Annuity Class Action Litigation—Trends and Strategies for Effective Class Action Defense

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I. The Big Picture: Thinking beyond the Class Action

Class action litigation does not occur in a vacuum. Litigants must consider the impact that litigation may have on other aspects of their business dealings and *vice versa.*

A. Regulatory Considerations

Companies being investigated by a regulator must consider whether that investigation could spawn or affect private litigation. For example, public investigations by attorneys general can provide useful information for the plaintiffs contemplating initiating or already prosecuting a class action suit. In addition, public regulatory scrutiny can color the landscape against which the merits of an action are evaluated.

1. Attorneys general

a. State attorneys general have been vigorous in investigating potentially improper sales of annuities, including sales of annuities to senior citizens. Examples include examinations of:
   - wealth management "seminars" that are well-disguised sales pitches
   - high-pressure sales pitches
   - annuities that companies claim offer substantial bonuses
   - other disclosure matters such as the failure to disclose specific attributes of annuities, including surrender charges, surrender periods, and tax penalties for early withdrawal
   - the suitability of annuities for seniors or other classes of purchasers perceived to be vulnerable

b. Regulatory investigations may raise public relations issues and be very costly. See, for example:
   i. Minnesota attorney general suits against various insurers alleging that each company sold unsuitable long term deferred annuities to senior citizens and misrepresented or failed to disclose terms of these annuities (*see generally* http://www.ag.state.mn.us).
      - On February 7, 2008, American Equity Investment Life Insurance Company settled a Minnesota suit alleging the improper sale to senior citizens of fixed or fixed indexed deferred annuities with a surrender charge period of one year or more. As part of this settlement, the company paid $250,000 to the state. The company also agreed (1) to collect and maintain certain customer information before selling an annuity that would assist the company in rendering a suitability analysis, (2) to conduct an elevated suitability review under specified circumstances for future sales, and (3) to establish a claims review process for determination of claims for restitution by complaining annuity holders and annuity holders 65 years old when they applied for an annuity they purchased since 2001.
      - On October 22, 2008, AmerUs Life Insurance Company (now Aviva) settled allegations that the company sold unsuitable long term deferred annuities to senior

citizens and misrepresented or failed to disclose terms of these annuities. The settlement required the company to request and obtain from consumers additional information that is necessary to make a suitability determination for sales in the future. The company also paid the state $375,000. Lastly, the settlement permitted review of claims by previously complaining policyholders and seniors who purchased (after January 1, 2001) a fixed or fixed indexed annuity with a surrender charge period of one year or more. According to the attorney general's office, there were 4500 policies with an estimated aggregate value of $250 million eligible for this review process.

- On October 8, 2007, Allianz Life Insurance Company settled a lawsuit brought by the state for allegedly selling deferred annuities to Minnesota senior citizens without first ascertaining whether those annuities were suitable investments for the senior citizens. The lawsuit claimed that Allianz marketed and sold fixed and indexed annuities to seniors that restricted their access to assets in the annuity for as long as 15 years and in some cases misrepresented the terms of the annuity. As part of the settlement, Allianz agreed to pay a $500,000 fee to the state and to give complaining annuity holders and seniors holding fixed and fixed indexed annuities with a surrender charge period of one year or more who had purchased since January 1, 2001, the opportunity to submit a claim for a full refund without penalties. Also, Allianz agreed to request and obtain from consumers additional information that is necessary to determine whether a deferred annuity is suitable for the particular consumer for all future sales.
- On December 15, 2008, Midland National Life Insurance Company and its affiliate North American Company for Life and Health Insurance settled a lawsuit alleging that the companies sold unsuitable fixed or fixed indexed annuities to senior citizens and misrepresented or failed to disclose adequately terms of these annuities. In particular, the state's complaint asserted that the companies sold unsuitable equity indexed deferred annuities to seniors by misrepresenting and/or failing to disclose the terms of the annuities. The suit further asserted that these deferred annuities were unsuitable for some seniors because they could lock up an investor's funds for more than ten years, and included early surrender penalties of up to 25 percent. As part of the settlement, Midland agreed to pay $225,000 and establish a claims review process for determining claims for resubmission by claimants who had previously complained about their purchase or who were 65 years or older on the date they applied for annuity issued after January 1, 2001. In addition, the companies agreed to obtain and review certain information about customers before selling these products in the future.

ii. Massachusetts settlements with:

- Investors Capital Corporation (settlement by Office of Secretary of the Commonwealth Security Division, December 19, 2006). ICC was fined $500,000 for allegedly failing to monitor its agents' outside business accounts and for allowing its agents to hold themselves out as investment advisor representatives allegedly resulting in the sale of unsuitable indexed annuities to elderly Massachusetts residents. Also, under the settlement, individuals 75 and older were permitted to withdraw money from these annuities without penalty (and with a minimum three percent interest).

- Bank of America. Pursuant to a July 13, 2005, settlement of a matter alleging that Banc of America Investment Services, Inc. had sold ill-suited variable annuities in 2003 and 2004 to seniors and failed to supervise their sales representatives, Bank of America agreed to offer those customers 78 and older who purchased these variable annuities the opportunity to receive the current value of the annuity without paying surrender charges. Bank of America further agreed (1) to provide investors who were between 75 and 77 at the time of purchase an expedited review of any suitability concerns applicable to their investment and (2) to implement certain changes in practice, including implementing automated suitability review, observing written suitability guidelines, and monitoring and training all sales representatives.
- Citizens Bank. Under a July 22, 2005 agreement with Massachusetts, Citizens settled a complaint that alleged that Citizens (and its agents) had improperly pushed the sale of improper variable annuities to elderly bank customers and failed to maintain internal e-mails concerning these allegedly improper sales. Under the settlement, Citizens agreed to pay a $3 million civil fine and to offer all Massachusetts customers who were 75 or older when they bought a variable annuity the opportunity to recover their money without penalty. Citizens also consented to the implementation of certain training guidelines for its sales representatives.

iii. California attorney general settlement

- On December 20, 2007, California's attorney general announced a settlement with American Investors Life Insurance Company, Family First Insurance Services, and Family First advanced Estate Planning stemming from sales of fee-laden annuities to seniors in California. The settlement required American Investors Life Insurance and the Family First companies to pay $1 million in civil penalties and to distribute $5.5 million to consumers who purchased the annuities through Family First and incurred surrender penalties. The settlement also required the companies to pay $700,000 to reimburse the Office of the Attorney General and Department of Insurance for costs incurred during the investigation of the case. In addition, the settlement required American Investors Life Insurance to let consumers redeem their annuities without surrender charges. Finally, the judgment forced Family First Insurance Services and Family First Advanced Estate Planning to permanently cease all business operations and barred American Investors Life Insurance Services from soliciting senior citizens without revealing that the consumer would be propositioned by an insurance agent.

2. State insurance regulators

a. A number of states impose on insurers and/or insurance producers a duty to ensure that annuities are suitable for the consumer based on a review of the facts disclosed by the consumer as to her investments and other insurance products and as to her financial situation and needs. *See*, *e.g.*, Ala. Admin. Code r. 482-1-137; 3 Colo. Code Regs. §702-4-1-11; 211 Mass. Code Regs. 96.00; Ill. Admin. Code tit. 50, §3120.10.

i. For instance, in Florida, insurance agents (or an insurer if no insurance agent is involved), "shall have reasonable grounds for believing that the recommendation [to purchase an annuity] is suitable for the senior consumer on the basis of the facts disclosed by the senior consumer as to his or her investments and other insurance products and as to his or her financial situation and needs." In addition, "insurance agent[s], or an insurer if no insurance agent is involved, shall make reasonable efforts to obtain information concerning the senior consumer's financial status, tax status, and investment objectives and such other information used or considered to be reasonable by the insurance agent, or the insurer if no agent is involved, in making the recommendation." Fla. Stat. §627.4554. This law does not create a private cause of action; instead, its provisions—like those of many other state laws—are enforceable by the state, usually through the state's insurance commissioner.

b. In addition, the National Association of Insurance Commissioners has adopted a regulation governing "Suitability in Annuity Transactions." This model regulation (adopted in 2006 and updated in 2007) requires:

i. Insurance producers, or the insurer where no producer is involved, to have "reasonable grounds for believing that the recommendation [regarding the sale of an annuity] is suitable for the consumer on the basis of the facts disclosed by the consumer as to his or her investments and other insurance products and as to his or her financial situation and needs." NAIC §6(A).

ii. Insurance producers or the insurer (where no producer is involved) to make reasonable efforts to obtain information concerning: the consumer's financial status, the consumer's tax status, the consumer's investment objectives, and such other information considered to be reasonable. NAIC §6(B).

iii. Insurers and insurance producers establish and maintain a system designed to effect these regulations, including maintaining written procedures in accordance with these regulations and conducting periodic reviews of records that are designed to assist in detecting and preventing violations of these regulations. NAIC §6(D).

