

Court Reaffirms Dismissal of Putative 412(i) Class Action

BY TODD FULLER



*Without specific facts,
fraud claims go nowhere*

Earlier this year, in *Berry v. Indianapolis Life Insurance Company, et al.*, the U.S. District Court for the Northern District of Texas granted Indianapolis Life's motion to dismiss a putative nationwide class action against several insurers relating to the design, marketing and sale of life insurance policies purportedly used to fund Section 412(i) defined benefit pension plans. The Court dismissed plaintiffs' fraud-based claims for failure to plead with specificity, and noted that the complaint failed to demonstrate why alleged representations regarding the validity of plaintiffs' 412(i) plans made several years prior to IRS guidance issued in 2004 were false when made. The Court also held that any predictions by an alleged Indianapolis Life agent regarding how the IRS would treat 412(i) plans in the future was "either an unactionable opinion or was unjustifiably relied upon."

The Court allowed plaintiffs to file an amended complaint to overcome the pleading deficiencies identified in its opinion, but on July 16, 2009, the Court reaffirmed its earlier ruling and dismissed the plaintiffs' fraud-based claims with prejudice. After considering plaintiffs' amended allegations, the Court concluded that, notwithstanding the complaint's addition of IRS pronouncements made prior to 2001, plaintiffs still could not identify any

definitive guidance by the IRS "to explain why the alleged representations by Indianapolis Life's agents were false when made in 2001 and 2002." The Court also held that alleged representations regarding the tax consequences and validity of plaintiffs' plans were merely predictions or opinions as to how the IRS would treat plaintiffs' plans in the future which, as a matter of law, could not form the basis of a fraud claim. Jordan Burt represented Indianapolis Life in this case.

MDL Panel Consolidates 412(i) and 419 Plan Litigation

BY TODD FULLER

In *re Indianapolis Life Ins. Co. Internal Revenue Service § 412(i) Plans Life Insurance Marketing Litig.*, (MDL No. 1983), was originally created to centralize claims relating to the design, marketing, and sale of specially designed life insurance policies used to fund defined benefit pension plans under § 412(i) of the Internal Revenue Code. Indianapolis Life recently requested that the proceeding be expanded to include cases, such as *Paul v. Aviva Life and Annuity Company* (the successor to Indianapolis Life), which assert claims relating to employee benefit plans formed under § 419 of the tax code because the core factual allegations asserted in these actions are nearly identical, with each asserting a variety of fraud-based claims relating to the design, marketing, and sale of certain Indianapolis Life insurance policies used by the plaintiffs to fund employee benefit plans for their small businesses.

On August 10, 2009, the MDL Panel issued an order transferring *Paul* to MDL No. 1983 for centralized pretrial proceedings. The MDL Panel recognized the "common questions of fact" between the actions and noted that "[t]he previously centralized MDL No. 1983 actions involve the funding of small business defined benefit pension plans with Indianapolis Life insurance policies which were represented to be in compliance with U.S. Internal Revenue Service (I.R.S.) § 412(i). *Paul* involves similar allegations involving Indianapolis Life policies used to fund small business I.R.S. § 419 welfare benefit plans." The MDL Panel noted that although "*Paul* may involve some unique questions of fact relating to § 419 plans, the transferee judge can establish a separate track, if necessary, to address any unique factual and legal issues which may arise." The MDL Panel also renamed MDL No. 1983 "*In re Indianapolis Life Ins. Co. I.R.S. § 412(i) and § 419 Plans Life Insurance Marketing Litig.*" to reflect the inclusion of cases asserting claims relating to § 419 welfare benefit plans. Jordan Burt represents Indianapolis Life in these cases.