CALPERS LTC CASES

MOTION FOR DECERTIFICATION

Date of Hearing: **May 10, 2018**
Department: 11
Case No.: JCCP4936

Having heard argument from the parties and having taken the matter under submission, the court now rules as follows:

The motion for decertification is DENIED.

Plaintiffs' Request for Judicial Notice is GRANTED.

DISCUSSION

"Decertification requires new law or newly discovered evidence showing changed circumstances. A motion for decertification is not an opportunity for a disgruntled class defendant to seek a do-over of its previously unsuccessful opposition to certification. 'Modifications of an original class ruling, including decertifications, typically occur in response to a significant change in circumstances, and "[i]n the absence of materially changed or clarified circumstances ... courts should not condone a series of reargruments on the class issues." ' '[A] class should be decertified "only where it is clear there exist changed circumstances making continued class action treatment improper." ' " See Williams v. Superior Court (2013) 221 Cal.App.4th 1353, 1360-1361.

While "[d]ecertification generally requires changed circumstances, . . . courts retain inherent authority (and in fact have the affirmative duty) to decertify a class if a merits ruling makes clear that individual issues will engulf the litigation such that the class litigation becomes unmanageable and/or will substantially interfere with one or both of the parties' due process rights." See Kight v. CashCall, Inc. (2014) 231 Cal.App.4th 112, 127.

Here, Defendant California Public Employees' Retirement System ("CalPERS") seeks to decertify the class previously certified on 1/28/16 based on "new positions" it claims Plaintiffs Holly Wedding, Richard M. Lodyga, and Eileen Lodyga (collectively, "Plaintiffs") and their counsel have taken since certification,[1] particularly, in Plaintiffs' opposition to CalPERS' motion for summary adjudication of the breach of contract claim and Plaintiffs' Proposed Trial Plan filed on 12/20/17.[2]

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1 See Notice of Motion, 2:6-9.

2 See Motion, 1:9-13.

A. PREDOMINANCE OF COMMON QUESTIONS

CalPERS contends that this class action requirement is not met because individualized questions predominate as to: (1) contract interpretation; and (2) "fact" of damage.[3]

(1) CONTRACT INTERPRETATION

CalPERS contends that during the summary adjudication stage, Plaintiffs "changed course," including: (a) by arguing that the EOC unambiguously prohibits premium increases as a result of annual benefit increases, but, at the same time supporting that interpretation with extrinsic evidence; and (b) by introducing a "new theory" that CalPERS breached the EOC by increasing premiums based on policyholders' "benefits" (e.g., Inflation Protection) rather than "on an issue-age basis for all similar coverage."[4] CalPERS further contends that Plaintiffs premised these theories on the argument that the EOC's language is ambiguous.[5]

According to CalPERS, due to the claimed ambiguity of the EOC, decertification is appropriate because the trier of fact would have to consider extrinsic evidence of the parties' intentions at the time they entered into the EOC, which, in turn, would require consideration of class members' interpretations of the EOC, the circumstances under which class members entered into the EOC, and course of performance.[6]

As Plaintiffs correctly respond, they did not introduce a "new theory" as they have always claimed that CalPERS breached the EOC by prohibiting premium increases as a result of the Inflation Protection benefit.[7] For example, in their motion for class certification, Plaintiffs contended that "the EOC expressly *prohibits* rate increases to the extent they are caused by inflation protection . . . ."[8]

Further, while CalPERS is correct that Plaintiffs' opposition to CalPERS' motion for summary adjudication of the breach of contract claim raised ambiguities in the EOC's language (particularly, as to the permissible "reasons" for premium increases[9] and as to what constitutes "similar coverage"[10]), decertification is

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3 See Notice of Motion, 2:10-12, 2:17-19.

4 See Motion, 2:18-24.

5 See Motion, 2:24-3:3.

6 See Motion, §§II.A to II.D.

7 See Opposition, §IV.B.1.a.i.

8 See Motion for Class Certification (filed 9/15/15), 13:10-11.

9 See Plaintiffs' Opposition to CalPERS Defendants' MSJ/MSA, 14:21-22.

10 See Plaintiffs' Opposition to CalPERS Defendants' MSJ/MSA, 16:24.

not required because any ambiguities are resolved by the objectively reasonable expectations of the insured. This issue has already been considered and decided by the Court during the class certification stage.[11] As stated in Williams, *supra*, 221 Cal.App.4th at 1360, "[i]n the absence of materially changed or clarified circumstances ... courts should not condone a series of rearguments on the class issues."

(2) "FACT" OF DAMAGE

CalPERS argues that the damage theories raise predominantly individualized questions regarding the "fact" of damage.

But as Plaintiffs correctly contend, CalPERS previously raised this argument in opposition to class certification.[12]

In its reply, CalPERS no longer argues the predominance of individualized questions regarding the "fact" of damage. Instead, CalPERS argues that "Plaintiffs are missing the point" that "there is simply no *manageable* way to establish damages for a substantial portion of the class under Plaintiffs' Trial Plan . . . ."[13] Manageability will be discussed below.