3. FINRA

a. FINRA (formerly the NYSE and NASD) is the largest independent regulator for all securities firms doing business in the United States. FINRA's primary role is to protect investors by maintaining the fairness of the capital markets in the United States.

b. FINRA's rules of conduct govern the sale of annuities that are securities and, to varying degrees depending on the product, the conduct of broker-dealers that sell annuity products.

c. General suitability requirements:

i. Conduct Rule 2010 (Standards of Commercial Honor and Principles of Trade) (formerly Conduct Rule 2110): members must "observe high standards of commercial honor and just and equitable principles of trade." This rule does not specifically govern sales of annuities, but it does require that members follow FINRA's suitability guidelines and to act in a professional manner in selling annuities.

ii. Conduct Rule 2310 (Suitability of Recommendations): governs customer-specific suitability requirements in the context of securities recommendations. All members may recommend the sale of a variable annuity only if it is tailored to the customer's specific financial needs and investment objectives.

d. Special guidance on variable annuities:

   i. Notice to Members 99-35 (The NASD Reminds Members of Their Responsibilities Regarding the Sales of Variable Annuities). This provides some specific guidelines regarding suitability requirements for variable annuity sales. Sellers must make reasonable efforts to obtain the following information about customers before selling these products: age, number of dependents, marital status, occupation, liquid worth, other investments, annual income, and investment objectives.

   ii. Joint SEC/NASD Report on Examination Findings Regarding Broker-Dealer Sales of Variable Insurance Products (2004). This joint report concerns the sales of variable annuities and life insurance products. Report highlights "strong" and "weak" practices with respect to suitability and supervision rules. Sound practices require sellers to confirm suitability through use of a checklist, to provide comprehensive written policies that guide sales force regarding suitability requirements, to review communications between sales representatives and customers, to review practices of investment advisors who sell annuity products, and to establish automated procedures for comparing sale recommendations with a customer's electronic suitability profile.

   iii. Conduct Rule 2821 (Members' Responsibilities Regarding Deferred Variable Annuities) (effective May 5, 2008). This prohibits recommending to "any customer the purchase or exchange of a deferred variable annuity unless such member or person associated with a member has a reasonable basis to believe" (1) "the transaction is suitable," (2) "the customer has been informed, in general terms, of various features of deferred variable annuities," (3) "the customer would benefit from certain features of deferred variable annuities," and (4) "the particular deferred variable annuity as a whole, the underlying subaccounts to which funds are allocated at the time of the purchase or exchange of the deferred variable annuity, and riders and similar product enhancements, if any, are suitable." The rule further requires that "prior to recommending the purchase or exchange of a deferred variable annuity, a member or person associated with a member shall make reasonable efforts to obtain, at a minimum, information concerning the customer's age, annual income, financial situation and needs, investment experience, investment objectives, intended use of the deferred variable annuity, investment time horizon, existing assets (including investment and life insurance holdings), liquidity needs, liquid net worth, risk tolerance, tax status, and such other information used or considered to be reasonable by the member or person associated with the member in making recommendations to customers."

e. Guidelines on sales to senior citizens:

   i. FINRA Regulatory Notice 07-43 (Reminds Firms of Their Obligations Relating to Senior Investors and Highlights Industry Practices to Serve These Customers). This notice promulgates compliance guidelines for sales of annuities to seniors. Sellers should follow appropriate procedures taking into account age and life stage of annuity purchasers. The notice further indicates that FINRA will closely examine annuity products that are poorly designed for senior citizens, including products that contain withdrawal penalties and liquidity limitations. In addition, this notice emphasizes that firms must be sure to avoid high pressure sales seminars aimed at senior investors.

ii. FINRA RCA—Spring 2002 (Reminder—Suitability of Variable Annuity Sales). This note reminds members of their suitability obligations under Conduct Rule 2310 when recommending variable annuities. Further, this notice cautions that members cannot determine whether a recommendation is suitable for a particular customer unless they are knowledgeable about the investment product at issue, bearing in mind that members should also weigh the impact that a proposed transaction might have on an investor's financial status before recommending the transaction.

iii. FINRA Investor Alert (May 27, 2003) Regarding Variable Annuities. This reminds investors to be aware of restrictive features of variable annuities, understanding that substantial taxes and charges may apply if they withdraw their money early, and to guard against fear-inducing sales tactics.

iv. FINRA Notice to Members 05-50, August 2005 (Member Responsibilities for Supervising Sales of Unregistered Equity Indexed Annuities). Firms must adopt special procedures under Rule 3030 with respect to equity indexed annuities. In particular, firms must require that their associated persons promptly notify the firm in writing when they intend to sell unregistered equity indexed annuities. Moreover, all recommendations to liquidate or surrender a registered security (such as a mutual fund, variable annuity, or variable life contract) must be suitable, including where such liquidations or surrender are for the purpose of funding the purchase of an unregistered equity indexed annuity.

v. FINRA Regulatory and Compliance Alert, Spring 2002, "NASD Regulation Cautions Firms for Deficient Variable Annuity Communications." FINRA reminds members of their suitability obligations under Conduct Rule 2310 when recommending variable annuities. Members must keep in mind that the suitability rules apply to any recommendation to sell a variable annuity regardless of the use of the process, including situations where the member recommends using the proceeds to purchase an unregistered product such as an equity indexed annuity. Any recommendation to sell the variable annuity must be based on the financial situation, objectives, and needs of the particular investor.

4. SEC

a. Variable annuities are considered securities and are regulated by the SEC.

b. Rule 151(a), 17 C.F.R. §230.151A, would regulate equity indexed annuities as securities under the federal securities laws. This rule would greatly expand the SEC's role in overseeing annuity transactions and the regulatory obligations of issuers. This rule became final on December 17, 2008, but the rule will not go into full effect until January 12, 2011.

B. Other Litigation

1. Attorneys defending class action suits must be aware of other ongoing litigation and how it may affect the defense of the class action.
2. Statements made in these cases can be used against company in subsequent proceedings.

3. Results of these class actions can be binding upon a company in subsequent proceedings.

C. Internal Compliance Processes

1. Companies selling annuities must develop a strategy for addressing proactively the government's heightened interest in pursuing costly investigations into the sale of annuities and the boom of private class action litigation challenging annuity sales.
2. Companies must take appropriate steps to ensure that their compliance commitment is both documented and implemented:
    a. Documentation of policies and expectations
    b. Appropriate training
        i. Policy features
        ii. Individual assessments of customer's finances, tax exposure, cash flows, retirement needs, customer's investment objectives
        iii. Documentation practices
    c. Mechanisms for monitoring employees and sales (or documented delegation of authority where appropriate)
    d. Review of sales for suitability analysis
    e. LIMRA/CAP
    f. Review of sales literature
    g. Exception reporting
3. Is refinement of prelitigation practices a good idea?

D. Public Relations

1. Companies who are the targets of class action litigation can have their public reputations tarnished.
2. PR is an important component of successfully resolving class action suits
    a. Maintain good customer relations
    b. Deflect regulatory scrutiny
    c. Maintain positive investor relations

E. Customer Relations

1. Companies must consider the impact of high-profile class action litigation on customer relations. These suits can:
    a. Discourage potential customers from purchasing products from company
    b. Encourage current customers to withdraw their assets from the company
    c. Cause customers to initiate complaints to the company or to complain about the company to regulatory bodies
    d. Cause customers to pursue litigation against the company or the insurance broker who sold them an annuity

2. Customer complaints can be a boon to the plaintiffs' lawyers, particularly if a complaint escalates and becomes the source of regulatory interest.

