IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Harold Hanson, Nellie McIlroy, Gladys Schimke, and the class of similarly situated purchasers of Nursing Home Benefit Policies,

Plaintiffs,

v.

Acceleration Life Insurance Company, Interstate Service Insurance Agency, Inc., Benefit Plans II, and Commonwealth Life Insurance Company,

Defendants.

Civil No. A3-97-152

MEMORANDUM AND FINAL ORDER ON APPROVAL OF SETTLEMENT

All capitalized terms used in this Order shall have the meanings and /or definitions given them in the Stipulation of Settlement ("Stipulation") entered into by or on behalf of the Settling Parties, which was filed with this Court on October 18, 1999 and preliminarily approved by this Court on the same date.

This court, having on December 7, 1999, conducted a hearing to determine whether to issue final certification of this matter as a nationwide class action settlement purposes and whether the Stipulation entered into on behalf of the Settling Parties was fair, reasonable, adequate and in the best interests of the Settlement Class, and after considering (1) the memoranda submitted on behalf of the respective Settling Parties, (2) the Stipulation and all exhibits thereto, (3) the entire record of this proceeding, including the evidence adduced at the hearing, (4) the representations and argument of Counsel for the respective Settling Parties, and

(5) the relevant law, including but not limited to Rule 23 of the Federal Rules of Civil Procedure, the court enters its findings of fact and conclusions of law in memorandum form.

I. CERTIFICATION OF NATIONAL CLASS

The Settlement Class consists of 13,320 current or former policyholders who purchased Form 520, 521, 522 or 523 nursing care insurance policies issued by defendants. All received the same sales brochure and communications from defendants, which information or lack thereof forms the basis of plaintiffs' claims. This court has previously found that all of the requirements of Rule 23 are met for the class of North Dakota policyholders. For purposes of giving notice of settlement, the court preliminarily certified a nationwide class of policyholders. The court now concludes that final certification of the national class is appropriate for settlement purposes, as the class meets all requisites of Rule 23.

With over 13,000 members, the class clearly is so numerous that joinder of all members is impracticable. As the purchasers of the same type of insurance product from defendants and the recipients of the same communications about that product, the class members all share common questions of both law and fact. The claims of the class representatives are typical of the national class to the same extent that they typified those in the North Dakota class. Further, the representatives have fairly protected the interests of the entire class, including for purposes of entering into and implementing the proposed settlement.

Under Rule 23(b) "the court finds that the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3), Federal Rules of Civil Procedure. The court notes that the modest value of the damage claims of individual members of the class, the advanced age of the class

members, and the novel and complex nature of the issues presented in this case all militate against prosecution of separate actions. This was apparently the first action of its kind, and it presents an opportunity to resolve the claims of all class members in a single action through a settlement that is attractive for them and ends further expense and uncertainty. These factors strongly indicate that national class certification is the fairest and most efficient adjudication of these claims.

Further, the court finds the Settlement Class is defined objectively in terms of ascertainable criteria, such that the court may determine the constituency of the Settlement Class for purposes of the conclusiveness of the judgment herein. In light of the settlement, any concerns about management of this case as a class action are minimized, and the court notes here the lack of objection to the settlement by even a single class members. Thus, the court does not expect management of the class action settlement to be prohibitive to certification.

The court hereby certifies the Settlement Class and will proceed to address the motion for final approval of settlement.

II. NOTICE OF SETTLEMENT

Since disposition of a class action binds class members under the principle of res judicata, due process requires notice of a proposed settlement that is "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Grunin v. International House of Pancakes*, 513 F.2d 114, 120 (8th Cir. 1975), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Notice of the proposed settlement was sent to class members by first class mail, utilizing the policyholder information maintained by defendant Commonwealth. Not surprisingly, given

the passage of time and advanced age of the class members, approximately 4000 of the 13,320 notices were undeliverable. Over half of these were determined through social security number checks to involve deceased policyholders. A social security number searching service together with a search of telephone white pages on the Internet resulted in 900 more addresses and a second mailing, leaving only about 1000 living class members without notice by mail.

