

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-9198 JVS (RNBx) Date May 28, 2013

Title Joyce Walker, et al. v. Life Insurance Company of the Southwest et al.

Present: The Honorable James V. Selna

Karla Tunis

Not Present

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS) Order Decertifying Illustration Subclass

On April 12, 2013, the Court issued its Order to Show Cause (“OSC”) on the issue of decertification of the Illustration Subclass. (Docket No. 417.)

As the Court noted in the OSC, the filing of motions regarding notice to class members and to appoint a special master to determine membership in the Illustration Subclass led the Court to further consider whether the Illustration Subclass should be certified. The Court invited further briefing. The parties have filed their responses thereto. (Docket Nos. 420-421.)

Upon further review, the Court determines that the individualized inquiry in the determination of subclass membership overwhelms the issues common to the subclass. Accordingly, the Court decertifies the Illustration Subclass because the predominance requirement of Rule 23(b)(3) of the Federal Rules of Civil Procedure is not met.

I. Background

The issue of subclass membership was discussed at length in the Class Certification Order. (Docket No. 353 at 27-35.) There, the Court considered the issue as related to the implicit requirement that a class (or subclass) be ascertainable.

Generally, the Court was of the opinion that difficulties regarding subclass ascertainability could be remedied by a file review by a court-appointed special master, and any remaining ambiguities could be remedied by a carefully drafted class member questionnaire. (*Id.*) Specifically, the Court noted in certain instances that examination of the application could answer the question of subclass membership. (*Id.* at 32.) Also

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relevant were the presence of a number of specific notations on the Agent's Report portion of the application. (*Id.* at 32-33.) Relatedly, the Court noted that if review of the file revealed a Sales Illustration signed by the applicant that predated the policy issuance, that would also be a reliable indicator of subclass membership. (*Id.* at 33.) With those guiding principles, the Court indicated a file review by a court-appointed special master could remedy issues regarding the ascertainability of the subclass.

As noted in the OSC, the Court so concluded without the benefit of time and volume estimates. Thus, the Court considers whether to decertify the Illustrations Subclass.

II. Legal Standard

The district court's order to grant certification is subject to later modification, including class decertification. Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."). The standard is whether the class continues to meet the requirements of Rule 23. *Bruno v. Eckhart Corp.*, 280 F.R.D. 540, 544 (C.D. Cal. 2012).

III. Correction to Class Certification Order

The Court pauses out the outset to correct an error in the record. Specifically, as the parties have recognized, the Court misunderstood the significance of a certification made by the agent and the policyholder in the application. The Court erroneously noted that a checked box certified that an Illustration matching the policy applied for *was provided* to the applicant, leading the Court to observe that this was a strong indicator of subclass membership.

However, as the parties agree, a checked box certifies that *no* Illustration that matched the policy applied for was provided. (See Def.'s Brief at 8 n.5; Pltfs.' Brief at 3 n.4.) That is, it certifies that a particular type of Illustration — one that matches the policy applied for — was *not* provided. It does not mean that no Sales Illustration was used. Thus, rather than being "the surest indication of membership in the Illustrations based subclass," a checked box would simply be inconclusive, as it is possible that a non-matching Illustration was provided. Instead, it is an unchecked box that would generally be a reliable indicia of subclass membership.

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This is not to say that an unchecked box conclusively establishes subclass membership either. It is possible that other evidence in a particular file may strongly suggest otherwise. Indeed, the Class Certification Order expressly recognized that other evidence in a given file, such as an Agent's Report, could contain notations that might bolster a finding of subclass membership. (Class Certification Order at 32 (noting that a finding of subclass membership is "made more certain in those cases in which the Agent's Report also contains a notation that an Illustration was used").) By the same token, other evidence in a given file may likewise detract from such a finding.

Having noted this correction to the Class Certification Order, the Court considers whether the individualized inquiries necessary to determine subclass membership are consistent with a finding that the issues common to the subclass predominate.

IV. Individualized Inquiry

Rule 23(b)(3) requires that "the court find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members." Id. In the Class Certification Order, the Court failed to expressly discuss the individualized issues of determining subclass membership as related to predominance. (Cf. Class Certification Order at 38 ("The major obstacles to predominance are whether materiality and reliance are individualized issues, or whether they are subject to common adjudication.")) The Court does so now, and on a more complete record.

As the Court noted in the OSC, a review of over 42,000 files consisting of 8.8 million pages is a task that would require 5 work years to complete.¹ Plaintiff proposes to perform this task more efficiently through the use of computer analysis to extract relevant

¹ Although several vendors bid to do the project for time periods ranging from 3.5 to 18 weeks for around \$200,000, the Court is dubious. (See generally Foster Decl.(Docket No. 430 (sealed version) Exs. I-K.) Moreover, one vendor set forth time estimates per file in its bid, and that vendor's estimate for review of each file is remarkably close to the estimates originally tendered by the Plaintiffs and used by the Court in the OSC. (Compare id. Ex. K (Docket No. 430 at 37-38) (7 to 10 minutes per file); with OSC at 2 (15 minutes per file amounting to 10,000 hours, and expressing doubts regarding predominance even if the time estimate was half that amount).

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documents. (Opp'n at 6-8.) Moreover, preparation of a spreadsheet of relevant data could be delegated to someone other than the special master, reducing the amount of time and expense required. (*Id.*) While adoption of such procedures might ameliorate some of the Court's concerns, it is insufficient to eliminate them.

As noted by LSW, the policy files are not uniformly organized. (Def.'s Brief at 7-9; Monahan Decl. ¶¶ 5-7.) Their volume and contents vary. (*Id.*) Moreover, some of the files have been found to contain multiple applications, necessitating further review and comparison of dates of Illustrations. (Def.'s Brief at 9; Monahan Decl. ¶¶ 10-13.)²

Moreover, in considering involvement of a special master, the Class Certification Order did not discuss how the findings of a special master would be presented to the Court. Absent agreement between the parties, a special master's findings of fact and conclusions of law must be reviewed by this Court *de novo*. Fed. R. Civ. P. 53(f)(3)-(4). Even assuming a very modest dispute rate, with 42,000 policy files at issue, and 8.8 million pages of documents, the Court would likely be called upon to determine hundreds of individual issues regarding subclass membership.

Moreover, the parties acknowledge that review of at least approximately one quarter of the policy files will not yield any type of definitive answer regarding subclass membership.³

² At the hearing, Plaintiffs asked that the Court consider the Dinglasan Declaration's response to the Monahan Declaration. (*See* Dinglasan Decl. (Docket No. 436-1).) Therein, Dinglasan points out that the three files referenced in the above-cited portion of the Monahan Declaration contain Agents' Reports with notations that Illustrations were used; thus, as the Court understands the inference, there would be no controversy regarding subclass membership. That may be so. However, even if this examination (and others like it) conclusively answer ascertainability issues as to particular files, the individualized inquiry required to do so as to all files merely underscores the lack of predominance of common issues.

³ Plaintiffs so concede. (Pltfs.' Brief at 14 (referencing 28% of the class members as requiring questionnaires on the issue of receipt of Sales Illustration).) LSW contends the number is actually much higher. For present purposes, the Court assumes Plaintiffs are correct.

