

# Litigation Update

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# Topics

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- **Class Action Certification**
- **Annuity Suitability**
- **Class Arbitration**
- **Rule 23 Preemption**
- **STOLI/STAT**
- **Rescission**
- **Alternative Fee Agreements**

# Class Certification



# Class Certification/Annuities

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- *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/Annuities

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- *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
  - California’s UCL required individual evidence notwithstanding *Tobacco II* decision
  - Different result in Ninth Circuit?



# Certification Post-Yokoyama

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- *In re Countrywide Fin. Corp.*, 2010 WL 1691451 (S.D. Cal. April 23, 2010)
  - Mortgage lending case involving claims under Washington Consumer Protection Act (“CPA”)
  - CPA does not require intent to deceive
  - But CPA does require causation, and causation may involve a showing of reliance
  - Court distinguished *Yokoyama* on this basis and denied certification



# Certification Post-Yokoyama

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- *Edwards v. First American Corp.*, 2010 WL 2617588 (9th Cir. June 21, 2010)
  - Lower court abused its discretion by denying certification of Ohio class
  - “The reliance or causation element requires a more individualized determination, but when misrepresentations are made to a class of similarly situated individuals, the requirement that the Plaintiff prove reliance or causation will not, by itself, defeat class certification.”



# Certification Post-Yokoyama

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- *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 Action Hypothetical

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- Jurisdiction A:
  - Record of granting class certification
  - Defendant has the burden of proving the amount of damages in dispute for jurisdiction
    - In some cases to a “legal certainty”
  - Focus on electronic discovery
  - Imposes settlement hurdles:
    - Burdensome notice requirements to regulators
  - Interlocutory appeal rarely granted



# Class Action Hypothetical

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- Jurisdiction B:
  - Appellate court rarely approves of certification
  - Defendant does not have to prove disputed damages
  - Minimal focus on electronic discovery
  - Automatic right to appeal certification ruling
  - No notice requirements to regulators

# Class Action Hypothetical

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- Answer:
  - Jurisdiction A
    - Federal Court in Eleventh Circuit (Florida, Georgia, Alabama)
  - Jurisdiction B
    - Alabama State Court



# Class Arbitration

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- *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S.Ct. 1758 (2010)
  - “[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”
  - No class arbitration where agreement is silent



# Rule 23 Preemption

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- *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 13. S.Ct. 1431 (2010)
  - New York state law prohibits class actions to recover a penalty, such as statutory interest
  - S. Ct. held that Rule 23 preempted the New York law for matters in federal court



# STOLI

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- Rapidly developing case law.
- Legal issues:
  - Lack of insurable interest
  - Material misrepresentation on application
    - Income
    - Net worth
    - Existence of agreement to assign policy
    - Applications pending with other companies
  - Contestability

# STOLI – New York

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- *Kramer v. Lockwood Pension Serv., Inc.*, 653 F. Supp. 2d 354 (S.D.N.Y. 2009)
  - \$56 million in coverage issued by three insurers to life insurance trusts.
  - Insured died after contestable period.
  - Court certified for interlocutory appeal the issue of whether New York law prohibits purchasing policy on one's own life with the intent to immediately transfer the beneficial interest to an investor.

# STOLI – New York

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- *Penn Mut. Life Ins. Co. v. Wolk*, 2010 WL 2594876 (S.D.N.Y. June 28, 2010)
  - Denied motion to dismiss insurer’s claims
  - Insurable interest required “good faith intent” to obtain insurance for family or business
  - Must be insured’s “own initiative”
  - Consider who paid premiums and amount of time between issuance and assignment



# STOLI – New York

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- *Settlement Funding, LLC v. AXA Equitable Life Ins. Co.*, 2010 WL 3825735 (S.D.N.Y. Sept. 30, 2010)
  - Assignee brought suit to recover under policy
  - AXA asserted policy was void after 2 years
  - Cross motions for summary judgment
  - Court held that evidence of lack of insurable interest and fraud created question of fact as to validity of policy
  - Court denied investor's MSJ

# STOLI – Delaware

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- *Sun Life Assur. Co. of Can. v. Berck*, 2010 WL 2607247 (D. Del. June 29, 2010)
  - Question of whether insurer may contest existence of insurable interest after contestability period is issue of first impression
  - Plaintiff failed to allege involvement of third party and “bilateral intent” to assign policy
  - Dismissal appropriate because insurer’s allegations were too general and speculative
  - Granted leave to amend complaint



# STOLI – Delaware

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- *Lincoln Nat'l Life Ins. Co. v. Joseph Schlanger 2006 Ins. Trust*, 2010 WL 2898315 (D. Del. July 20, 2010)
  - Denied motion to dismiss where plaintiff alleged third party investor was involved and would be identified in discovery
  - Court deferred until summary judgment stage ruling on issue of whether incontestable clause barred plaintiff's claim



# STOLI – Delaware

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- *Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Trust*, 2010 WL 3395661 (D. Del. Aug. 30, 2010)
  - Insured purchased policy pursuant to agreement to sell beneficial interest
  - Insurer brought suit within contestable period
  - Granted summary judgment in favor of Insurer on issue of whether policy lacked insurable interest

