Lincoln National Life Insurance Company, Appellant-Defendant, v. Peter S. Bezich, individually and on behalf of a class of others similarly situated, Appellee-Plaintiff,

Court of Appeals Cause No. 02A04-1407-PL-319

COURT OF APPEALS OF INDIANA

2015 Ind. App. LEXIS 433

June 2, 2015, Decided
June 2, 2015, Filed

PRIOR HISTORY: [*1] Interlocutory Appeal from the Allen Circuit Court. Honorable Thomas J. Felts, Judge. Case No. 02C01-0906-PL-73.

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JUDGES: Robb, Judge. Bailey, J., and Brown, J., concur.

OPINION BY: Robb

OPINION

Robb, Judge.

Case Summary and Issues

P1 Peter Bezich filed a complaint against Lincoln National **Life Insurance** Company ("Lincoln"), alleging three separate counts of **breach** of **contract** regarding his variable **life insurance** policy. Bezich then moved to certify a class of policyholders on all three **breach** of **contract** claims. The trial court issued an order denying class certification as to Count 1 and Count 2 of Bezich's complaint. However, the trial court concluded that a single-issue class may be certified as to [*2] Count 3 for the purpose of determining liability. Lincoln appeals, arguing that the trial court erred by certifying a single-issue class for Count 3. Bezich cross-appeals, arguing that the trial court erred by declining to certify a class for Count 1 and Count 2. We conclude the trial court acted within its discretion by certifying a single-issue class for Count 3. However, we conclude that Count 1 and Count 2 should have similarly been certified for class treatment. Therefore, we affirm in part, reverse in part, and remand.

Facts and Procedural History[1]

1 We held oral argument in this case at the Indiana Statehouse in Indianapolis on April 13, 2015.

P2 Between 1986 and 2008, Lincoln sold a standardized variable **life insurance** policy known as an Ensemble II. Bezich purchased an Ensemble II in 1996. The Ensemble II works as both a **life insurance** policy and an investment tool. Amounts paid by the policyholder as premiums are credited to the policy and are included in the "Accumulation Value" of the policy, which is comprised of premiums, investment earnings, and interest. The actual insurance existing under the policy is called the "Net Amount at Risk," which is the difference between the [*3] Accumulation Value and the policy's assigned death benefit.

P3 Lincoln is authorized under the contract to make monthly deductions from the Accumulation Value to keep the policy in force. Those monthly deductions are comprised of two charges: (1) a "cost of insurance" ("COI") charge and (2) an administrative charge.[2] The COI charge is calculated by multiplying the Net Amount at Risk by a COI rate. With respect to that COI rate, the Ensemble II states: "The monthly cost of insurance rate is based on the sex, issue age, policy year, and rating class of the Insured. Monthly cost of insurance rates will be determined by the Company based upon expectations as to future mortality experience." Appellee's Appendix at 19 ("COI rate provision"). Regarding administrative charges, the Ensemble II states the monthly deduction includes "a monthly administrative charge. This charge is equal to $6.00 per month in each policy year." *Id.* ("administrative charge provision").

> 2 Specifically, the Ensemble II states: "Monthly Deduction -- The monthly deduction for a policy month shall be equal to (1) plus (2), where: (1) is the cost of insurance . . . [and] (2) is a monthly administrative charge. This charge [*4] is equal to $6.00 per month in each policy year." Appellee's App. at 19.

P4 In 2009, Bezich surrendered his Ensemble II policy and forfeited the $200,000 death benefit the policy provided. On July 25, 2012, Bezich filed his amended complaint alleging that Lincoln breached three separate provisions of the Ensemble II.

P5 In Count 1, Bezich claims Lincoln breached the terms of the Ensemble II by including non-mortality factors in determining the COI rate charged under the policy. He argues that the terms "based on" and "based upon" in the COI rate provision limit the calculation of the COI rate to consideration of mortality factors only, and because Lincoln imposed COI charges that included expenses undisclosed in the Ensemble II, Lincoln breached the agreement.