F. Public Disclosure and Reporting Requirements

1. Defendant companies must assess whether they have an obligation to report or account for a potentially adverse judgment.
2. Accounting rules generally require the company to assess the following factors in determining how to account for these contingent events:
    a. The period in which the underlying cause (*i.e.*, the cause for action) of the pending or threatened litigation or of the actual or possible claim or assessment occurred
    b. The degree of probability of an unfavorable outcome
    c. The ability to make a reasonable estimate of the amount of loss

II. Strategic Litigation Considerations

A. Document Preservation and Production

1. The Rules of Civil Procedure in all jurisdictions require litigants to search for and produce any documents requested by opposing counsel that are relevant to the litigation. In addition, the rules governing civil procedure require that parties preserve (*i.e.*, avoid destroying) any documents that could be pertinent to the suit. This process of preservation and production can be extremely time-consuming and resource intensive.
2. Document preservation
    a. Litigants are legally obligated to preserve (and therefore not destroy, discard, alter, or make inaccessible) any and all documents that relate to the subject of the litigation. This duty to preserve typically arises when litigation becomes reasonably foreseeable, and the duty to collect and preserve remains throughout the litigation.
    b. Destruction or loss of potentially relevant documents (including electronic documents, such as e-mails and computer files) could expose litigants to sanctions.
    c. Accordingly, litigants must take steps to collect and preserve all documents (including e-mails) that may pertain to the litigation, including:
        i. Identifying custodians' potentially relevant documents, communicating preservation obligation to these "affected persons"; sending initial preservation notice to all employees; and following up with individual employees to ensure that all documents are preserved
        ii. Developing a preservation plan with IT (and possibly outside IT vendors) in order to preserve and collect all electronic documents. Work with counsel to separately preserve all hard copy materials
        iii. Maintaining adequate supervision, control, and documentation of preservation efforts, taking care to document all preservation efforts
3. Document production

a. Litigants are entitled to request (and receive) all nonprivileged documents that are relevant to the claim or defense of any party.

b. Parties receiving document requests must search for documents where they are reasonably likely to be found and produce them to opposing counsel.

c. Effective document production requires the following basic steps:

   i. Full document preservation

   ii. Review of requests for production and preparation of a collection plan to identify the requested documents

   iii. Review of documents collected for responsiveness (and potential privilege) and organization of documents for production to opposing counsel

4. E-discovery

   a. All of these document preservation and document production requirements apply to documents stored electronically (including e-mails).

   b. As companies increasingly rely on electronic correspondence, the task of preserving, cataloging, and producing electronic documents can be extremely difficult, costly, and labor intensive.

   c. Federal Rules of Civil Procedure require litigants to meet and confer early in a lawsuit to develop plans to catalog and produce electronically stored data in any litigation, which places a burden on defendants in class action suits.

5. Strategic considerations

   a. The process of preserving, collecting, reviewing, and producing documents is very time-consuming and resource intensive.

   b. This burden, however, falls disproportionately on defendants in annuity class action suits because defendant-companies possess many documents that are potentially relevant to the suit (whereas the plaintiffs tend to have only a few documents).

   c. Accordingly, the plaintiffs will typically attempt to push the court to order early and extensive document discovery. This can place a financial burden on defendants, thus pressuring them to settle. In addition, the plaintiffs prefer early discovery in order to gain as much useful information as possible (again keeping in mind that defendants possess the bulk of the information pertinent to the suit).

      i. Plaintiffs can make early discovery requests in order to keep pressure on defendants.

   d. By contrast, defendants will want to delay discovery and keep the scope of discovery narrow, both to avoid the expense of a burdensome document production and to keep potentially damaging information away from the plaintiffs for as long as possible.

      i. Defendants can sometimes delay document production by filing early motions to dismiss. In some courts, this may support a stay of discovery.

      ii. Thereafter, defendants can attempt to encourage the court to "phase" discovery or to limit the scope of discovery.

B. State *versus* Federal Jurisdiction; Class Action Fairness Act and Removal

1. Jurisdiction is the right, power, or authority to administer justice by reviewing and determining controversies.
2. In many instances, both state courts and federal courts are capable of exercising proper jurisdiction over a class action case. However, the plaintiffs and defendants frequently attempt to steer litigation into their court of choice.
   a. Plaintiffs may prefer to have class action suits litigated in state courts:
      i. Can choose to litigate in small, plaintiff-friendly courts
      ii. Smaller jury pools in plaintiff-friendly counties
      iii. Depending on the jurisdiction, state court judges may be unaccustomed to handling large, complex, class actions
      iv. Sometimes, states have peculiar procedural rules that can be advantageous to the plaintiffs
   b. Defendants, by contrast, may prefer to have cases litigated in federal courts:
      i. Uniform procedural rules across all federal courts
      ii. No need to litigate in small, plaintiff-friendly state courts
      iii. Potentially more experienced judges to oversee complex, often technical cases
      iv. Juries selected from broader geographical pool
      v. Federal courts have more resources than state courts
      vi. Easier to consolidate multiple lawsuits before one judge, sometimes in the most convenient of jurisdictions
3. Mechanisms of steering cases to either state or federal courts.
   a. Filing a case. Plaintiffs, because they initiate litigation, can initially select the forum for a class action suit. The plaintiffs' choice of forum is accorded significant weight by courts, although this deference is diminished in the context of class action suits. *Avritt v. Reliastar Life Ins. Co.*, 2007 WL 666606 (W.D. Wash. Feb. 27, 2007) (discussing choice-of-forum principles in context of class action on behalf of a class of California residents, mainly public school teachers, who purchased certain deferred retirement annuity policies).
   b. Removal. 28 U.S.C. §1441 allows a defendant to remove a case filed in state court to federal court if, at the time of removal, the case could have been filed in federal court. Thus, removal requires an independent ground for subject matter jurisdiction such as diversity jurisdiction or federal question jurisdiction.
   c. Class Action Fairness Act, 28 U.S.C. §§1332(d), 1453, & 1711-1715. This act, passed in 2005, gives federal courts jurisdiction over class actions in which the amount in controversy exceeds $5 million, and in which any of the members of a class of plaintiffs is a citizen of a state different from any defendant, unless at least two-thirds or more of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state in which the action was originally filed, 28 U.S.C. §1332(d). This act was designed to reduce forum shopping by plaintiffs in friendly state courts by expanding federal diversity jurisdiction to class actions where there is

not "complete diversity" (as required under 28 U.S.C. §1332(a), whereby all plaintiffs are from states different from those of all defendants) giving federal jurisdiction over class actions against out-of-state defendants. Thus, this law expands the defendants' ability to remove a class action to federal court. Accordingly, it is a powerful device that can be used by defendants to avoid litigating class action suits in state court.

d. Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §78u-4, was an effort by Congress to make it more difficult for plaintiffs to state a claim for violation of the federal securities laws. Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §§77p, 78bb(f) ("SLUSA"), preempts certain class actions that alleged fraud under state law "in connection with the purchase or sale" of securities. Such state law claims cannot be filed in state or federal court. Together, these statutes serve as a mechanism for removing suits involving the sale of variable annuity products, which are treated as securities, to federal court.

e. Remand. If a defendant removes a case to federal court, the plaintiffs can contest that removal in federal court through a motion to remand to state court. In the motion to remand, the plaintiffs can challenge whether the court has proper jurisdiction over the removed case.