B. ADEQUACY

CalPERS also challenges the adequacy of both Plaintiffs and Plaintiffs' counsel.

First, CalPERS contends that the positions advocated by Plaintiffs' counsel are detrimental to the entire class, including Plaintiffs.[14] Citing to Metzger v. American Fidelity Assur. Co. (W.D. Okla. 2007) 249 F.R.D. 375, Pipes v. Life Investors Ins. Co. of America (E.D. Ark. 2008) 254 F.R.D. 544, and Smith v. Life Investors Ins. Co. Of America (W.D. Pa., Nov. 6, 2009, No. 2:07-CV-681) 2009 WL 3756913, it contends that Plaintiffs' success in this litigation would directly harm the class because it would necessitate "massive premium increases" to protect the LTC Fund's solvency.

Second, CalPERS contends there are intra-class conflicts between (1) class members who accepted CalPERS' offer to avoid premium increases by dropping

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11 See Ruling on Submitted Matter Re Motion for Class Certification and Ruling on Evidentiary Objections (attached to Nelson Declaration as Exhibit A), pp.5-6.

12 See CalPERS Defendants' Opposition to Plaintiffs' Motion for Class Certification (filed 10/19/15), §III.B (section entitled, "A Threshold Individualized Issue of Fact Exists with Respect to any Plaintiff's Proof That he or she Incurred any Damages"); see also Ruling on Submitted Matter Re Motion for Class Certification and Ruling on Evidentiary Objections (attached to Nelson Declaration as Exhibit A), p.7.

13 See Reply, 18:11-15 (italics supplied).

14 See Motion, §III.A.

inflation protection and reducing lifetime coverage to 10-, 6-, or 3-year plans,[15] and (2) class members who did not. According to CalPERS, if CalPERS is found to have breached the EOC by requiring policyholders with inflation protection and lifetime coverage to offset the LTC program's deficit, then policyholders who dropped inflation protection and lifetime coverage would have to shoulder part or even all of the LTC program's increased costs.

CalPERS' adequacy challenge is not based on "new law or newly discovered evidence showing changed circumstances." See Williams, *supra*, 221 Cal.App.4th at 1360. Metzger, Pipes, and Smith are not new law, and CalPERS could have raised (but did not raise[16]) these arguments regarding conflicts in connection with its opposition to the motion for class certification. Additionally, the declaration of CalPERS' actuary, Amy Pahl ("Pahl"), opining that the impact of reversing the 85% premium increase is at least a 124% premium increase[17] for all LTC1 and LTC2 policyholders, is not newly discovered evidence. See Pahl Declaration, ¶¶12-18.

Further, Metzger, Pipes, and Smith are distinguishable in any event. As CalPERS itself recognizes, Plaintiffs' success in this litigation would affect "the entire class, *including Plaintiffs*."[18] That was not the case in Metzger, Pipes, and Smith. See Metzger, *supra*, 249 F.R.D. at 377 ("In the case at bar, the likely result of a successful outcome for Plaintiff's proposed class will be an increase in insurance premiums. Although Plaintiff has proposed a class of members who have filed claims, some of the purported class members may be current policyholders who will have to pay the increased premiums unlike Plaintiff who is not and has never been a policyholder. This places Plaintiff and her economic incentives at apparent odds with the purported class. Accordingly, the Court finds that a conflict of interest exists such that the purported class should not be certified.") (italics supplied); Pipes, *supra*, 254 F.R.D. at 550 ("Life Investors asserts that class members who are not current policyholders and seek only monetary relief, such as Pipes, will not be impacted by increased premiums and, rationally, are not concerned whether Life Investors raises the premium rates for current policyholders . . . The conflict identified by Life Investors goes to the very heart of this litigation because Pipes's claim for monetary relief impacts the economic interests of current policyholders who want affordable insurance rates. The Court agrees that Pipes's interests conflict with other class members and disqualify him as an adequate class representative."); Smith, *supra*, 2009 WL 3756913, at *9 ("Smith has not suffered the same injury as most of the absent class members.

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15 CalPERS states that these comprise "roughly 30% of class members" and include the Lodygas. See Motion, 18:2-7.

16 CalPERS did not challenge adequacy. See Ruling on Submitted Matter Re Motion for Class Certification and Ruling on Evidentiary Objections (attached to Nelson Declaration as Exhibit A), p.15.

17 Pahl states that the premium increase would be even higher if attorney fees are awarded to Plaintiffs' counsel. See Pahl Declaration, ¶18.