# STOLI – Delaware

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- *American Gen. Life Ins. Co. v. Goldstein*, 2010 WL 3833955 (D. Del. Sept. 30, 2010)
  - Insurer brought suit after contestable period
  - Court denied defendants’ motion to dismiss
  - “[C]omplaint sufficiently alleges ... that there was either an arrangement in place or a unilateral intent, at the time of procurement, to transfer the policy”

# STOLI – New Jersey

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- Lincoln Nat'l Life Ins. Co. v. Schwarz, 2010 WL 3283550 (D.N.J. Aug. 18, 2010)
  - Lincoln adequately alleged that policies were void *ab initio* for lack of insurable interest
  - Court declined to hold that incontestability clause barred Lincoln's claim
  - Deferred final ruling on the issue, but implied that incontestability clause would not bar claim under New Jersey law where there was fraud in the application



# STAT

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- Stranger-originated Annuity Transactions
  - Deferred variable annuities
  - Guaranteed minimum benefits
  - Market participation without risk
- State law varies on whether annuities require insurable interest



# STAT

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- *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



# Rescission

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- *Harper v. Fidelity and Guar. Ins. Co.*, 234 P.3d 1211 (Wyo. 2010)
  - Several misrepresentations on application
  - Insurer rescinded policy
  - Insured filed bad faith action
  - Court granted summary judgment for insurer
- *See also Adam v. Stonebridge Life Ins. Co.*, - F.3d --, 2010 WL 2772682 (8th Cir. July 15, 2010)

# Rescission

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- *Mitchell v. Fortis Ins. Co.*, 686 S.E.2d 176 (S.C. 2009)
  - Insured did not misrepresent HIV status
  - Insurer rescinded health policy based on erroneous date in insured's medical records
  - Jury awarded \$186,000 in compensatory damages and \$15 million in punitive damages
  - S.C. Supreme Court reduced punitive damages award to \$10 million based on ratio to estimated \$1 million cost of treatment



# Alternative Fee Agreements

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- Three General Categories:
  - Billable Hour
    - Discounted or Blended Rates; Retainers; Holdbacks
  - Contingency
    - Plaintiff Cases
  - Fixed Fee
    - Modules
    - Matter
    - Volume of Matters



# Structuring AFAs

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- Are AFAs a good fit?
  - Litigation volume
  - Corporate culture
- Keep an open mind
  - Brainstorming is free
- Don't focus on the fee (at first)



# Structuring AFAs

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- Three Steps:
  1. Identify goals and objectives
  2. Define the scope
  3. Determine the fee



# Structuring AFAs – Step 1

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- Identify Goals and Objectives
  - Communicate to outside counsel
  - Understand client’s goals and objectives
    - Predictability?
    - Cost savings?
    - Streamline administration?
    - Consolidate outside counsel?
- Identify Win-Win Opportunities



# Structuring AFAs – Step 1

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- Fee is not everything
  - Relationship is paramount
  - Value-added bonuses
  - Identify problems and solve them
- Two Keys:
  - Improve company's business
  - Make client's life easier



# Structuring AFAs – Step 2

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- Define the Scope
  - Scope of Agreement
    - One matter
    - Volume of matters
      - Define selection criteria
    - Geographic region
  - Scope of Representation
    - Counterclaim?
    - Trial?
    - Appeal?

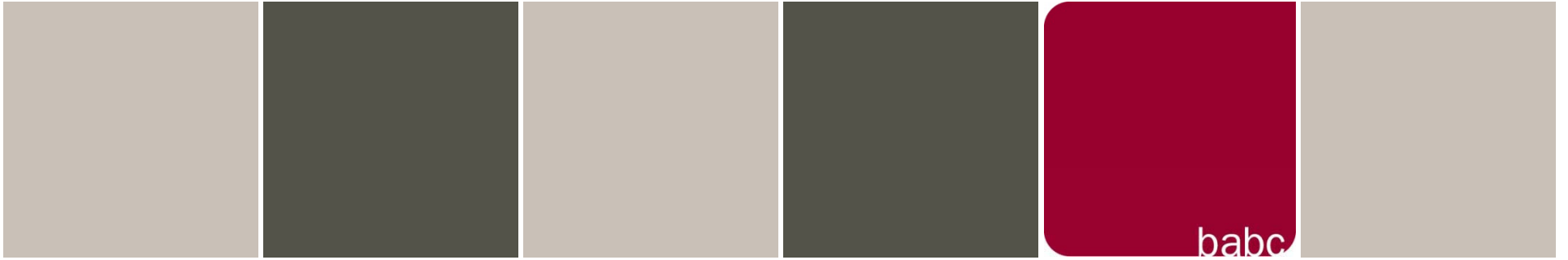




# Structuring AFAs – Step 3

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- Determine the Fee
  - Mine billing history on similar matters
  - Analyze historical legal spend
  - Evaluate staffing
  - Collar provision
  - Hit the green, not the flag



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