C. Governing Pleading Standards and Motions to Dismiss

1. Two competing standards for evaluating sufficiency of a complaint on a motion to dismiss:
   a. Rule 8(a): the plaintiff must provide a "short and plain statement of the claim showing that the pleader is entitled to relief." This standard applies in annuity class actions unless a plaintiff is stating a claim for fraud.
      i. In order to satisfy the Rule 8 pleading standard, a plaintiff must demonstrate a "plausible" entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561-63 (2007). *Twombly* repudiated the *Conley v. Gibson* standard, which had previously permitted dismissal only where the plaintiffs could prove "no set of facts" to warrant recovery.
      ii. This standard is easier for a plaintiff to satisfy than the heightened Rule 9 pleading standard.
   b. Rule 9(b): "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."
      i. Rule 9(b) applies to all claims "sounding in fraud." This includes all claims for fraud, as well as all claims that are predicated upon fraudulent acts or intentionally misleading conduct.
      ii. This particularity requirement demands a higher degree of notice than that required for claims that do not sound in fraud. If the plaintiff states a claim for fraud, it must identify, with specificity, the "who, what, where, when, and how" of the alleged fraudulent misconduct. The particularity required by Rule 9(b) is intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations.
2. Defendants have succeeded in getting fraud-based annuity class action suits dismissed pursuant to Rule 9(b).

a. *Bendzak v. Midland Naionall Life Ins. Co.*, 440 F. Supp. 2d 970 (S.D. Iowa 2006). Dismissed the plaintiffs' RICO claim, alleging scheme to defraud seniors by selling them inappropriate annuities, because complaint did not identify dates or locations of communication that facilitated the alleged scheme to defraud amongst defendant corporation and its employees.

b. *Bacon v. American International Group*, 415 F. Supp. 2d 1027 (N.D. Cal. 2006). The plaintiffs alleged that Washington Mutual defrauded and manipulated seniors into buying unsuitable deferred annuities. The defendants filed a motion to dismiss arguing that the complaint failed to satisfy Rule 9(b) because it did not identify any misrepresentations that were made, nor did it allege the role of each defendant in the supposed fraud. The court dismissed all counts that sounded in fraud under Rule 9(b).

3. Plaintiffs take several steps to avoid the strictures of Rule 9(b):

   a. Avoid pleading claims sounding in fraud, opting, for instance, to allege that defendants sold a defective product

   b. Find and allege particularized facts

D. Rule 23 and Class Certification

1. Class certification is the process by which the court grants permission to an individual plaintiff (or a small group of plaintiffs) to sue on behalf of similarly situated individuals. The rules for class certification are governed by Federal Rule of Civil Procedure 23 or its state court analogues. Certain state court claims may also incorporate their own requirements for certification of a class. *See*, *e.g.*, Mass. Gen. Laws ch. 93A, §9.

2. Frequently, the decision on whether to certify a class is heavily litigated, as this issue can be dispositive of an entire case and has a profound impact on defendants' potential exposure.

3. In order to certify a class under Rule 23, a plaintiff must satisfy its burden to prove four threshold requirements of Rule 23(a), in addition to the particularized requirements of 23(b)(1), 23(b)(2), or 23(b)(3). Most commonly in an annuity class action, the plaintiffs ask a court to certify either a 23(b)(2) class (seeking injunctive or declaratory relief) or a 23(b)(3) class (seeking money damages) (the more common of the two). The Rule 23(a) requirements are as follows:

   a. Numerosity: the class is so numerous that joinder of all members is impractical. This requirement is usually not disputed in annuity class action cases. Courts generally require that relatively few class members exist to satisfy the numerosity requirement. Precise calculation of the number of class members is not required to satisfy numerosity requirement for class certification, and it is permissible for the court to rely on reasonable inferences drawn from available facts; numbers in excess of 40 have generally sufficed to satisfy this requirement. See *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 309 (3d Cir. 1998); *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79 (S.D.N.Y. 2007).

   b. Commonality: there are questions of law or fact common to the class. To establish commonality, a plaintiff must identify at least one question common to all members of the class. *Quinn v. Nationwide Ins. Co.*, 281 Fed. Appx. 771, 776 (10th Cir. 2008) (affirming denial of class certification because the plaintiffs could not carry their burden of identifying a common, certifiable factual issue in regard to their claims stemming from variable annuity contract sales); *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006).

c. Typicality: claims of the representative parties are typical of the claims of the class. To be typical, a class representative's claim need not always involve the same facts or law as the remainder of the class, provided there is a common element of fact or law. In other words, factual variations in individual claims will not normally preclude class certification if the claim arises from same event or course of conduct as class claims, and gives rise to the same legal or remedial theory. See *In re Prudential Ins. Co.* 148 F.3d at 311 (discussing typicality requirement in context of insurance sales practices); *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525 (8th Cir. 1996). In an attempt to rebut a showing of typicality, defendants may argue that a plaintiff's claim arises out of unique facts or is subject to defenses that would preclude him from representing a class.

d. Adequacy: the representative parties will fairly and adequately protect the interest of the class. Courts chiefly inquire whether the named plaintiffs' interests are antagonistic to those of the class, and whether class counsel is competent. *Yokoyama v. Midland Nat'l Life Ins. Co.*, 243 F.R.D. 400, 407 (D. Haw. 2007) (finding adequacy of representation prong satisfied in evaluating class certification motion); *Spann v. AOL Time Warner, Inc.*, 219 F.R.D. 307 (S.D.N.Y. 2003).

4. In addition, a plaintiff seeking to certify a 23(b)(3) class must establish two additional elements:

   a. Predominance: questions of law or fact common to class members must predominate over any questions affecting only individual members of the proposed class

   b. Superiority: class action must be superior to other available methods for fairly and efficiently adjudicating the controversy

5. In order to certify a 23(b)(2) class, the plaintiffs must also meet two requirements in addition to those set forth in Rule 23(a):

   a. That the defendant has acted or refused to act on grounds that apply generally to the class, and

   b. Final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; see *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir. 2006) (refusing to apply Rule 23(b)(2) where relief sought was not predominantly injunctive or declaratory in nature)

6. Class certification requirements are designed to ensure that the case being managed by the court on behalf of a numerous and diverse class of plaintiffs is sufficiently homogenous and uniform to permit effective one-size-fits-all adjudication.

   a. Plaintiffs will seek to make their claims as uniform as possible in order to make class certification more likely, such as:

      i. Claims based on the design of a single annuity product purchased by a large number of people

      ii. Claims based on uniform treatment of customers purchasing an annuity (*e.g.*, use of a certain sales script)

iii. Claims based on a single federal law or state law, as opposed to various state law causes of action with variable requirements across states

iv. Uniform failure to train sales representatives

b. Plaintiff will generally eschew any cause of action that is inherently individualized, including:

i. Allegations of point-of-sale misrepresentations

ii. Allegations arising out of nonuniform contract provisions

c. Conversely, defendants will argue that class certification is inappropriate because the claims of the proposed class are not sufficiently similar, attacking claims brought by the plaintiff to show:

i. Individualized treatment of purchasers of annuities by defendants

ii. Unique questions of fact pertaining to claims of the proposed class (for example, relating to producer training, point of sale representations, customer needs and objectives, annuity forms and features, and damages)

iii. Different state are laws applicable to different members of the class

iv. Damages require individualized and idiosyncratic calculations

d. It is never too early to begin thinking about how these points will be addressed by each litigant when certification is contested (the filing of papers in addition to argument and/or an evidentiary hearing are possible depending on the court).

E. Damages (punitive damages, RICO damages, fee recovery, state consumer protection, elderly abuse statutes)

1. Compensatory damages: paid to compensate the plaintiff class for loss, injury, or harm caused by defendants' breach of duty.

a. Compensatory damages are the most common award of damages in civil cases, including annuity class actions.

b. The purpose of these damages is to restore the plaintiffs to their economic position but for the defendants' actions.

c. However, compensatory damages can be difficult to measure precisely, and parties will propose different ways to measure the loss suffered by the class in apportioning damages:

i. Plaintiffs prefer a broad measure of damages in order to boost the payout to the class. For instance, the plaintiffs will often request that they be awarded what they could have earned in an alternative investment (frequently an alternative investment with a high rate of return).

ii. Defendants adopt a more restricted view of compensatory damages, tending to reduce the total payout to the class. Defendants may prefer a measure of damages that simply restores the plaintiffs to their financial position before purchasing an annuity product.

