



Annuity Marketplace

ACLI 2011 Compliance and
Legal Sections Annual Meeting

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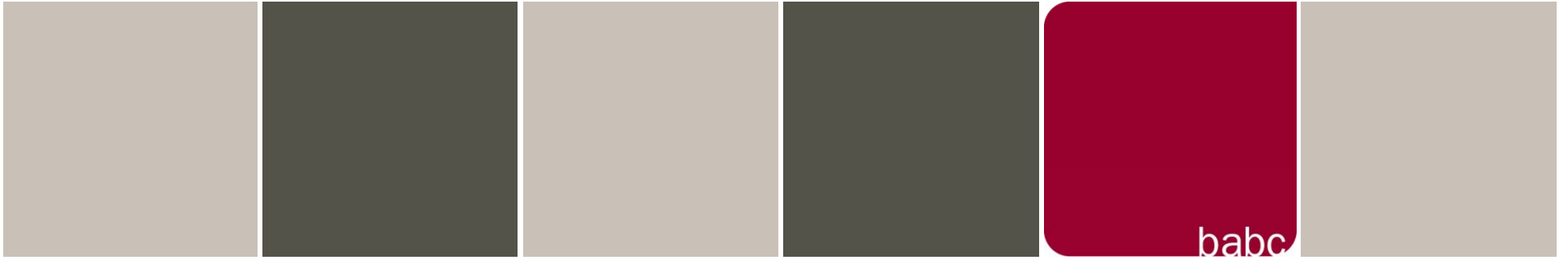


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Topics

- Class Certification in Annuity Litigation
 - Impact of *Wal-Mart v. Dukes*
- Recent Annuity Case Law
- Exchanging Annuities for Life Insurance
- STAT Litigation
- Bad Faith Claims in Annuity Litigation



Class Certification in Annuity Litigation





Class Certification

- *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087 (9th Cir. 2010)
 - Hawaii's Deceptive Practices Act ("DPA")
 - Allegedly misleading annuity brochures
 - Court found that trial court abused its discretion by denying certification
 - DPA does not require individualized evidence of reliance—only reasonable person standard
 - Individual question of damages does not defeat certification



Class Certification

- *Kennedy v. Jackson Nat'l Life Ins. Co.*, 2010 WL 2524360 (N.D. Cal. 2010)
 - RICO and state law claims based on sale of deferred annuities to seniors
 - Nationwide class of persons 65 or older who purchased deferred annuities from '02-present
 - Fraud-based claim may be certified if based on “common course of conduct”
 - Causation and reliance could be “inferred”



Class Certification

- *In re Nat'l W. Life Ins. Deferred Annuities Lit.*, 268 F.R.D. 652 (S.D. Cal. 2010)
 - Court certified nationwide class for RICO claim and California class for state law claims
 - Causation may be established by reliance, and reliance may be inferred where marketing materials are uniform
 - Denied certification on fiduciary duty claim because agent conduct was not uniform
 - Recently granted “Apex” depositions



Class Certification

- *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. Aug. 12, 2010)
 - Interest rates on fixed deferred annuities
 - Credited higher rates on “new money”
 - Affirmed denial of class certification
 - Claims involved individual questions of reliance under California UCL
 - Different result in Ninth Circuit?



Class Certification

- *Dukes v. Wal-Mart Stores, Inc.*, 2011 WL 2437013 (U.S. June 20, 2011)
 - Reversed judgment affirming class certification
 - Court held that no common question of law or fact existed under Rule 23(a)(2)
 - Certification of claims for monetary relief under Rule 23(b)(2) is not appropriate
 - Rejected “predominance” argument
 - Court disapproved of “Trial by Formula”



Does *Dukes* Matter to Us?

- Plaintiffs will say no:
 - Employment case—not analogous
 - Annuity cases involve uniform decisions, representations, omissions, unlike discretionary employment decisions
 - Annuity cases involve more “questions” than employment cases like *Dukes*—only need one common question to satisfy Rule 23(a)(2)



Does *Dukes* Matter to Us?

- Why *Dukes* matters:
 - Rule 23(b)(2) and trial by formula holdings
 - Commonality holding supports argument that reliance is not a “common question”
 - Impacts analysis of Rule 23(a)(2) and predominance requirement of Rule 23(b)(3)



Does *Dukes* Matter to Us?

- Why *Dukes* matters:
 - Employment decisions in *Dukes* are analogous to purchase decisions in annuity litigation.
 - Just as there was no “common answer” for the employment decisions in *Dukes*, there is no “common answer” for why policyholders purchase annuities.

Does *Dukes* Matter to Us?

- Before *Dukes*:

- *Kennedy v. Jackson Nat'l*:

- Commonality “has been construed permissively.”

- *In re Nat'l Western*:

- Commonality is “‘minimal’ bar to certification.”

- After *Dukes*:

- *Walter v. Hughes Communications, Inc.*, 2011 WL 2650711 (N.D. Cal. July 6, 2011)

- *Dukes* “represents a significant restatement of the commonality requirement.”