In addition, the settlement was publicized in North Dakota through a *Bismarck Tribune* article and was publicized nationally by syndicated columnist Jane Bryant Quinn, who outlined the settlement and gave the Settlement Administrator's toll free telephone number and web site and encouraged participation in the settlement by class members. The State of Washington Department of Insurance also mailed notice of the settlement to each of the policyholders in that state. Notice is being published in the Casper, Wyoming newspaper at the request of the Wyoming Department of Insurance.

Under the circumstances the court finds the best practicable notice has been given to class members. National publication of the notice seems unnecessary and financially wasteful. It would be at best a shot in the dark, unlikely to provide actual notice to additional class members.

The court further finds that the content of the notice fairly apprised class members of the settlement terms and the steps to be taken to submit a claim or to exclude themselves from the class. The numerous responses by class members, several of which were quoted in Class Counsel's brief, indicate the class members well appreciated the terms and effect of the settlement. The only class members who were possibly confused were among those submitting exclusion forms. That situation has been remedied by another explanatory mailing to them which has already been approved by the court.

The court finds that the requirements of due process have clearly been met both as to the

method and content of the notice of settlement to class members.

III. APPROVAL OF SETTLEMENT

In considering whether a settlement is fair, reasonable and adequate and in the best interests of the plaintiff class, the court considers several factors, including "the strength of the case for plaintiffs on the merits, balanced against the amount offered in the settlement[;] . . . defendant's overall financial condition and ability to pay; the complexity, length and expense of further litigation; and the amount of opposition to the settlement." *Grunin*, 513 F.2d at 123 (citations omitted).

This case involves novel, complex issues that were vigorously contested until the very eve of trial. The parties conducted extensive discovery, including production of tens of thousands of documents and taking over 40 depositions, generating along the way several hotly contested disputes over the scope of discovery. Each party developed testimony of several expert witnesses in such key areas as actuarial science, regulatory practice and economics. In addition to the discovery disputes, the court ruled on a statewide class certification motion and a round of summary judgment motions involving such issues as the filed rate doctrine. Another round of summary judgment motions on additional issues plus a number of motions in limine were pending at the time of settlement. The final pretrial conference had already been held, at which the parties listed all exhibits and witnesses for trial.

The undersigned hosted settlement discussions spanning several weeks, commencing with a lengthy in-person session immediately following the final pretrial conference and continuing by telephone and in person on a daily basis thereafter until settlement was reached late on Friday, October 1, 1999, just before the Monday, October 4 trial date. The negotiations were complicated and arduous. Counsel for each party, including

Class Counsel, vigorously represented their respective clients' interests throughout the process. It is seriously inadequate to simply say that settlement was reached at arms length. As one of the defense attorneys aptly described the course of the litigation at the final hearing, "Hand to hand combat is an understatement." Even after verbal agreement was reached, counsel engaged in extensive negotiations, involving almost daily lengthy discussions monitored by the court, to reduce the terms of the settlement to a written document.

Based on the court's extensive exposure to the issues throughout the course of this litigation, the court can easily conclude that the proposed settlement is well within the range of potential outcomes in this case. Although the court does not intend at this point to evaluate the merits of the claims and defenses raised in the case, it does acknowledge that the final outcome had the case been tried was anything but certain. The issues were novel, they were highly complex, and a favorable outcome for plaintiffs was by no means assured. Even if plaintiffs prevailed on liability, there were serious issues on the proper measure of damages and whether many or even most of the class members have even suffered compensable damages. Class Counsel's negotiations on behalf of the Settlement Class had full appreciation of these risks, but were prepared to try the case for the North Dakota class if a sufficiently favorable settlement could not be reached.

In addition to providing a substantial fund to provide compensation to class members, the proposed settlement provides another, equally important benefit: Class members who still retain their long term care policies have already received a reduction in their premiums as a result of the settlement. Defendant Commonwealth implemented a rate reduction on November 1, 1999, within a month after reaching verbal agreement to settle and within just a few days after the written Stipulation for Settlement was executed and had received preliminary approval by the

court. Further, Commonwealth has agreed in the settlement to refrain from any further requests for rate increases. The immediate availability of this relief together with the significant fact that premium reduction, a very real and substantial benefit to elderly class members on fixed incomes, would not have been available as a remedy at trial, further demonstrate the advantage of this settlement for the class.