2. Damage multipliers; some statutes permit the court to double or treble the amount of damages paid to the plaintiff class. Accordingly, the plaintiffs frequently seek to state a cause of

action under these statutes in order to increase the potential for obtaining a large jury award and to increase defendants' exposure to liability (thus increasing the pressure on defendants to settle).

a. Racketeering Influenced and Corrupt Organizations Act ("RICO"); provides for a potential doubling or trebling of a damage award.

b. State consumer protection statutes (broad statutes designed to punish unfair, fraudulent, or deceptive trade practices):

   i. Example: Mass. Gen. Laws ch. 93A, §9 permits a court to double or treble damages if the court finds that the use or employment of the act or practice was a willful or knowing violation of the consumer protection statute.

   ii. Example: Tex. Bus. & Com. Code Ann. §17.41, *et seq.*, prohibits false, misleading, or deceptive acts against consumers, forbids any breach of an express or implied warranty, and bars companies from engaging in an unconscionable action or course of action against consumers.

   iii. Example: Vt. Stat. Ann. Tit. 9, §2451, *et seq.*, is designed to "complement the enforcement of federal statutes and decisions governing unfair methods of competition and unfair or deceptive acts or practices in order to protect the public, and to encourage fair and honest competition" in commerce.

c. State elderly abuse statutes (statutes designed to curb unfair, fraudulent, or deceptive trade practices targeted at senior citizens, who are viewed as particularly vulnerable):

   i. Example: Cal. Civ. Code §1780(b) and Cal. Bus. & Prof. Code §17206.1 provide that any violation of California's consumer protection statute or unfair practices statute against a senior citizen can be punished by an additional award against the defendant.

3. Punitive damages: damages not awarded in order to compensate the plaintiff, but in order to punish or deter the defendant and similar persons from pursuing a course of action.

   a. Typically, punitive damages are available only when jurors find that defendants' conduct is willful or egregious. Thus, punitive damages tend to be a relatively rare remedy.

   b. Nonetheless, the threat of punitive damages can loom large, as awards for punitive damages can vastly exceed any award for compensatory (or actual) damages.

   c. As such, the plaintiffs frequently ask courts and juries to award punitive damages against defendants in an effort to boost the overall compensation to the class (and in order to pressure defendants into settling).

4. Attorneys' fees and litigation costs

   a. RICO, many consumer protection statutes, and many elderly abuse statutes provide a fee shifting mechanism that requires defendants to pay for attorneys' fees and litigation costs if the plaintiffs prove a violation of the statute.

   b. This is a tremendous "hammer" for the plaintiffs, as litigation costs for complex class actions can easily exceed millions of dollars. Accordingly, the plaintiffs can use the threat of fees to exert settlement pressure on defendants.

F. To Fight or Settle?

1. The decision to fight or settle depends on an analysis of the relative costs and benefits of proceeding through litigation, as modified by the risk of success or failure. In rendering this analysis, attorneys and clients must weigh a number of factors, including those set forth below.
2. Potential costs of litigation:
   a. Potential damages
   b. Legal fees, including potential for paying opponent's fees
   c. Document production and retention
   d. Internal resources occupied during litigation
   e. "Big Picture" considerations, such as PR considerations, collateral regulatory impact
3. Potential costs of settlement:
   a. Settlement payment to class or cost of prophylactic measures
      i. Impact of "take rates"
   b. Legal fees
   c. Settlement approval process
      i. Confirmatory discovery
      ii. Hearing/objections under Rule 23(e). Rule 23(e) requires the court to give notice to all class members who would be bound by a settlement and requires the court to find that the proposed settlement is "fair, reasonable, and adequate" before approving it. Any class member is permitted to object to the proposed settlement before a court approves the settlement.
      iii. CAFA requirements, 28 U.S.C. §§1711-1715. CAFA requires that courts closely scrutinize any "coupon settlements" as well as any attorneys' fees that are awarded as part of a class settlement. In addition, CAFA directs courts to notify certain state and federal officials (*i.e.*, attorneys general) to afford these officials the opportunity to weigh in on any class settlement before final approval.
   d. Class administration costs
      i. Notice
      ii. Claims process (form requirement? adjudication panel?)
      iii. Benefit administration
   e. "Big Picture" considerations, such as the message sent to the plaintiffs' bar by resolving litigation
4. Likelihood of success (or failure) on merits:
   a. Chances of winning (or defeating) motion to dismiss, which is affected by governing pleading standard
   b. Chances of winning (or defeating) class certification
   c. Chances of winning (or defeating) a motion for summary judgment motion after discovery but before trial
   d. Chances of winning (or losing) trial

   e. Chances of winning (or losing) an appeal on any of these issues

5. Attractiveness of a release

III. Litigation Trends: Illustrative Cases

A. Equity-Indexed Annuity Cases

1. *Yokoyama v. Midland Life Insurance Co.*, 243 F.R.D. 400 (D. Haw. 2007). The plaintiff alleged that defendant deceptively marketed equity indexed annuities to persons over age 65 through the use of deceptive written materials, including contracts with inadequate disclosures. The plaintiff also averred that Midland failed to implement procedures to ensure suitability of the sales. As a result, the plaintiff claimed that Midland had violated Hawaii's consumer protection statute. The court denied the plaintiff's motion to certify a class, finding that whether or not the product was "suitable" required an individual assessment of the facts pertaining to each class member. Accordingly, the case would not be manageable as a class action, as individual questions of fact predominated. Therefore, the plaintiff could satisfy neither the "predominance" nor the "superiority" requirements of Rule 23(b)(3).
2. *Mear v. Sun Life Assurance Co. of Canada (U.S.)/Keyport Life Insurance Co.*, 2008 WL 245217, at *5 (D. Mass. Jan. 24, 2008). The plaintiff challenged the sale of equity indexed annuities to herself and to other persons aged 65 and older. The court granted defendants' motion to dismiss on a variety of grounds. Specifically, the district court held that the plaintiff lacked standing to pursue her claim because she had failed to allege that "she actually removed funds from her account, that she suffered a loss as a result, that she ever needed immediate access to her funds, or even that she would not have made the investment had the allegedly omitted information been provided to her." In addition, the court found that the plaintiff's fraud claim was inadequately pled under Rule 9(b); that the plaintiff's RICO claim failed to comply with the pleading elements of the RICO statute; that the plaintiff's statutory consumer protection claim was barred under a choice-of-law provision; that the plaintiff's negligence claims were barred by the economic loss doctrine; and that the plaintiff's unjust enrichment claim was precluded by the existence of a contract.
3. *Negrete v. Allianz Life Insurance Co. of North America*, 238 F.R.D. 482, 496-97 (C.D. Cal 2006). The plaintiff alleged that Allianz engaged in a misleading marketing scheme to sell equity indexed annuities to seniors under circumstances in which other investments would have been more appropriate. The plaintiff asserted that defendants violated RICO, California's "elder abuse" statute, and California's consumer protection law. The court has certified a nationwide RICO class consisting of "All persons who within the applicable statute of limitations of the date of the commencement of this action and while 65 years of age or older, purchased one or more Allianz Life Insurance Company of North America deferred Annuities either directly, or through surrender (in whole or part) of an existing permanent life insurance policy or annuity, or by borrowing against an existing permanent life insurance policy." The court also certified a California subclass for state statutory claims (primarily under the state's unfair competition law) consisting of: "All California residents who within the applicable statute of limitations of the date of commencement of this action and while 65 years of age or older, purchased one or more Allianz Insurance Company of North America deferred annuities either directly, or through the surrender (in whole or part) of an existing

permanent life insurance policy or annuity, or by borrowing against an existing permanent life insurance policy." In certifying these classes, the court rejected defendants' contention that the RICO claims could be resolved only by examining individual point-of-sale circumstances to demonstrate reliance, causation, and damages. Such an individualized analysis, the defendants suggested, rendered class certification impossible. Instead, the court found that reliance and causation could be proven on a uniform basis by expert evidence that rational plaintiffs would not have purchased annuities if they had accurate information regarding the costs of the annuities.