P6 In Count 2, Bezich claims Lincoln breached the policy by loading administrative **fees** and expenses into the COI rate. Bezich argues that the administrative charge provision acts as a cap on administrative expenses, and that the recovery of administrative expenses in excess of $6.00 per month is a breach of the Ensemble II.

P7 In Count 3, Bezich claims Lincoln breached the agreement by failing to reduce the COI rate in response [*5] to improving mortality rates. Count 3 relies on contract language saying that "[m]onthly cost of insurance rates will be determined by the Company based upon expectations as to future mortality experience." *Id.*

P8 On August 27, 2012, Lincoln filed a motion to dismiss Bezich's claims, arguing that unambiguous language in the Ensemble II required that Bezich's claims be dismissed as a matter of law. However, the trial court denied Lincoln's motion as to all three Counts, and in doing so, the court interpreted the relevant provisions corresponding to each Count of Bezich's complaint:

> o As to Count 1, the trial court found that the COI rate provision was *ambiguous* insofar as the terms "based on" / "based upon" could lead a reasonable person to believe the COI rate was restricted to mortality factors only, but that the provision could also be read to say that mortality factors were the primary--but not exclusive--factors to be considered in setting rates.
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> o As to Count 2, the trial court concluded that the administrative charge provision was an *unambiguous* cap on administrative expenses and that "an ordinary policyholder of average intelligence would not interpret this provision to mean that administrative [*6] **fees** can exceed $6.00/month or that these administrative **fees** can be tacked on to the COI rate." Appellant's Appendix at 43-44.
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> o As to Count 3, the trial court concluded dismissal was inappropriate because "[g]iving [the COI rate provision] its plain and ordinary meaning, an ordinary policyholder of average intelligence could reasonably interpret this provision to mean that the COI rate would be adjusted based on future mortality expectations, whether those mortality experiences are improving or declining." *Id.* at 44.

P9 On September 16, 2013, pursuant to Indiana Trial Rule 23, Bezich sought to certify a class of Ensemble II policyholders from thirty states on all three Counts. Following an evidentiary hearing, the trial court issued its Findings of Fact, Conclusions, and Order, denying class certification on Count 1 and Count 2 but granting class certification on Count 3 solely on the issue of liability.

P10 As to Count 1 and Count 2, the trial court concluded that issues concerning extrinsic evidence and choice of law prohibited a finding that common questions of law and fact predominated over questions affecting individual class members. Specifically, the trial court reiterated its finding that the COI rate provision [*7] is ambiguous as it applies to Count 1 and thus extrinsic evidence may be necessary to aid the court in in-

Associated Med. Networks, Ltd. v. Lewis, 824 N.E.2d 679, 686 (Ind. 2005) (citation omitted).

II. Standard of Review

P16 Whether an action is maintainable as a class action is a question committed to the sound discretion of the trial court. *Associated Med. Networks, Ltd.*, 824 N.E.2d at 682. Thus, we review the trial court's ruling on a motion for class certification by employing an abuse of discretion standard. *Id.* The trial court's determination concerning class certification will be affirmed if it is supported by substantial evidence; however, a misinterpretation of law will not justify an affirmance. *Id.*

P17 This case also involves the interpretation of insurance contract provisions. [*11] The interpretation of an insurance contract is a question of law, which we approach using a de novo standard of review. *Justice v. Am. Family Mut. Ins. Co.*, 4 N.E.3d 1171, 1175 (Ind. 2014). An insurance contract is interpreted "from the perspective of an ordinary policyholder of average intelligence." *Bradshaw v. Chandler*, 916 N.E.2d 163, 166 (Ind. 2009) (citation omitted). A contract is ambiguous if "reasonably intelligent people may interpret the policy's language differently . . . ." *Id.*

III. Count 1[5]

5 As an initial matter, Bezich argues that this court does not have jurisdiction to decide whether the COI rate provision is ambiguous. The trial court first found that the provision was unambiguous in its order denying Lincoln's motion to dismiss. Bezich argues that because this interlocutory appeal concerns only the order on Bezich's motion for class certification--and not the trial court's order denying Lincoln's motion to dismiss--interpretation of the COI rate provision is not properly before this court. Lincoln counters that interpretation of the Ensemble II was clearly at issue in the trial court's order on class certification and that Lincoln was not required to file a separate interlocutory appeal of the trial court's order denying dismissal. In our view, interpretation of the Ensemble II was an integral [*12] part of the trial court's order concerning class certification and is a question properly before this court on appeal.