The defendants' financial condition bears brief mention. Defendant Acceleration, who initially underwrote these policies, is financially strapped, and the primary focus of all settlement discussions between Class Counsel and Acceleration was the limit on Acceleration's ability to pay. Class Counsel and the court were satisfied that Acceleration contributed to the settlement fund to the extent that it could. Commonwealth, on the other hand, has substantial resources and could easily have funded continued litigation through trial, appeal and subsequent rounds if remand resulted. Such a lengthy process, while a legitimate contest on Commonwealth's part, would not be in the best interests of this elderly class.

Trial of the North Dakota case would have taken at least two weeks, followed inevitably by post-trial motions and appeal. The cases in Florida and Wyoming had recently been filed by Class Counsel and were progressing into discovery. They planned to file actions in other states as well (potentially 20 other states). Without the settlement and national class certification, the North Dakota case would have been tried separately and there is no assurance that even statewide classes would have been certified in the other states. Defendants planned to continue to contest certification of the North Dakota class as well. This litigation would have spanned many years to come and the expense would have been staggering. The delay alone would have been a travesty for the elderly class. The expense would have been an incredible waste.

Finally, the court notes the significant and surprising lack of any opposition to the

settlement. Class Counsel and the Settlement Administrator have received many comments from class members, a few of which are quoted in Class Counsel's brief, and without exception they are very favorable. The complete lack of opposition to this settlement is as strong a comment on its adequacy and benefit to the class as any factor could be.

The court finds the settlement is fair, reasonable and adequate and in the best interests of the class, and concludes that it should be approved.

IV. ATTORNEY'S FEES

Class Counsel have requested attorney's fees of 30 percent of the value of the settlement amount (including interest) to be paid from the Settlement Fund. The settlement consists of $12.6 million in cash plus interest and an estimated additional value of $2.1 million for premium rate reduction.

The court finds that given the nature of this litigation as a fraud/misrepresentation case and its novel and complex nature, a percentage fee is the appropriate method of compensating Class Counsel. The court further finds that a 30 percent fee is reasonable under the circumstances. This is not a case in which counsel put fees ahead of achieving the best possible result for the class, or in which counsel quickly compromised the case to turn a fee. This litigation was hard fought throughout its two year pendency and required thousands of hours of counsel's time and hundreds of thousands of dollars advanced for expenses, with significant risk of no compensation. Both local counsel and national class counsel are commended for their willingness to take on this cause when there were no virtually no precedents to assure them of likely success. They are all highly skilled and well-experienced attorneys who appreciated the risky nature of this litigation; yet their strong desire to correct a perceived injustice suffered by a

vulnerable group of people led them to take the risk.

In spite of counsel's skill and experience, nothing came easy for them. Each step of discovery was an arduous struggle; statewide certification was still being contested at the time of settlement; they successfully argued for denial of summary judgment on the filed rate doctrine and other issues, only to face a renewed summary judgment motion on other issues as they approached trial and reached the settlement agreement. They were completely prepared to try this case had an attractive settlement for the class not ensued. A "war room" for trial preparation was up and running in Bismarck throughout the settlement discussions, even on the last evening. Counsel's considerable skill, both in the substantive areas of this case as well as in discovery and class action procedure, together with their degree of preparation were primary factors leading to the favorable settlement for the class. Of equal note is the fact that counsel unquestionably put the interests of the class far ahead of their own interests.

The court further notes that the requested fee was fully disclosed in the notice of settlement and received absolutely no criticism. In fact, a number of class members wrote to praise the efforts of Class Counsel.

Although the court finds that the fee in this case should not be limited to a lodestar figure, it notes that the complexity of the case and the fact that settlement came on the eve of trial resulted in such a substantial investment of time by counsel that the requested fee would be reasonable even under a lodestar analysis. The reasonable value of counsel's time is over $2.5 million, and the impressive result achieved for the class would justify a significant multiplier award. A very modest lodestar multiplier of two in this case would result in a fee higher than the 30 percent requested by counsel.