4. *Mooney v. Allianz Life Insurance Co. of North America*, 244 F.R.D. 531, 538 (D. Minn. 2007). Here, the plaintiff alleged that Allianz failed adequately to screen or train agents who sold equity indexed annuities, and used uniform and misleading sales literature that falsely conveyed that purchasers would receive an "upfront" bonus (which they claimed was paid only if the contract was annuitized). The plaintiff asserted claims for violation of the Minnesota Consumer Fraud Act and unjust enrichment. The plaintiff moved to certify a class, and the court permitted the certification of a nationwide class of purchasers consisting of "[a]ll individuals who from February 9, 2000 to the present purchased one of the following two-tiered annuities from Allianz Life Insurance Company of North America: BonusMaxxx, Bonus-Maxxx Elite, BonusDex, BonusDex Elite, 10 percent Bonus PowerDex Elite, MasterDex 10, and the InfiniDex 10. The Class excludes all persons who purchased the above-listed Annuities from Allianz while they were California residents and when they were 65 or older." In certifying the class, the court rejected the defendant's contention that the court would need to apply the law of each individual state (thus defeating the superiority requirement).

5. *Iorio v. Asset Marketing, Allianz Life Insurance Co. of North America*, 05-cv-00633 (S.D. Cal.). The complaint alleged that Allianz sold equity indexed annuities to senior citizens by use of misleading disclosures that failed to properly describe surrender penalties and did not comply with California disclosure laws. The plaintiff asserted claims for violation of California consumer protection law, fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, and sought declaratory relief concerning the terms of the annuity contracts. The court certified a California class of all persons who purchased one of the following annuities from Allianz Life Insurance Company of North America or LifeUSA while they were California residents and when they were age 65 or older: Bonus Maxxx, BonusDex, Bonus Maxxx Elite, BonusDex Elite, 10 percent Bonus PowerDex Elite and MasterDex 10. On July 23, 2008, defendants appealed the ruling on class certification and moved to stay pending this appeal. The motion to stay was denied by the district court on August 28, 2008, and the appellate petition was denied on October 9, 2008.

6. *Estate of Migliaccio v. Midland National Life Insurance Co.*, 436 F. Supp. 2d 1095 (C.D. Cal. 2006). The plaintiff alleged that the defendant used misleading marketing materials to sell deferred equity indexed annuities to seniors that would mature after their actuarial life expectancies. The plaintiff asserted claims under RICO, elder abuse, unfair and deceptive practices, deceptive advertising, breach of fiduciary duty, fraud, negligent misrepresentation, fraudulent inducement, and constructive trust. The defendants moved to dismiss the complaint, arguing that the complaint was not plead with the required specificity under Rule 9(b); that claims relating to elder abuse and unfair and deceptive practices failed because product features were disclosed to the plaintiff; that the plaintiff failed to state a RICO claim

because the complaint failed to allege a RICO enterprise; and that the complaint failed to specify the predicate mail or wire fraud with sufficient specificity. After reviewing these arguments, the court declined to dismiss the complaint. The defendants have moved for summary judgment, and on February 25, 2008, oral argument on a motion for summary judgment was held. The court issued a tentative order on summary judgment (taking the matter under advisement before issuing a final order) and ordered the appointment of a court expert on the issue of damages. A *Daubert* hearing on expert methodology is scheduled for March 2009.

7. *Jones v. Allianz Life Insurance Co. of North America*, 07-cv-00145 (E.D. Ark.). The plaintiffs filed this action on March 1, 2007, alleging that Allianz sold unsuitable deferred annuities and made misleading statements concerning the annuities in connection with the sales. The plaintiffs alleged that the annuities were unsuitable because their maturity dates exceeded the life expectancies of the purchasers. The plaintiffs alleged that Allianz marketed its deferred annuities as providing a six to seven percent return, when in fact they provided only a three percent return. The plaintiffs state claims for (1) unfair and deceptive practices under Arkansas law and other "similar state statutes prohibiting unfair and deceptive acts and practices," and (2) breach of fiduciary duty. The plaintiffs proposed a national class to include "All residents of the United States 60 years of age or older who, during the Class Period, purchased an Allianz deferred annuity either directly or through the surrender (in whole or part) of an existing permanent life insurance policy or annuity, or by borrowing against an existing permanent life insurance policy, which annuity had a maturity date beyond the annuitant's actuarial life expectancy" and an Arkansas subclass for all residents of Arkansas who fell under this definition. The defendant moved to stay this action pending a resolution of *Negrete* and also moved to dismiss the complaint. On August 7, 2007, the court denied the motion to dismiss and allowed the motion to stay "pending resolution of the RICO class claims pending in" *Negrete*.
8. *DeCesare v. Lincoln Benefit Life Co.*, 852 A.2d 474 (R.I. 2004). The defendant sold equity indexed annuities to the plaintiff class, consisting of individuals who had purchased the savers index annuity during 1997. The equity indexed annuity contracts specified that the defendant would, on a yearly basis, declare the index participation rate (to establish return on investment) for the year. The plaintiffs alleged that defendant sent out an annual report declaring a rate of 80 percent index participation, but then sent a revised report declaring a rate of 70 percent index participation. The plaintiff sued for breach of contract. After construing the contract at issue, the Rhode Island Supreme Court determined that Lincoln's attempt to alter the participation rate was a breach of contract. In addition, the court affirmed the decision to certify a class action Rule 23(b)(2), providing for equitable relief on behalf of the plaintiffs.
9. *Malone v. Addison Insurance Marketing, Inc.*, 225 F. Supp. 2d 743 (W.D. Ky. 2002). The purchaser of indexed deferred annuities commenced a securities fraud class action suit against insurer and insurance agent, alleging claims under the Securities Exchange Act of 1934 and state tort law. The plaintiff specifically alleged that the defendant sold her an equity indexed annuity based on misrepresentations during the marketing and sale of these products. On a motion to dismiss, the court ruled that (1) the annuities sold were fixed rather than variable annuities and thus fell outside the auspices of the Exchange Act, and (2) the annuities were

within Exchange Act regulations' so-called safe harbor provision, thus excluding the application of the Exchange Act. Thus, the claim was dismissed.

B. Other Deferred Annuity Cases

1. *In re National Western Life Insurance Deferred Annuities Litigation*, 467 F. Supp. 2d 1071 (S.D. Cal. 2006). The plaintiff alleges that the defendant defrauded senior citizens into purchasing deferred annuities that were unsuitable as a result of lengthy surrender periods. The plaintiff further alleges that defendant's marketing materials failed to adequately disclose risks of the products. The plaintiff asserted claims for (1) violations of RICO, (2) financial elder abuse in violation of the California Welfare & Institutions Code, (3) violations of the California Business & Professions Code, (5) breach of fiduciary duty, (6) aiding and abetting breach of fiduciary duty, (7) fraudulent concealment, (8) breach of the duty of good faith and fair dealing, and (9) unjust enrichment and imposition of constructive trust. The defendant moved to dismiss the plaintiff's claims for RICO violations, breach of fiduciary duty, breach of the duty of good faith and fair dealing, and violations of California law for unfair competition and false advertising. The court dismissed, in part, the complaint. The court dismissed the California law claims, finding that there was no nexus between the alleged wrongdoing and California, thus rendering California law inapplicable. The court also dismissed part of the plaintiff's RICO claim (arising under §1962(a)) because the plaintiff could not show an "investment injury." The court otherwise permitted the plaintiff's RICO claim to proceed, however. Finally, the court dismissed the claims for breach of the duty of good faith, finding that the plaintiff could, at most, show that he had been fraudulently induced into signing the annuity contract; this, the court found, was insufficient to state such a claim under California law.
2. *Bendzak v. Midland National Life Insurance Co.*, 440 F. Supp. 2d 970, 974-75 (S.D. Iowa 2006). The plaintiff challenged Midland's marketing and sales practices, which allegedly targeted seniors for sales of ill-suited deferred annuities. The plaintiffs proposed class consisted of "All persons in the United States who have incurred, or could possibly incur, a surrender charge, whether upon surrender or a death benefit claim, under a Midland deferred annuity policy issued where the annuitant or owner was over the age of 65 at the time of sale, and where the date that the distribution payments from the annuity commences is beyond the annuitant's actuarial life expectancy." She asserted violations of RICO, common-law and civil conspiracy under Iowa and other states' laws, and unjust enrichment. The defendant moved to dismiss this complaint. The court (1) held that the statute of limitations barred the plaintiff's RICO claim as to seven of the eight annuities she purchased, (2) held that the plaintiff's RICO count failed to comply with F.R.C.P. 9(b) and granted the plaintiff ten days to amend, and (3) rejected the remainder of the defendant's arguments. Thereafter, this case was transferred and consolidated with *John G. Migliaccio Estate v. Midland National Life Insurance Co.*, 06-cv-01007 (C.D. Cal.).
3. *In re Conseco Insurance Co. Annuity Marketing and Sales Practices Litigation*, 2007 WL 486367 (N.D. Cal. Feb. 12, 2007), *mot. to dismiss*, 2008 WL 4544441, slip copy (N.D. Cal. Sept. 30, 2008). The plaintiffs alleged that the defendant insurance company sold unsuitable deferred annuities to senior citizens. The plaintiffs alleged that the insurance company trained the affiliated agents who sell the annuities to use inappropriate sales tactics, including failing to disclose material information about the annuities. The plaintiffs took issue with the annui-