A. The COI Rate Provision is Unambiguously Limited to Mortality Factors

P18 Bezich argues that the trial court abused its discretion by denying class certification on Count 1 after finding Bezich failed to establish that common questions of law and fact predominate over individualized issues. The grant or denial of class certification hinges on whether the COI rate provision is ambiguous. Whether the contract language is ambiguous is important because Indiana follows the majority "four corners rule," which provides that "extrinsic evidence is not admissible to add to, vary or explain the terms of a written instrument if the terms of the instrument are susceptible of a clear and unambiguous construction." *Univ. of S. Ind. Found. v. Baker*, 843 N.E.2d 528, 532 (Ind. 2006) (citation omitted).

P19 Bezich contends that the COI rate provision is unambiguous as it relates to Count 1. In its entirety, the COI rate provision says: "The monthly cost of insurance rate is based on the sex, issue age, policy year, and rating class of the Insured. Monthly cost of insurance rates will be determined by the Company based upon expectations as to future [*13] mortality experience." Appellee's App. at 19. Bezich maintains that in the context of a contract like the Ensemble II, the terms "based on" / "based upon" connote exclusivity--i.e. only mortality factors may be considered--and that the contract does not leave room for Lincoln to pad the COI rate with other undisclosed factors or expenses. Lincoln counters that the COI rate provision *unambiguously does not* mean exclusivity, or is, at the very least, ambiguous.

P20 In support of his position, Bezich cites several court decisions concluding COI provisions that stated a rate was "based on" certain factors unambiguously meant that calculation of the rate was limited to the use of those factors. For instance, in *Jeanes v. Allied Life Ins. Co.*, 168 F.Supp.2d 958 (S.D. Iowa 2001), *rev'd on other grounds* 300 F.3d 938 (8th Cir. 2002), the court dealt with an insurance contract which provided in relevant part: "The Cost of Insurance Rate is based on the sex, attained age and rate class of the Insured. . . . Monthly cost of insurance rates will be determined by us based on our expectations as to future mortality experience." *Id.* at 973 (emphasis omitted). The court found that the language was unambiguous and held "the plain language of the contract only allows [the insurance company] to change the [*14] cost of insurance for increases in the companies [sic] expectations as to future mortality." *Id.* at 974; *see also Alleman v. State Farm Life Ins. Co.*, 334 F. App'x 470, 472 (3d Cir. 2009) (holding that contract language stating "[t]he guaranteed values are *based on* the Insured's age[,] last birthday[,] and sex" unambiguously meant that "age and sex are the only mortality factors relevant to the rate that the insureds received under the policies.") (emphasis added).

P21 In contrast, Lincoln relies most heavily on *Norem v. Lincoln Benefit Life Co.*, 737 F.3d 1145 (7th Cir. 2013), which dealt with a COI provision similar to the

need for the trial court to resort to extrinsic evidence, and questions of law or fact common [*19] to the members of the class predominate over questions affecting individual members. Therefore, class certification for Count 1 is appropriate.

B. Need for Extrinsic Evidence Despite a Lack of Ambiguity

P29 Lincoln also contends that even if the COI rate provision is not ambiguous, individualized inquiries involving extrinsic evidence will still be necessary because contract law in a few of the class states requires examination of extrinsic evidence even when reading an unambiguous contract. Lincoln asserts that five of the thirty class states--California, Colorado, Washington, Arizona, and Utah--either permit or require the use of extrinsic evidence even where a contract is unambiguous on its face. *See* Appellant's Br. at 26; Appellant's Reply Brief at 6. Lincoln claims this variation in law among the class states would require a choice-of-law inquiry for each individual class member and that those inquiries combined with the following need for extrinsic evidence precludes a finding that common issues predominate. Lincoln relies on *Bowers v. Jefferson Pilot Fin. Ins. Co.*, 219 F.R.D. 578, 583-84 (E.D. Mich. 2004), which held that variations in state law regarding the use of extrinsic evidence in interpreting contracts precluded class certification.