The court without reservation approves an attorney's fee of 30 percent of the $14.7

million (plus interest) value of the settlement fund. Class Counsel shall divide the fee in accordance with their own arrangements. The court notes it has already approved a "quick-pay" procedure for payment of attorney's fees because of the extent of counsel's investment of time and costs in the case.

V. COSTS

Class Counsel have advanced $605,344.00 for litigation expenses to date. The court has reviewed the cost itemization and finds the expenses to be reasonable and fully reimbursable. In particular, the court finds the costs relating to the data base of information were reasonably and necessarily incurred. Payment of the requested amount is approved.

VI. INCENTIVE AWARDS

Class Counsel have requested an award of $5000 to each of the three Class Representatives from North Dakota case and an award of $2500 for each of the Named Plaintiffs in the Florida and Wyoming cases. The court finds these awards to be appropriate and reasonable.

The three Class Representatives in the North Dakota action answered discovery requests and underwent extensive cross-examination in depositions. They undertook significant risk that they would not prevail and that a class would not be certified. They exposed themselves to risk of judgment for defendants' costs if their claims were unsuccessful, which defendants' counsel reminded them during their depositions.

The Named Plaintiffs in Florida and Wyoming had not undergone the same discovery demands by the time of settlement, but the pendency of their actions served as a substantial factor leading to resolution of this matter on a nationwide basis.

The commitment of each of these Class Representatives and Named Plaintiffs led to the Settlement Fund and thus substantially benefitted the class. The court approves incentive awards

of $5000 each for Harold Hanson, Nellie McIlroy and the Estate of Gladys Schimke, and incentive awards of $2500 each for Bertha Shankland, Muriel Masters, Eugene Meskill as personal representative for the Estate of Bertha Lehman, Ida Bugg, and Jane Buchanan.

VII. ORDER FOR JUDGMENT

IT IS ORDERED that judgment be entered as follows:

1. The Settling Parties and the Settlement Class Members have submitted to the jurisdiction of the court for purposes of the Proposed Settlement; the court has personal jurisdiction over the Settling Parties; the court has subject matter jurisdiction to release all claims and causes of action released in the Stipulation of Settlement; and the court has subject matter jurisdiction to approve the Stipulation, including all exhibits thereto.

2. After adequate notice and opportunity, no objections have been made to the Settlement.

3. The Settlement is fair, reasonable and adequate for the Settlement Class Members and is in their best interests. The court hereby declares: (i) the Stipulation is binding on all Settlement Class Members; and (ii) the Stipulation is preclusive in all pending and future lawsuits or other proceedings. The Settling Parties and their Counsel are hereby directed to comply with and consummate the terms of the Stipulation.

4. The certification of the Settlement Class for settlement purposes is hereby approved and confirmed.

5. Each and every term and condition of the Stipulation and the Stipulation as a whole is approved as proposed, and the Stipulation is made a part of this Final Order and the Judgment herein and is to be effective, implemented and enforced as provided in the Stipulation.

6. All claims of the Settlement Class as set forth in the Stipulation, under the terms and

conditions of the Stipulation, against each of the Releasees are hereby dismissed, with prejudice, each party to bear its own costs, and Releasees are forever discharged from any claims or liabilities relating to the Actions and/or Released Transactions, in accordance with the Stipulation.

7. The class action captioned *Hanson, et al. v. Acceleration Life Ins. Co., et al.*, No. 3:97cv152 (D.N.D.) is hereby dismissed with prejudice and without attorney's fees or costs to any party except as provided in the Stipulation and in this Memorandum and Order.

8. The pending actions captioned *Shankland, et al. v. Acceleration Life Ins. Co., et al.*, No. 99-1411-CI-20, 6th JDC (Fl. Cir. Ct.) and *Bugg, et al. v. Acceleration Life Ins. Co., et al.*, No. 99cv190J (D. Wyo.), will be dismissed with prejudice by agreement between the parties within five (5) business days of entry of this Order and of Judgment, and without attorney's fees or costs to any party except as provided in the Stipulation and in this Memorandum and Order.

