by William Penn Insurance Co. (William Penn).

Plaintiff alleged that the policy provided that any change in the cost of insurance ("COI") rates will be "applied to all insureds with the same age, sex, amount at risk, and classification." The complaint further alleged that William Penn increased COI rates, "without regard to flexible factors in the policies, such as improvements in mortality." Based on these allegations, the complaint asserted causes of action for: (1) breach of contract (2) constructive trust; (3) fraud in the sale of insurance contracts; (4) fraud; and (5), unfair trade practices.

William Penn moved to dismiss the complaint pursuant to CPLR section 3211 (a) (7) and section 3016 (b), arguing that plaintiff failed to state a cause of action and had failed to plead fraud with requisite particularity.

More specifically, in a motion filed before Justice Geoffrey O'Connell, the defendant argued that the plaintiff alleged that William Penn improperly adjusted the cost of insurance premiums upwards, but had failed to explain how any adjustment made by the defendant was improper or actionable.

Justice O'Connell agreed and ruled that in the complaint, plaintiff failed to allege facts supporting her first cause of action for breach of contract. He further found that she failed to allege facts indicating that defendant's calculations of the premiums were in violation of the policy terms. He also noted that the premiums charged did not exceed the maximum set forth in the policy. Justice O'Connell, based his ruling on the filed rate doctrine. "Simply stated, the doctrine holds that any 'filed rate' - that is, one approved by the governing regulatory agency - is per se reasonable and unassailable in judicial proceedings brought by ratepayers." Wegoland v NYNEX Corp., 27 F3d 17,18 (2d Cir. 1994). The court's decision touched on a number of other issues, however, they are not relevant for our purposes at this time.

The plaintiff appealed to the Appellate Division, which affirmed in part and reversed in part Justice O'Connell's decision. The court ruled "the filed rate doctrine bars actions that challenge as unreasonable or unlawful the rates charged by a regulated industry (citations

omitted)."

More specifically, the Appellate Division found "that the plaintiff's claim that the defendant breached the insurance contract by raising the cost of insurance rates without considering the specified factors states a cause of action, which is not barred by the filed rate doctrine." The court further found that "the subject insurance contract imposed a continuing duty upon the defendant to consider the factors comprising the cost of insurance before changing rates, and to review the cost of insurance rates at least once every five years to determine if a change should be made." As to the extent of the plaintiffs claim for damages, the court noted "only claims for damages accruing more than six years before the commencement of this action are time barred (citations omitted)." Beller v. William Penn Life Insurance Co., 8 AD 3 D. 310, 313 (2d Dept. 2004). Thus, the Appellate Division left the plaintiff with the first cause of action and damages that would not go back any further than 1996.

Considering the above quoted elements of the decision of the Appellate Division in this matter, the court will now address the factors set forth in the CPLR, relative to the certification of class actions.

Plaintiff has brought this action as a class action pursuant to article 9 of the CPLR, on behalf of all persons who have purchased flexible premium adjustable life insurance policies issued by William Penn and who, after the policy was issued, paid premiums computed in a manner contrary to the express terms of the policies (the "class").

Before the court is able to certify a class action it must consider the factors presented in CPLR 901 (a). Generally, case law in New York, supports a liberal construction of Article 9. Kidd v Delta Funding Corp., 289 AD2d 203 (2d Dept. 2001); Brandon v Chefetz, 106 AD2d 162, (1st Dept. 1985) ("the policy of this rule is to favor maintenance of class actions and for a liberal interpretation.").

1. **CPLR 901(a)(1): Is the Class So Numerous That Joinder Of All Members Is Impracticable?**

This subsection is sometimes referred to as the numerosity test. It has been held for quite some time, that the test of numerosity is not mechanical, but rather is based upon the reasonable inferences and commonsense assumptions from the facts of the case. See Friar v Vanguard

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Holding Corp., 78 AD2d 83 (2d Dept. 1980).

It is now clear, and William Penn has conceded, that there have been at least 8277 new holders of F. P. A. L. I. P.'s since January 1, 1996. Each of these policies contains identical C.O.I. (Cost of Insurance) factors that will be used in determining rate changes (mortality, interest, expenses and persistency). Therefore, these thousands of policies should satisfy the numerosity element of Article nine, yet defendant disagrees. Defendant argued initially that plaintiff had failed to show the number of policies that would be the same as hers and therefore had not satisfied the numerosity element. Once discovery revealed the number of policies that fit the one issued to plaintiff, the defense changed its position.