Other Annuity Cases

- *Kennedy v. Jackson Nat'l Life Ins. Co.*, 2010 WL 4123994 (N.D. Cal. Oct. 6, 2010)
 - Granted summary judgment for RICO claim
 - No duty to disclose commissions
 - Such logic would require disclosure of all expenses
 - Disclosure of MVA/EIA did not amount to scheme to defraud
 - Interest rate bonus was not deceptive
 - UCL and Elder Abuse claims also failed for essentially the same reasons



Other Annuity Cases

- *Rand v. Am. Nat'l Ins. Co.*, 717 F. Supp. 2d 948, 950-51 (N.D. Cal. 2010)
 - Alleged improper disclosure of surrender charge, MVA, and death-related surrender charge
 - Granted plaintiffs' motion for partial SJ
 - Ct found that MVA was “associated penalty” under surrender charge disclosure statute
 - Case settled for over \$9 million
 - Fairness hearing set in September



Other Annuity Cases

- *Rowe v. Bankers Life and Cas. Co.*, 2010 WL 3699928 (N.D. Ill. Sept. 13, 2010)
 - Court granted motion to dismiss RICO claim
 - RICO fraud allegations must meet specificity standard of Rule 9(b)
 - Court granted plaintiffs leave to amend complaint, which they did.
 - Court recently ruled that Cal. market conduct exam was privileged and not subject to production. 2011 WL 1897181



Other Annuity Cases

- *Smith v. Nat'l W. Life Ins. Co.*, 2010 WL 1904040 (M.D. Pa. May 22, 2010)
 - Plaintiff, 83 with dementia, purchased annuity with 20-year surrender period
 - Plaintiff brought claims under Pennsylvania's Unfair Trade Practices and Consumer Protection Law
 - Court granted summary judgment on grounds that agent was plaintiff's broker, not defendant's agent



Other Annuity Cases

- *Ballard v. Hartford Life Ins. Co.*, 2011 WL 522793 (Conn. Super. Jan. 18, 2011)
 - Transfer of assets from one annuity to another led to cancellation of death benefit
 - Court granted motion to strike fiduciary duty and punitive damages claims
 - Court denied motion to strike breach of contract and negligence claims
 - Held that a negligence claim can arise out of a breach of contract



Commission Chargebacks

- Settlements often result in chargebacks
- Factors to consider before litigating:
 - Amount in issue
 - Ability to setoff against future commissions
 - Potential counterclaims by agent
 - Accuracy of commission calculations
 - Ability to recover judgment
 - Assemble evidence in advance



Commission Chargebacks

- *Midland Nat'l Life Ins. Co. v. Nikkel*, 2011 WL 1885984 (Mich. App. May 12, 2011)
 - Agent failed to disclose tax implications of withdrawals from two \$200k annuities
 - Midland settled dispute prior to litigation by refunding one of the annuities
 - Charged back \$18k in commissions and filed suit against agent
 - Court granted summary judgment to Midland

Commission Chargebacks

- *American Gen. Life Ins. Co. v. Crosswhite*, 2011 WL 285704 (D. Utah Jan. 26, 2011)
 - \$17m life policy; \$137k in commissions
 - Insured surrendered policy
 - 50% chargeback--\$69k
 - Court granted summary judgment for Insurer



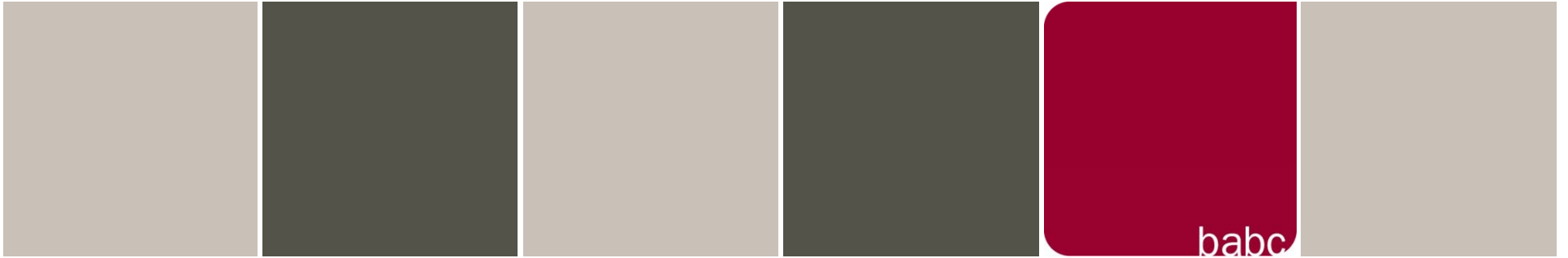
Commission Chargebacks

- *Union Central Life Ins. Co. v. Balian*, 2011 WL 1753620 (S.D. Ohio March 8, 2011)
 - Insurer brought suit to recover \$91k in commissions
 - Insurer filed suit in state of its principal place of business
 - Court dismissed suit for lack of personal jurisdiction



Insurance Coverage

- *Lafayette Life Ins. Co. v. Arch Ins. Co.*, 2011 WL 1085799 (N.D. Ind. March 21, 2011)
 - Rogue agent; allegations of fraud and unsuitable life sales in N.C.
 - Vicarious liability coverage under E&O policy
 - Arch denied defense and indemnity
 - Court held that allegations of independent wrongdoing by LLIC did not bar coverage
 - Arch's interpretation would render policy illusory



Suitability in the Exchange of Annuities for Life Insurance





Annuity Exchanged for Life Policy

- Two Issues:
 - Does the exchange of an annuity for a life insurance policy trigger the suitability in annuity transactions model regulation?
 - If so, how should companies compare the value of a life policy to the value of an annuity?