ties' surrender charges and asserted that, as a result of such charges, the annuities are unsuitable for seniors. The plaintiffs asserted claims for (1) RICO violation, (2) elder abuse, (3) violation of California Business & Professions Code, (4) breach of fiduciary duty, (5) aiding and abetting breach of fiduciary duty, (6) fraudulent concealment, (7) breach of the duty of good faith and fair dealing, and (8) unjust enrichment. The defendant moved to dismiss, and the court granted the motion in part, and denied it in part, primarily dismissing part of the plaintiffs' RICO claim. On April 27, 2007, the plaintiffs filed an amended complaint and Conesco again moved to dismiss on June 11, 2007. Conesco argued that (1) the plaintiffs' RICO claim was inadequately pled, (2) the plaintiffs failed to plead facts sufficient to toll the statute of limitations, and (3) the plaintiffs failed to plead the existence of a fiduciary duty in support of a claim for breach of fiduciary duty. The court rejected Conesco's arguments concerning RICO and the statute of limitations, but allowed the motion to dismiss the breach of fiduciary duty claim, and allowed the plaintiffs leave to replead the breach of fiduciary duty claim. Again, the plaintiffs amended the complaint, and again, defendants moved to dismiss, adding several new Conseco entities as defendants. Once again, the court dismissed the complaint in part, finding a lack of jurisdiction over the newly added defendants.

4. *Bacon ex rel. Moroney v. American International Group*, 415 F. Supp. 2d 1027, 1028 (N.D. Cal. 2006). The plaintiffs claimed that the defendants intentionally drafted deferred annuity contracts that were difficult to comprehend and "manipulated" senior citizens into purchasing these deferred annuities with high surrender charges. The plaintiff alleged that such annuities are inappropriate for seniors. In particular, the plaintiff alleged that defendant failed to disclose (1) tax consequences of annuity purchases and their lack of liquidity, (2) large commissions, and (3) surrender charges incurred upon death. The plaintiffs' proposed class consisted of "persons 65 and older who have purchased a deferred annuity solicited, referred, marketed, sold and/or issued by any defendant, and/or who have suffered or could suffer a penalty and/or surrender charge, including those incurred on death for accessing their money before its maturity date." The defendant moved to dismiss and argued that all California claims must be dismissed because sales of annuities are legal in California; the court rejecting the claim, interpreted the complaint not to allege that annuity sales to seniors are *per se* inappropriate. The defendant next challenged the fraud claim under Rule 9(b); the court dismissed with leave to amend on the ground that the plaintiff had not alleged what she was told at the time of sale or by whom. The defendant argued that the plaintiff had not pled the elements of an unfair competition claim and the court agreed, dismissing the claim. The defendant argued that the plaintiff's claims were barred by the statute of limitations; the court rejected the argument on the ground that defendant had not established when the claims accrued. Finally, the court dismissed the plaintiff's claim under the Consumers Legal Remedies Act on the ground that the statute does not apply to annuities.
5. *Castillo v. Nationwide Financial Services, Inc.*, 2003 WL 22078046 (Ohio Ct. App. Sept. 9, 2003). The plaintiff alleged that defendant sold unsuitable deferred annuities. The plaintiff claimed that defendant's agent did not disclose (1) that tax advantages of a deferred annuity are redundant if funds are in an IRA, (2) that a deferred annuity does not provide the maximum investment return, and (3) that there was a lengthy surrender period. The plaintiff asserted claims for fraud, breach of fiduciary duty, and negligent misrepresentation, training, and supervision of the agent who sold the product. Upon defendant's motion, the court

dismissed the complaint as barred under the statute of limitations and for failure to state a proper claim for relief.

6. *Estate of Gleiberman v. Hartford Life Insurance Co.*, 94 Fed. Appx. 944 (3d Cir. 2004). The plaintiff purchased a deferred annuity from defendant without selecting an annuitization option. Pursuant to the annuity's terms, defendant applied the default annuitization option. The plaintiff attempted to state claims (on behalf of a class of similarly situated individuals) for unjust enrichment, breach of the implied duty of good faith and fair dealing, restitution, and breach of fiduciary duty against the defendant. The district court dismissed the case, and the court of appeals affirmed, finding that the plaintiff's claims failed because there was no allegation that the defendant had failed to perform under the contract.
7. *Donovan v. American Skandia Life Assurance Corp.*, 96 Fed. Appx. 779 (2d Cir. 2004). The plaintiff alleged that defendant inappropriately recommended that the plaintiff fund tax-deferred accounts with deferred annuities, without disclosing the redundant tax benefit. The plaintiff sued for violation of federal securities laws and sought to certify a class consisting of "All persons who, between December 13, 1997 and October 22, 2000, were parties to a deferred annuity contract issued, underwritten, marketed or sold by defendants." The district court dismissed and the court of appeals affirmed, holding that defendant had no duty to disclose the redundant tax benefit. The court stated that, having disclosed the tax deferral of the annuity, a reasonable investor would have understood the tax redundancy with a tax-deferred account.
8. *Johnson v. Aegon USA, Inc.*, 355 F. Supp. 2d 1337, 1340 (N.D. Ga. 2004). The plaintiffs alleged that defendant sold deferred variable annuities and "misled prospective investors by failing to reveal that these deferred annuities were not generally appropriate investments for placement into qualified retirement plans." The plaintiffs sued for violation of federal securities laws and sought to certify a class. The defendant moved to dismiss, relying on *Donovan*, and arguing that it had no duty to disclose tax redundancy in a prospectus. The court rejected the argument, declining to hold as a matter of law that such disclosures were unnecessary. The defendant also asserted an argument based on the statute of limitations. The court rejected the argument with respect to the first-filing named plaintiff, holding that, in light of the above ruling, the court could not find as a matter of law that she was on notice of her claim at the time of purchase. The court dismissed the claims of several later-filing plaintiffs as untimely. After this order issued, the lead plaintiff decided not to pursue this case, and it was ultimately dismissed as moot.
9. *In re Jackson National Life Insurance Co. Premium Litigation*, 209 F.R.D. 134 (W.D. Mich. 2002). Insured residents of Mexico brought a Texas state court action against life insurer and its agents, alleging fraud, breach of contract, and bad faith in connection with (1) allegations that defendant insurance agents misrepresented that they were authorized to sell insurance or annuities in Mexico and (2) allegations that defendants misrepresented facts regarding the sale of interest-sensitive "vanishing premium" life insurance policies. Action was removed, consolidated with related cases, and transferred for multidistrict proceedings to the Western District of Michigan. The plaintiffs specifically alleged that defendant sold them life insurance policies and/or annuity contracts and misrepresented (1) that defendant was licensed to do business in Mexico, and (2) the "vanishing premium" aspect of the life insurance policies. The plaintiff moved for class certification, seeking to certify two classes: "1. Mexican

Resident Class: All purchasers, who were residents of Mexico at the time of the purchase, that purchased one or more whole or variable life insurance policies and/or annuity products from a Jackson National life insurance Texas agent from July 4, 1991 to April 7, 1999," and "2. Texas Agent Vanishing Premium Class-All purchasers, who were residents of Mexico at the time of purchase, that purchased one or more whole or variable life insurance policies sold on the basis that the projected cash outlay would be for only a limited period of time from a Texas agent." The court denied certification, finding that (1) common questions of law did not predominate because the plaintiff failed to identify relevant questions common to class members, (2) there was no typicality because adjudication would require a case-by-case analysis of what the brokers represented to the insureds, and (3) the plaintiff was not an adequate class representative where the plaintiff sought rescission and other class members wanted their policies enforced.