Defense now claims that plaintiff has failed to prove that any other member of the putative class exists, arguing that no other policyholder claims to be aggrieved in the same manner as plaintiff. The ridiculousness of this argument is obvious. If the insured does not know that they are being overcharged, they cannot complain that they are being overcharged. To the view of the court, few people who purchase insurance policies actually go to the trouble to read the details of what may or may not result in rate increases. They trust the insurance company to do the right thing. They assume that if their rates go up there was a reason for their rates to go up. This argument of the defense is rejected out of hand.

The defendant also argues that the numerosity element has not been met in that plaintiff has not established that other policyholders share plaintiff's complaint. The defendant relies heavily on Scott v. Prudential Insurance Co. of America, 80 AD2d 746, 747 (4th Dept. 1981). Scott, however, appears to apply more to the "typicality" issue and even then an act (pre-payment of premium) was required of a class member. There is no affirmative act needed by members of this class.

This court does not believe that Scott applies to the facts of our case, especially considering the ruling of the Appellate Division in partially reversing Justice O'Connell. This court will not second-guess the Appellate Division in its finding that a cause of action existed and, in fact, agrees that it does. The Appellate Division found "the subject insurance contract imposed a continuing duty upon the defendant to consider the factors comprising the cost of insurance before changing rates, and to review the cost of insurance rates at least once every five

years to determine if a change should be made." The plaintiff alleges that the defendant insurance company did not do this and she alleges this on behalf of herself and all those similarly situated. She has showed to the court, proven to the court, that there are 8200 similarly situated policyholders of William Penn; further, the court finds that said number is not so numerous that joinder would be impracticable. She has satisfied the numerosity element.

2. **CPLR 901(a)(2): Do Questions of Law and Fact Common to the Class Predominate Over Questions Affecting Only Individual Class Members?**

CPLR 901(a)(2) requires that the existence of question of law or fact common to the class predominate over individual questions or issues. This area is sometimes labeled commonality.

Pursuant to pre-certification discovery it has been determined that William Penn issued five types of F.P.A.L.I.P. insurance with nearly identical components of C.O.I. These policies in order of issuance were:

a. Crusader I and II (early generation universal life policies)

b. Penn Option Flex (included bonus interest and some expense charges)

c. Longevity (similar to Option Flex)

d. Longevity 100 (some factions similar to above, but with coverage to age 100)

e. Survivor Life (this covered two insured)

All of the above indicated that the C.O.I. would be calculated periodically to adjust the premium. The premiums would be adjusted based on changes in C.O.I. Again, the factors considered in adjusting the C.O.I. were mortality, interest, expense and persistency.

Each of the policy types had identical or nearly identical language stating the "cost of insurance is deducted each month from Policy Account Value". The "Policy Account Value" was defined as premiums paid less C.O.I. Thus, logically, changes in the C.O.I. required corresponding changes in premiums in order to maintain the death benefit of the policy.

The policies also state the C.O.I. will be "reviewed at least once every five years to determine if a [premium] change should be made." All the policies also state, as did plaintiff's, that the changes would be uniformly applied to all insureds with the same age, sex, amount at risk and classification.

Each of these F.P.A.L.I.P.s contain "merger clauses" which prohibit oral modification

and allow for change only by an officer of the company. Such change or waiver must be made in writing. Thus, we have uniform written provisions common to each of the types of policies previously set forth relating to premium changes.

Defendant argues there cannot be issues of commonality because there is no proof of a putative class. The court disagrees. Said putative class would include all policy holders with similar or identical premium change clauses as previously described whose premiums were changed without consideration of one or more of the factors set forth in the policy - mortality, interest, expense and persistency.

The commonality clause, CPLR 901(a)(2), may be satisfied in class action cases based upon breach of contract where said claims are founded upon uniform written provisions. Englade v. Harper Collins Publishers, Inc., 289 AD2d 159 (1st Dept. 2001) (royalty clauses in contracts of different authors with publisher); see also, Liechtung v. Tower Air, Inc., 269 AD2d 363 (2d Dept. 2000) (representation of non-stop flight to ticket holders held to predominate all individual questions); Broder v. MBNA Corp., 281 AD2d 369 (1st Dept. 2001) (identical written language in credit card solicitation).

The court concludes that there are questions of law and fact common to the class that predominate over questions that would only affect individual class members or sub-classes. If the court was to find that one or more parts of the larger class present specific separate problem of law or fact, it could always create a sub-class.

Defendant argues that the openendedness of plaintiff's class definition creates serious problems which mitigate against commonality.

