

## MOST OF CONSECO CLASS ACTION SURVIVES BID TO TOSS

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Law360, New York (July 31, 2009) -- A federal court has refused to dismiss most of a putative class action against Consecos Life Insurance Co. alleging the insurer knowingly underfunded life insurance policies and failed to inform policyholders about a calculation error for nearly three years.

In a decision handed down Wednesday in the U.S. District Court for the Northern District of California, Judge Susan Illston denied the majority of Consecos motion to dismiss the 14 causes of action in the suit, which seeks compensatory, treble and punitive damages.

The suit was filed in December against the Indiana-based Consecos and its holding company, Consecos Inc., by seven plaintiffs who bought life insurance policies from a company Consecos acquired in 1996.

Under the terms of those policies, premium payments were placed into an account that earns monthly interest, and as long as a policy was adequately funded, a policyholder could stop making premium payments.

According to the complaint, although Consecos discovered in November 2005 that it had miscalculated several policies, the insurer continued to send policyholders annual statements saying that it was not charging cost of insurance expenses, and that the values of the policies were continuing to increase.

It was not until October 2008 that Consecos informed policyholders that due to "administrative issues" related to certain policies, policyholders might not have been informed that their policies were underfunded and required additional premiums.

The complaint alleges Consecos overstated the amount of the shortfalls in order to retroactively charge plaintiffs the cost of insurance rates that differed from the amounts the insurer disclosed in the annual statements.

The plaintiffs also claim that Consecos breached the terms of the policies by failing to give policyholders proper notice when it believed the policies were underfunded.

The suit was brought on behalf of a class of all U.S. residents who owned three types of policies acquired and serviced by Consecos, and also includes a California subclass.

In a motion to dismiss filed in May, Consecos argued that five of the 14 causes of action are legally deficient because they allege violations of California's Consumers Legal Remedies Act, which does not apply to insurance transactions.

In her opinion, Judge Illston noted that both parties had agreed to dismiss these claims.

As for the claim asserting violation of the consumer protection statutes of certain states, the court denied the defendants' request for dismissal, ruling that the defendants have been given adequate notice of the allegedly wrongful conduct on which the violations of other states' consumer protection laws are based.

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Conseco had argued for dismissal of the remaining claims, insisting that the complaint does not contain well-pleaded facts showing that the alleged wrong caused cognizable harm.

But Judge Illston disagreed, holding that the plaintiffs had provided sufficient facts for the claims to proceed.

The court ruled in favor of Conseco on several points, however, including that the plaintiffs failed to allege facts supporting the breach of fiduciary duty claim because the complaint does not state that the policyholders relied on the defendants for investment advice. The court dismissed that claim with leave to amend.

The court also agreed with Conseco that the plaintiffs failed to allege sufficient facts to support the claim that Conseco Life is Conseco Inc.'s general agent in California, but told the plaintiffs they could conduct discovery to amend the complaint as to this point.

August J. Matteis Jr., an attorney for the plaintiffs, said the order was "a great ruling for the policyholders" because it rejected the defendants' argument that the holders were not damaged as a result of Conseco's conduct.

Counsel for Conseco could not be reached for comment Friday.