18 See Motion, §III.A.

Smith has a large, current dispute with Life Investors regarding its treatment of her claim for 'actual charges' benefits. In stark contrast, the vast majority of the putative class members have ***no*** active dispute with Life Investors regarding its interpretation of 'actual charges' because they have not submitted any claim. Smith's economic interest is the immediate payment of her claim in the amounts billed by the medical providers. The majority of the putative class members, who have not asserted claims, simply do not share that economic incentive and may instead prefer to prevent future premium increases.") (emphasis in original). In contrast to Metzger, Pipes, and Smith, "Plaintiffs are current policy holders and would be subject to any hypothetical rate increase that CalPERS claims could be imposed on the Class."[19]

There is also no conflict between class members who dropped inflation protection and/or lifetime coverage and those who did not. As Plaintiffs explain:

> The only policyholders who are Class Members are those who were subjected to the 85% rate increase, and the only individuals who were subjected to the rate increase are those who had inflation protection and/or lifetime benefits. The fact that certain Class Members now do not have inflation protection and/or lifetime benefits because they were forced to give them up is irrelevant to the breach of contract claim, and certainly does not create a "conflict." Prior to the rate increase the two groups were in an identical position, and it is only the measure of their damage that may differ.[20]

C. MANAGEABILITY

CalPERS also challenges the manageability of proving damages.

Plaintiffs' Proposed Trial Plan states that there will be separate damage models for class members who: (1) retained their benefits and accepted the 85% premium increase; (2) reduced their benefits; and (3) cancelled their policies.[21]

For the first group (i.e., those who retained their benefits and accepted the 85% premium increase), Plaintiffs' Proposed Trial Plan states: "[T]he experts will calculate the extra-contractual premiums paid through the date of trial as a result of the improper 85% premium increase. Plaintiffs' expert actuary will provide actuarial assumptions, derived primarily from the LTCG data, as to how long each Class member will likely continue paying excessive premiums going forward. This

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19 See Opposition, 21:8-9.

20 See Opposition, 22:5-11.

21 See Plaintiffs' Proposed Trial Plan (attached to Opposition as Exhibit B), pp.16-19.

amount will then be added to the historical damages (i.e. the amount paid by policyholders who have paid the 85% premium increase from the date of implementation to trial). Expert testimony will be presented as to the present value of both the past and future economic losses for this group of class members who are paying the 85% premium increase."[22]

For the second group (i.e., those who reduced their benefits), Plaintiffs' Proposed Trial Plan states: "Plaintiffs' experts will calculate the value of the benefits they were forced to give up to avoid CalPERS' improper rate increase. Plaintiffs' actuary and economist experts will use actuarial assumptions and CalPERS['] own internal analysis to present testimony as to the difference in value between the benefits these policyholders had contracted for prior to the premium increase, and the value of the reduced benefits they subsequently were forced to accept. As of the date of the benefits change, the actuarially computed value of the reduced benefits will be subtracted from the actuarially computed value of the previously agreed benefits and the difference will be present valued as of the date of trial or shortly prior thereto. These damages may be presented to the jury in the aggregate (i.e., for all of those who accepted reduced benefits) or separately for each of the categories of reduced benefits made available (e.g., 3 year, 6 year, 10 year). These computations can all be performed using the LTCG data."[23]

For the third group (i.e., those who cancelled their policies), Plaintiffs' Proposed Trial Plan states: "Using the LTCG data, Plaintiffs' experts will also estimate the number of policy terminations resulting from the announced 85% rate increase. They will do so by determining cancellation rates and characteristics during periods in which no extraordinary premium increases occurred. This reference group (including information such as their ages, sex, and years of prior premium payment) will then be compared to the group of policies terminated during the period following the February 2013 rate hike announcement. Terminations attributable to death will be removed. The aggregate population of excess terminations will then be converted to economic damages using the actuarial value of the benefits lost as of the date of terminations, present valued forward to the trial date or shortly before. In performing their calculations and presenting testimony as to damages, Plaintiffs' experts will rely on the LTCG data. Plaintiffs' experts may also present evidence to the jury regarding the replacement cost of policies issued by other insurers as of various dates which would have offered comparable coverage. This analysis will be based on publicly available information."[24]

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22 See Plaintiffs' Proposed Trial Plan (attached to Opposition as Exhibit B), 17:19-18:2.

23 See Plaintiffs' Proposed Trial Plan (attached to Opposition as Exhibit B), 18:3-14.

24 See Plaintiffs' Proposed Trial Plan (attached to Opposition as Exhibit B), 18:15-19:2.

As Plaintiffs correctly contend, the merits of their damage models and the differing expert opinions (those of Pahl, on the one hand, and Plaintiff's expert, Gordon Rausser, Ph.D., on the other hand) are inappropriate for consideration on this motion for decertification. See Safeway, Inc. v. Superior Court of Los Angeles County (2015) 238 Cal.App.4th 1138, 1163 ("We do not examine the merits of real parties in interest's proposed measure of restitution, as no such inquiry is necessary for a determination whether it precludes class treatment of real parties in interest's UCL claim. For purposes of our review, it is sufficient that the proposed measure does not require the litigation of issues unsuitable for class certification.")

For all of the foregoing reasons, the motion for decertification is DENIED.