Plaintiff defines the class "as all persons who purchased a F.P.A.L.I.P. from William Penn and, who after the policy was issued, paid premiums computed in a manner contrary to the express terms of their policies." This definition is unlimited in time and scope, however, the decision of the Appellate division does limit the class. The Appellate Division ruling limited the class "to the extent that it seeks damages for rate increases imposed more than six years prior to the commencement of the action." In other words, the class would be limited to policyholders whose premiums were increased after 1996 in a manner contrary to the express terms of their policies. Thus, the defendant's "openendedness" argument in light of the Appellate Division

decision does not affect the commonality element of CPLR 901(a)(2), which the court finds has been satisfied.

3. **CPLR 901(a)(3): Is Plaintiff's Claim Typical of the Class?**

This area is commonly called typicality. The Appellate Division has ruled in Friar, supra, that the typicality requirement may be satisfied when "plaintiff's claim derives from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory. . ." Friar, 78 AD2d at 99.

In our case we have no knowledge of other claims. However, we do know there are thousands of other F.P.A.L.I.P. policies and they all contain the same C.O.I. factors. William Penn has also indicated that it has issued uniform policies in a uniform manner on a specific form (FPA/83).

Thus, there appears to be a class of policyholders uniformly affected by what William Penn did or did not do as to the adjustment of premiums based upon adjustments to the C.O.I. The claims of all other policyholders as previously described will be the same as that of plaintiff.

Defendant points out that plaintiff relies on conclusory statements to support typicality. Plaintiff and the putative class "were affected by defendant's uniform conduct, namely, breaching the terms of the F.P.A.L.I.P.'s by failing to adjust properly the premiums based upon changes in the C.O.I."

Defendant refers to this statement as "conclusory" and "patently insufficient to support typicality." Feder v. Staten Island Hospital, 304 AD2d 470, 471 (1st Dept. 2003). Defendant's argument is without foundation in this case.

This court has concluded based on the Appellate Division decision the plaintiff has stated a cause of action. With that as a given, then the arguments of the defense against typicality must fail.

4. **CPLR 901(a)(4): Will Plaintiff Fairly and Adequately Protect the Interests of the Class?**

This subsection addresses two factors relating to the protection of the class: (1) the adequacy of the plaintiff to represent the class, and (2) adequacy of the class counsel.

In determining the adequacy of the class representative, the court is to consider the

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qualification of counsel, the ability of the representative to assist counsel, and the relationship between the class representative and the class. Ackerman v. Price Waterhouse, 252 AD2d 179, 202 (1st Dept. 1998).

Plaintiff is admitted to the bar in New York and Connecticut. It is she who wondered how premiums were consistently being increased on her father's life while mortality (life span) increased. She is obviously familiar with the allegations of the complaint and has authorized its filing.

Defendant attacks her ability to represent the class. The case is somewhat unusual in that Ms. Beller is a trustee of a trust set up by her father for the benefit of her mother, during her mother's lifetime, which will have the proceeds of her father's life insurance policy with William Penn added to the trust corpus upon his death. It is clear that Ms. Beller as trustee may bring this action without joining her father. CPLR 1004. Defendant points out the plaintiff was not involved in the purchase of the policy, never had contact with William Penn or its agents regarding the policy and does not know if her father did. She has never seen an illustration of the policy allegedly provided when it was sold.

Plaintiff has stated she had certain expectations of the policy's premium range ($3,000 per year) and believes that came from her father. She also has a notable lack of knowledge on how the alleged breach occurred vis-a-vis the raising of premiums. Her deposition also would indicate that she does have a general understanding that the C.O.I. factors were "allegedly" not used in raising premiums but does not really understand what the factors that determine the C.O.I. mean, specifically, expense, interest and persistency. Defendant also argues that plaintiff lacks knowledge about the class action allegations.

All of these allegations are of interest to the court but what the court finds of greatest interest, and, perhaps, typical of defendant's argument, is the following paragraph found on page 7 of defendant's "Supplemental Memorandum of Law in Opposition to Motion for Class Certification of Plaintiff Lauren Beller":

> Plaintiff admitted that she did not have a basis for several factual allegations in her Complaint and, in fact, acknowledged that she did not even know what some of those allegations mean. For example, she testified under oath that: (i) she did not personally have proof that thousands of other policyholders existed; (ii) she

> did not know anyone else who owns a William Penn flexible premium adjustable life policy; (iii) she does not know where other William Penn policyholders live; (iv) she does not know anyone else who has alleged that William Penn improperly increased the COI; and (v) she does not know anyone else who brought a lawsuit involving these same allegations. *Id.* at 75:23-76:19.