P30 The extrinsic [*20] evidence that Lincoln contends is relevant to Count 1 (and Count 2) are Illustration Questionnaires and statements potentially made by insurance agents to customers. We note that the Ensemble II provides that "[t]he entire contract consists of this policy and the application (and any supplemental applications for additional Specified Amounts)." Appellee's App. at 11. The contract also states that "[t]he agent has *no authority* to make, modify, alter or discharge any policy." *Id.* at 25 (emphasis added). Thus, the contract clearly embodies the full and final expression of the agreement, and statements made by an agent or written materials outside the Ensemble II, including the Illustration Questionnaire, cannot alter the terms of the policy.

P31 Moreover, the minority-rule states upon which Lincoln relies do not allow consideration of extrinsic evidence if that evidence would vary or alter the language of a contract or if the contract is meant to be the full and final expression of the terms of the agreement. *See, e.g., Taylor v. State Farm Mut. Auto Ins. Co.*, 175 Ariz. 148, 854 P.2d 1134, 1138 (Ariz. 1993) (citation omitted) ("When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, [*21] evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing."); *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n*, 55 Cal. 4th 1169, 151 Cal. Rptr. 3d 93, 291 P.3d 316, 318 (Cal. 2013) (citing Cal. Civ. Proc. Code § 1856 and Cal. Civ. Code § 1625) (stating "when parties enter an integrated written agreement, extrinsic evidence may not be relied upon to alter or add to the terms of the writing); *Denver Found. v. Wells Fargo Bank, NA*, 163 P.3d 1116, 1126 (Colo. 2007) (en banc) (stating "intent must be determined from contract language itself, and an unambiguous document cannot be explained by extrinsic evidence so as to dispute its plain meaning"); *Daines v. Vincent*, 2008 UT 51, 190 P.3d 1269, 1277-78 (Utah 2008) (stating "there can be no ambiguity where evidence is offered in an attempt to obscure otherwise plain contractual terms"); *Brogan & Anensen LLC v. Lamphiear*, 165 Wn.2d 773, 202 P.3d 960, 961 (Wash. 2009) (en banc) (per curiam) ("The parol evidence rule precludes the use of extrinsic evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract; that is, a contract intended as a final expression of the terms of the agreement."). Therefore, the extrinsic evidence that Lincoln relies upon--as it pertains to interpretations of the Ensemble II under Count 1 and Count 2--would not be admissible even under the law of those few minority-rule states. Accordingly, we conclude that any differences in the use of extrinsic [*22] evidence in those states does not prevent class certification on Count 1 or Count 2.[6]

6 Even if the Ensemble II was not an integrated contract and extrinsic evidence would not modify or alter its unambiguous terms, and if extrinsic evidence must be considered by the trial court based on the law followed by a few outlier states, the answer would be to exclude those states from the putative class, not outright denial of class certification.

IV. Count 2

P32 Bezich argues the trial court erred by ruling that individualized issues of extrinsic evidence and choice-of-law preclude class certification on Count 2. He maintains that the administrative charge provision is unambiguous and that the trial court was wrong to conclude that any ambiguity in the COI rate provision affects the meaning of the administrative charge provision.

P33 In relevant part, the Ensemble II lays out the policyholder's monthly charges as follows: "Monthly Deduction -- The monthly deduction for a policy month shall be equal to (1) plus (2), where: (1) is the cost of insurance . . . [and] (2) is a monthly administrative charge. This charge is equal to $6.00 per month in each policy year." Appellee's App. at 19. The trial court [*23]

future mortality experience." Appellee's App. at 19. This is an unambiguous statement that rates will reflect changes in mortality. Even if Lincoln is correct that the question of precisely *how* and *when* rates must be changed is up for grabs, it is a question that can certainly be answered on a class-wide basis.