9. The court hereby bars and enjoins: (i) Plaintiffs, all Settlement Class Members and all persons acting on behalf of or in concert or participation with such Plaintiffs or Settlement Class Members, from filing, commencing, prosecuting, intervening in or participating in any lawsuit in any jurisdiction on behalf of any Plaintiff or Settlement Class Member, based upon or asserting any of the Released Transactions, and (ii) all Plaintiffs or putative Settlement Class Members who have not timely and validly excluded themselves from their respective classes, and all persons acting on behalf of or in concert or participation with such Plaintiffs or Settlement Class Members from bringing a class action on behalf of Settlement Class Members or seeking to certify a class which includes such Plaintiffs or Settlement Class Members in any lawsuit (including by seeking to amend a pending complaint to include class action allegations, or seeking class certification in a pending action) based upon or asserting any of the Released

Transactions.

10. Under applicable law, including Rule 23 of the Federal Rules of Civil Procedure, the Stipulation was entered into in good faith, at arm's length, and is fair, reasonable and adequate and in the best interests of the Settlement Class.

11. This court hereby awards Class Counsel attorney's fees of thirty percent (30%), or $4,430.701.00 (together with interest on such amount earned by the Settlement Fund) from the Settlement Fund. In addition, the court hereby awards Class Counsel $605,344.00 in reimbursement of litigation costs to date to be paid from the Settlement Fund, including costs associated with the actions described in paragraphs 7 and 8 above. Class Representatives, Harold Hanson, Nellie McIlroy and The Estate of Gladys Schimke, are awarded $5000.00 each as compensation for risks taken and their time and devotion to this matter. Named plaintiffs, Bertha Shankland, Muriel Masters, Eugene Meskill as personal representative for the Estate of Bertha Lehman, Ida Bugg and Jane Buchanan, are awarded $2500.00 each for their risks taken and their time and devotion to this matter. These awards, totaling $27,500.00, shall be made from the Settlement Fund.

Class Counsel may also apply to this court for reimbursement of additional fees and expenses incurred in the administration of this Settlement.

12. The Court retains continuing and exclusive jurisdiction over the parties to the Stipulation for all purposes necessary or proper: (i) for the consummation, administration, supervision, interpretation, construction and/or enforcement of the Stipulation and the Final Order and Judgment; (ii) for supervising the management and disbursement of the Settlement Funds; (iii) to protect and effectuate the Final Order and Judgment; and (iv) for any other necessary purpose.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated and signed at Fargo, North Dakota, on this 11th day of December, 1999.

Karen K. Klein
United States Magistrate Judge

NOTICE OF ENTRY
Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 13 day of December 1999
EDWARD J. KLECKER, CLERK
By: Deputy

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Harold Hanson, Nellie McIlroy, Gladys Schimke,)
and class of similarly situated purchasers)
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) Civil No. A3-97-152
v.)
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Acceleration Life Insurance Company,)
Interstate Service Insurance Agency, Inc.,)
Benefit Plans II, and Commonwealth)
Life Insurance Company,)
Defendants.)

JUDGMENT

All capitalized terms used in this Judgment shall have the meanings and/or definitions given them in the Stipulation of Settlement ("Stipulation") entered into by or on behalf of the Settling Parties, which was filed with this Court on October 18, 1999 and preliminarily approved by this Court on the same date.

This court, having on December 7, 1999, conducted a hearing to determine whether to issue final certification of this matter as a nationwide class action settlement purposes and whether the Stipulation entered into on behalf of the Settling Parties was fair, reasonable, adequate and in the best interests of the Settlement Class, and after considering (1) the memoranda submitted on behalf of the respective Settling Parties, (2) the Stipulation and all exhibits thereto, (3) the entire record of this proceeding, including the evidence adduced at the hearing, (4) the representations and argument of Counsel for the respective Settling Parties, and