Is the defendant truly serious in this style of attack? Should the court take what defendant says seriously when it denounces plaintiff for not knowing the names of other flexible premium adjustable life policyholders? That she does not know where they live? That she does not know anyone else who brought a lawsuit? This type of attacks have been disapproved by the Supreme Court. Surowitz v. Hilton Hotels Corp., 383 US 363 (1966).

The court will not address any more of defendant's ad hominem attacks. As long as putative plaintiff is represented by zealous and competent counsel, her less than detailed knowledge of the intricacies of the complaint will not make her an inadequate representative. The court finds Ms. Beller is adequate to represent the class. She is dedicated to follow through on this action and will be an appropriate plaintiff.

As to the plaintiff's law firm, Wechsler, Harwood, LLP, it is clear they are also dedicated to pursuing this action as evidenced by their appeal of the O'Connell dismissal and have the capability to follow through on any course this proceeding takes.

Defendant has attacked the complaint and specific allegations because they raise individual questions about the knowledge of each policyholder, what was disclosed to them about the C.O.I. rates, what each was told and what each understood about what they may have been told.

The causes of action of the complaint to which these accusations refer predate the Appellate Division ruling that eliminated anything but the breach of contract claim. None of the allegations to which defendant referred are relevant to the breach of contract claim. One must wonder why defendant chose to discuss these allegations in light of the Appellate Division decision which mooted them.

5. **CPLR 901(a)(5): Is A Class Action Superior To Other Available Methods For The Fair And Efficient Adjudication Of This Controversy?**

If each member of the proposed class, once educated about the claim, were to proceed

individually against William Penn, it would flood the court system. Further, most of the people would be pro-se litigants creating even a greater burden on the court. Thus, the class action is superior to individual actions by class members.

CPLR § 902

CPLR § 902 directs that an action may only be maintained as a class action if the court finds the prerequisites under section 901 have been satisfied. It further directs that the court shall consider five factors before determining that "the action may proceed as a class action":

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. The impracticability or inefficiency of prosecuting or defending separate actions;

3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;

5. The difficulties likely to be encountered in the management of a class action.

Based upon the above, the class members do not appear to have an interest in individually controlling the prosecution of separate actions. In fact, the members of this class most likely are unaware of the allegation of being improperly charged higher premiums and would not want to undergo expensive litigation for the possibility of what might only be a small recovery. It is also obviously impractical for the 8000 plus possible claimants who existed during our class period to bring separate actions. Neither side has identified any other action of this nature, and the failure to identify another action is not grounds for denying class certification.

As far as forum, the Supreme Court of Nassau County is as appropriate as any forum and better than most. The plaintiff resides herein and the defendant has its principal place of business herein. Coincidentally, all of the form FPALIPs originated (were signed) in New Hyde Park or in Garden City.

William Penn has argued that certifying the class here would be unfair to those people who were issued FPALIPs and who are non-New York residents. The evidence presented to the

court has not indicated such problem exists, but if they should be identified, the court is sure those problems can be managed in this forum.

This court has managed other class actions successfully and the defense has not proferred any reason why this court cannot manage this action. If the referred to mini-trials become necessary, sub-classes may be established as the need arises to address the differences.

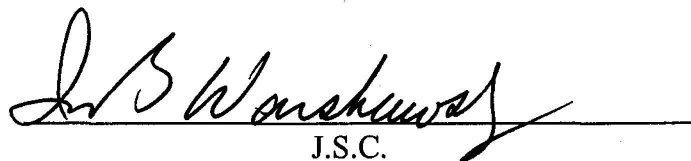
Accordingly, the motion to certify the class is granted. The plaintiff is directed to submit a modified definition of the class consistent with this court's findings and that of the Appellate Division in Beller v. William Penn Life Insurance Company of New York (11/7/03, 2d Dept.) which covered:

> all persons (other than William Penn, its officers, employees, representatives, and their families) who purchased a flexible premium adjustable life insurance policy from William Penn and who, after the policy was issued, paid premiums computed in a manner contrary to the express terms of their policies

The modification shall indicate it is limited to policyholders who paid premiums after March 20, 1996 and whose premiums were increased without regard to the factors of the C.O.I.

The matter is set down for a conference on December 1, 2005, at 9:30 A.M., to determine the issues necessary for class notification and to set a schedule to cover any remaining discovery issues and to set dates for certification and trial.

Dated: October 26, 2005



J.S.C.

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