10. *Grove v. Principal Mutual Life Insurance Co.*, 200 F.R.D. 434 (S.D. Iowa 2001). The plaintiffs claimed that defendant's sales agents deceived them into purchasing life insurance policies and or annuities through the use of false and misleading policy illustrations, marketing materials, and sales presentations. The parties jointly moved the court to certify the case as a class action, and approve as fair, reasonable, and adequate their settlement agreement. The court held that: (1) prerequisites to class action were met; (2) predominance and superiority tests of class actions were met; and (3) acting on the advice of several court-appointed experts, settlement agreement was fair, reasonable and adequate. The settlement was approved and the case was accordingly dismissed.
11. *In re LifeUSA Holding Inc.*, 242 F.3d 136, 142 (3d Cir. 2001). The plaintiff alleged that the defendant used a network of poorly trained agents to sell deferred annuities using misrepresentations as to the annuities' features. In addition, the plaintiff alleged that postsale quarterly reports sent to purchasers misrepresented the interest rate calculation applicable to the annuities. The plaintiff asserted claims for fraud, breach of duty of good faith and fair dealing, negligence, and unjust enrichment on behalf of a class of individuals consisting of "All persons who purchased an Accumulator annuity from Life USA between August 1, 1989 and the present and are not officers or directors of Life USA or members of the immediate family of any officer or director of Life USA or any entity in which Life USA has a controlling interest or the heir, successor or assign of any such excluded party." The district court certified a class, but the Third Circuit reversed this decision, finding that (1) neither commonality prerequisite nor predominance requirement was satisfied, and (2) requirement that class action device be superior method of adjudicating claims was not met. In short, the Third Circuit found that a class could not be certified because the postsale misrepresentations that served as basis of the plaintiffs' claims required an individual assessment of facts for each member of the proposed class.

C. Variable Annuity Cases

1. *Webster v. New York Life Insurance & Annuity Corp.* The plaintiffs alleged that the insurer defendant breached its contract with the plaintiffs by failing to pay a minimum guaranteed interest rate on its variable annuity policies. After a battle over whether this case would be adjudicated in state or federal court, 386 F. Supp. 2d 438 (S.D.N.Y. 2005), the state court ultimately allowed defendant's motion to dismiss. The court found that under the plain language

of the contract, the minimum guaranteed interest rate did not apply to investments in the variable portions of the annuity contracts. The contract terms indicated that values based on the performance of the separate account were variable and not guaranteed. Thus, the plaintiffs could not recover for breach of contract.

2. *Dudek v. Prudential Securities, Inc.*, 295 F.3d 875 (8th Cir. 2002). The plaintiffs alleged that defendants inappropriately sold variable annuities to investors that already had funds in tax-deferred vehicles. The plaintiff initially filed suit in state court and alleged state law claims. The defendant removed case to federal court and moved to dismiss. The district court dismissed on the ground that the variable annuities in this suit were covered by SLUSA, and thus the plaintiff's state law tort claims were precluded.
3. *Cooper v. Pacific Life Insurance Co.*, 229 F.R.D. 245, 266 (S.D. Ga. 2005), *mot. denied*, 458 F. Supp. 2d 1368 (S.D. Ga. 2006). The defendant sold deferred variable annuities to the plaintiffs allegedly without sufficiently disclosing that the tax deferral benefit would be redundant with the tax benefits of tax-deferred accounts, and allegedly after having failed to make determinations that the annuities were suitable for the purchasers. The plaintiffs sued for violation of federal securities laws. The defendant moved to dismiss and the court denied the motion, except with respect to the plaintiffs' control person liability claim under the securities laws. The court held that under NASD rules, the registered representative who sold the insurance products could have a duty to disclose the tax issues identified by the plaintiff. The court likewise rejected arguments under Rule 9(b) and the statute of limitations. On May 9, 2005, the court certified a class, including "all persons who purchased an individual variable deferred annuity contract or who received a certificate to a group variable deferred annuity contract issued by Pacific Life Insurance Company, or who made an additional investment through such a contract, on or after August 19, 1998 through April 30, 2002 (Class Period), which was used to fund a contributory retirement plan or arrangement qualified for favorable tax treatment pursuant to sections 401, 403, 408, 408A or 457 of the Internal Revenue Code." The defendant thereafter moved for decertification of the class, arguing that discovery had disclosed that many class members had, in fact, been notified of the redundant tax benefit. The court rejected that argument, noting that such evidence should be presented at trial. Subsequently, the parties settled the class action, and the court approved this settlement in October 2007.
4. *Patenaude v. Equitable Life Assurance Society of the United States*, 290 F.3d 1020 (9th Cir. 2002). Investor in simplified employee pension, which was funded with variable annuities, brought suit in California state court against defendant insurer and agent, alleging unfair and fraudulent business practices and acts of false or misleading advertising for failure to disclose high surrender penalties and redundant tax benefits associated with variable annuities. The defendant removed from state court under SLUSA and successfully moved to dismiss. The Ninth Circuit affirmed this dismissal, finding that SLUSA did preempt the state law claims because tax-deferred variable annuities were "covered securities" under SLUSA.
5. *Malhotra v. Equitable Life Assurance Society of the United States*, 364 F. Supp. 2d 299 (E.D.N.Y. 2005). The defendant sold deferred variable annuities to the plaintiffs without allegedly adequately disclosing that tax deferral benefit would be redundant of the tax benefit of tax-deferred accounts. The plaintiffs sued for violation of federal securities laws on behalf of a proposed class including "All persons who purchased an individual variable deferred annu-

ity contract or received a certificate to a group variable deferred annuity contract issued by [Equitable], or who made an additional investment through such a contract, on or after October 3, 1997, which contract was used to fund a contributory (not defined benefit) retirement plan or arrangement qualified for favorable income tax treatment pursuant to Internal Revenue Code sections 401, 403, 408, 408A or 457." The defendant moved to dismiss, and the court dismissed the claims of one named plaintiff as time-barred under the statute of limitations. With respect to a second named plaintiff, the court dismissed on the ground that the defendant had no duty to disclose the redundant tax benefit under the securities laws, finding it sufficient that defendant had disclosed the tax features of the annuity. After the court issued this order, the parties filed a joint stipulation of dismissal with prejudice.

6. *Winne v. Equitable Life Assurance Society of the United States*, 315 F. Supp. 2d 404 (S.D.N.Y. 2003). The plaintiff commenced putative class action suit in New York state court alleging state law causes of action against defendant insurers for allegedly assessing penalty fees for premature withdrawal from variable annuity account after inducing the investor to switch from one annuity to another. The defendants removed pursuant to SLUSA and moved to dismiss, arguing that variable annuities were "covered securities" under SLUSA, thus the plaintiff's state law claims were preempted. The court agreed, finding that these variable annuities were treated as covered securities under SLUSA, thus precluding the plaintiff's state law action.
7. *McEachern v. Equitable Life Assurance Society of the United States*, 1:00-cv-00403-CB-C (N.D. Ala.). The plaintiffs filed complaint in Alabama state court alleging that Equitable misrepresented that the variable annuity policies it sold were appropriate for use within a tax-deferred IRA, and claiming that the fees were excessive. The defendants removed the case from state to federal court pursuant to SLUSA and moved to dismiss, claiming that SLUSA precluded the plaintiffs' state law claims. The court agreed and dismissed the complaint, but allowed the plaintiffs to amend to excise any state law fraud claims that were barred by SLUSA. Upon renewed motion to dismiss by the defendants, the court again dismissed the complaint, finding that the crux of the plaintiffs' negligence and misrepresentations claims were precluded by SLUSA because the defendants' alleged "misrepresentations" were central to the case.

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