P42 Finally, we cannot help but comment upon the absurdity of Lincoln's own interpretation of the COI rate provision, which is that the Ensemble II *allows Lincoln to unilaterally increase rates* on customers to reflect a change in mortality factors but offers no parallel commitment to decrease rates despite an overwhelming improvement in mortality. We have grave doubts that any policyholder of average intelligence would read the COI rate provision to confer on Lincoln that sort of "heads we win, tails you lose" power.

2. Need for Extrinsic Evidence Despite a Lack of Ambiguity

P43 Lincoln also contends that even if the COI rate provision unambiguously imposes an obligation to change rates as [*28] mortality expectations change, individualized inquiries involving extrinsic evidence will still be necessary because contract law in a few of the class states requires examination of extrinsic evidence even when interpreting an unambiguous contract. As discussed above, Lincoln claims this variation in law among the class states would require a choice-of-law inquiry for each individual class member and that those inquiries combined with the following need for extrinsic evidence precludes a finding that common issues predominate.

P44 Bezich counters that the extrinsic evidence issue is irrelevant as to Count 3 because Lincoln has failed to establish that any extrinsic evidence exists that could potentially alter the interpretation of the COI rate provision as it applies to Count 3. We agree. The Illustration Questionnaire--the extrinsic evidence Lincoln hangs its hat on--is relevant only to the parties' competing interpretations as they relate to Count 1 or Count 2. Although the Illustration Questionnaire could explain that COI rates may include a loading of expenses, nothing in the questionnaire implies that COI rates would not be adjusted to correspond with changes in mortality expectations. [*29] Because the use of extrinsic evidence would not change the outcome under Count 3, class certification should not be denied on that basis.[8] *See Simon v. United States*, 805 N.E.2d 798, 805 (Ind. 2004) (stating that Indiana's choice-of-law analysis first asks "whether the differences between the laws of the states are important enough to affect the outcome of the litigation.") (citation and internal quotation marks omitted).

8 Even if material extrinsic evidence did exist that must be dealt with based on the law followed by minority-rule states, the answer would be to exclude those states from the putative class, not outright denial of class certification.

D. Adequacy

P45 Lincoln also contends that the trial court abused its discretion by finding that Bezich is an adequate representative of the proposed class. The Trial Rule 23(A)(4) adequacy requirement has three components: "1) the chosen class representative cannot have antagonistic or conflicting claims with other members of the class; 2) the named representative must have a sufficient interest in the outcome to ensure vigorous advocacy; and 3) counsel for the named plaintiff must be competent, experienced, qualified, and generally able to conduct the proposed litigation vigorously." *N. Ind. Pub. Serv. Co. v. Bolka*, 693 N.E.2d 613, 618 (Ind. Ct. App. 1998), *trans. denied.*

P46 We note [*30] initially that there seems to be general agreement among the parties that Bezich has a sufficient interest in the outcome to ensure vigorous advocacy, and that Bezich's counsel is qualified to litigate this case. Lincoln's challenges to Bezich's adequacy as a class representative are claims that he poses a risk of conflict with certain members of the proposed class.

P47 First, Lincoln states that uncontradicted evidence presented to the trial court showed that updating COI rates in the manner Bezich advocates would actually result in *higher* COI rates for some of the putative class members.[9] Therefore, Bezich's claim under Count 3 is antagonistic to certain members of the proposed class. Bezich responds that this supposed conflict is entirely speculative, pointing out that he only seeks past damages on behalf of the class and that there would be no order forcing Lincoln to raise rates on policyholders in the future. *See Allen v. Holiday Universal*, 249 F.R.D. 166, 181 (E.D. Pa. 2008) ("[P]otential conflicts relating to relief issues which would arise only if the plaintiffs succeed on common claims of liability on behalf of the class will not bar a finding of adequacy.") (citation omitted). Additionally, Bezich argues that the possibility of higher COI rates [*31] in the future should not be a bar to certification because Lincoln's own interpretation of the Ensemble II would allow it to increase COI rates whenever it pleases.

9 It is unclear what portion of the putative class are allegedly benefitting from Lincoln's refusal to adjust COI rates in response to changes in mortality expectations. The trial court's factual findings (at Paragraph 6) make reference to some "Band 4 policyholders" for whom "Lincoln al-