

Courts Take Divergent Paths in Annuity Certification Decisions

BY DAWN WILLIAMS

Two federal courts recently took different approaches in deciding whether classes of fixed indexed annuity owners should be certified.

In *Duchardt v. Midland Nat'l Life Ins. Co.*, the U.S. District Court for the District of Iowa determined that certification was not appropriate in an action challenging the company's interest crediting mechanism. The named plaintiff purported to represent owners of eighteen different types of annuities, some of which had differing language in the interest crediting definition. The court first held that the proposed subclass—which included all individuals whose account values

were lower because of the interest credited—was not ascertainable without individualized inquiry. The court then found that the named plaintiff's claims were not typical of the class because he sought to represent individuals who have different contract language, and because the contract law of the class members' states of domicile (47 states in all) varied in how to interpret ambiguous terms. *Duchardt* was then found to be inadequate because his interests might be in conflict with class members who benefitted from Midland's crediting method.

Conversely, the Ninth Circuit reversed a decision denying certification against the same insurer in *Yokoyama v. Midland Nat'l Life Ins. Co.*, in which the plaintiff claimed that the company marketed and sold annuities to seniors living in Hawaii in violation of that state's Deceptive Practices Act. The court found that Hawaii law required no individualized showing of reliance, and thus "there is no reason to look at the circumstances of each individual purchase in this case ... and the fact-finder need only determine whether [Midland's] brochures were capable of misleading a reasonable consumer." The court noted that there could be individualized damages determinations (because each person's damages would depend upon their financial circumstances and objectives and the particular status of each person's annuity), but held that such individualized damage determinations would not defeat certification.



*Courts in different directions
in annuity certification*

Class Certification Denied In ERISA Breach Of Fiduciary Duty Case

BY ROBIN SANDERS

On June 15, 2009, the U.S. District Court for the Middle District of Louisiana denied class certification in an action brought pursuant to ERISA against Pan-American Life Insurance Company related to non-discretionary administrative services it provided to an employer-sponsored 401(k) defined contribution plan. The plaintiffs in *Turner v. Talbert*, several 401(k) plan participants, had brought suit against Pan-American alleging that it conducted itself as an ERISA fiduciary and breached its fiduciary duty to the 401(k) plan.

In denying their motion for class certification, the court held that the plaintiffs failed to satisfy the predominance and superiority requirements of Federal Rule of Civil Procedure 23(b)(3). The court held that, based on plaintiffs' class definition—which sought relief on behalf of all plan participants who incurred losses as a result of Pan-American's alleged breach of fiduciary duty—determining class membership, as well as the fact of injury and extent of damages, would require an individualized review of each plan participant's past and hypothetical future investment allocations. Since the case had the potential to degenerate into multiple individual lawsuits, the court found that common issues of fact and law did not predominate over the individual questions.

Plaintiffs subsequently filed a motion for reconsideration in the district court and a Rule 23(f) petition for appellate review with the U.S. Court of Appeals for the Fifth Circuit, both of which were denied. The case is now proceeding on the merits of the plaintiffs' individual claims. Jordan Burt acted as counsel for Pan-American in defending against plaintiffs' attempts at class certification.