Annuity Exchanged for Life Policy

- Does the exchange of an annuity for a life policy trigger the suitability regulation?
 - Section 2 of the 2010 Annuity Suitability Reg.:
“This regulation shall apply to any recommendation to purchase, exchange or replace an annuity....”



Annuity Exchanged for Life Policy

- Legislative history of Section 2 (NAIC 275-19) from 2003:

“[O]ne new issue was whether the rules should apply to all transactions involving an annuity, or just a transaction where an annuity was being purchased. The language settled on referred to a purchase or exchange of an annuity.”



Annuity Exchanged for Life Policy

- Section 5.G.:
 - “Recommendation” is defined as “advice provided by an insurance producer ... to an individual consumer that results in a purchase, exchange or replacement of an annuity in accordance with that advice.”



Annuity Exchanged for Life Policy

- Section 6A. Duties of Insurers and of Insurance Producers:

“In recommending to a consumer the purchase of an annuity or the exchange of an annuity that results *in another insurance transaction or series of insurance transactions,*”
....”



Annuity Exchanged for Life Policy

- Contrary language:
 - Section 5.1.: Suitability information includes “(6) Intended use of the annuity;”
 - Section 6: “(1) The consumer has been reasonably informed of the various features of the annuity....”



Annuity Exchanged for Life Policy

- How should companies compare the value of a life policy to the value of an annuity to evaluate suitability?
 - Current surrender value?
 - Maximum benefit to estate?
 - How should the death benefit be weighed?
 - Should projected account value be considered?
 - Note: Section 1.A.: suitability is determined “at the time of the transaction”



Annuity Exchanged for Life Policy

- Inevitably involves some degree of subjective analysis
- Factors to consider:
 - Suitability information, especially financial objectives
 - Type of life policy
 - Standard policy or hybrid product?
 - Number of years annuity was in force
 - Same agent? Same company?



STAT Litigation

- Stranger-initiated Annuity Transactions
 - Annuity equivalent of STOLI
 - Deferred variable annuities
 - Guaranteed death benefit
 - Market participation without risk
- State law varies on whether annuities require insurable interest



STAT Litigation

- *Western Reserve Life Assur. Co. of Ohio v. Conreal LLC*, 2010 WL 2222409 (D.R.I. June 2, 2010)
 - No insurable interest requirement for annuities because they are not “insurance contracts” under R.I. law
 - Incontestability clause barred claims against policyowners
 - Incontestability clause did not protect sponsors, agents and brokers

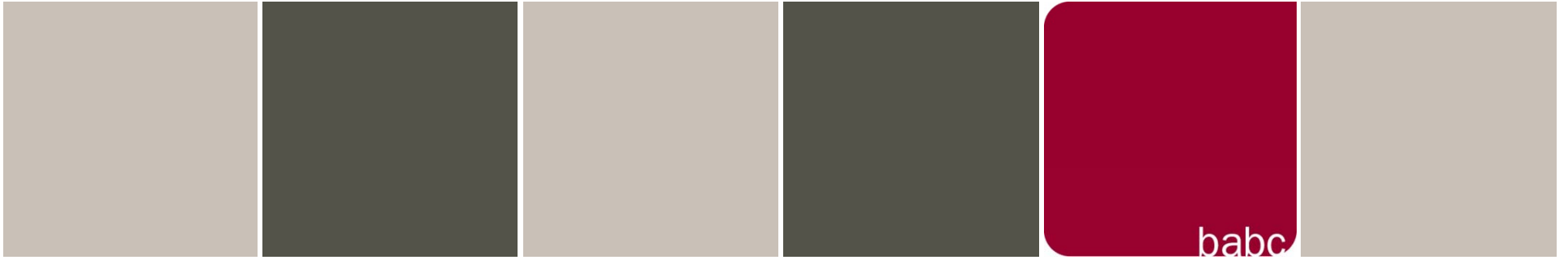
STAT Litigation

- *MetLife Investors USA Ins. Co. v. Zeidman*, 734 F. Supp. 2d 304 (E.D.N.Y. 2010)
 - \$975k deferred variable annuity with death benefit and 40% bonus on gains
 - 38 year old, terminally-ill annuitant with no relationship to trust
 - Annuitant died 12 days after issue
 - MetLife rescinded the policy and filed interpleader action; estate counterclaimed
 - Court dismissed all claims



Bad Faith

- Prusky v. Allstate Life Ins. Co., 2010 WL 3859787 (E.D. Pa. Sept. 30, 2010)
 - Court granted Allstate’s motion to dismiss bad faith claim
 - Court distinguished annuities from insurance policies and held that no bad faith claim existed under Pennsylvania law for breach of an annuity



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