

Case No. B254409

**COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN**

DANIEL TABARES; RHODA TABARES; JUDY L. TAYLOR; and
ELIZABETH YOUNG. On behalf of themselves and all other similar
situated individuals

Plaintiff and Appellant,

v.

EQUITRUST LIFE INSURANCE COMPANY; JOSEPH SACKKEY;
and DOES 1 through 100, inclusive

Defendant and Appellee.

**AMICUS BRIEF OF UNITED POLICYHOLDERS
IN SUPPORT OF PLAINTIFF AND APPELLANT**

From a Decision by the Los Angeles Superior Court
Case No. BC390195, Hon. Lee Smalley Edmon, Presiding

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I. INTRODUCTION

United Policyholders (“UP”) respectfully submits this brief of *amicus curiae* in support of Plaintiff Appellants Daniel Tabares (“Appellants”). We agree with Appellants’ contention that the trial court erred in granting Defendant Respondent Equitrust’s (“Equitrust”) motion for summary judgment on Appellants’ breach of contract cause of action, and in denying class certification on Appellants’ causes of action for declaratory relief and under the unlawful prong of the Unfair Competition Law based on EquiTrust’s violation of Insurance Code section 10127.13 in the sale of its deferred annuity products (AOB at 3).

We also agree with Appellants’ contention that the trial court erred in denying class standing to class representatives that surrendered their contracts. *Id.* Annuity products with investment features are among the most complex insurance products being marketed to consumers today, and errors in yield forecasts associated with these products played a role in the financial crisis.¹ Lessons

¹ See “*Variable Annuities – Recent Trends and the Use of Captives*”, Federal Reserve Bank of Boston, Elise Brenneman, David (Fengchen) Du, Cynthia Martin, October 7, 2014 (last visited April 16, 2015) (<http://www.bostonfed.org/bankinfo/publications/variable-annuities.pdf>).

apparently not having been learned, private equity investors and insurance entrepreneurs are again rushing to concoct and sell “creative” new types of annuities with investment features and regulators cannot keep up. Given the facts set forth in Appellants’ pleadings, and the fact that Congress has given the states regulatory oversight over these products, summary judgment and class cert denial in this case was neither warranted nor appropriate.

As noted in Appellants’ Opening Brief, the trial court described the cause of action as one for breach of the implied covenant of good faith and fair dealing yet in the order granting summary adjudication, the court recognized that “a breach of the implied covenant is necessarily a breach of contract,” *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885, and that the claim of breach of the implied covenant in this case “is inextricably linked” with the claim for breach of the express contract here (Order at 8, FN 7; AOB at 2). As Appellants correctly contend, the court erred in above rulings, effectively dismissing all claims and parties to the action.

The purpose of UP’s *amicus curiae* brief is to assist the Court in its understanding of the equities at issue in this case, beyond the

“four corners” of the contract. As the Court is no doubt aware, insurance contracts, whether they be for life, health, property, or in the instant case, deferred annuities, are written by lawyers, not for the average consumer. As such, courts must not only enforce contracts as they are written, but also as they are understood, their terms given meaning in their ordinary and popular sense in accordance with the reasonable expectations of the policyholder. *See, e.g., Waller v. Truck Ins. Exch.* (1995) 1. Cal.4th 1, 18; *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186; *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27; *See also* Cal. Civ. Code. Sec. 1644.² In addition to the unique way in which courts interpret insurance contracts, insurers owe a “quasi-fiduciary” duty to abide by the covenant of good faith and fair dealing implied in all contracts. *See Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal. 3d 566.

In the instant case, indexed annuity policyholders reasonably expected a satisfactory return on investment and were led to believe the product they had purchased would deliver on its promise.

² The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

Accordingly, UP urges the Court to reexamine Appellants' cause of action for breach of contract and breach of the covenant of good faith and fair dealing ("bad faith") and the trial court's refusal to certify the class and appoint the specified class representative.

II. STATEMENT OF INTEREST

United Policyholders ("UP") was founded in 1991 as a non-profit organization dedicated to educating the public on insurance issues and consumer rights. The organization is tax-exempt as a §501 (c)(3) entity. UP is funded by donations and grants from individuals, businesses, and foundations. UP does not accept financial contributions or support from insurance companies.

Through a *Roadmap to Recovery*[™] program United Policyholders helps individuals navigate the insurance claim process and recover fair and timely settlements. Through an *Advocacy and Action* program, UP works with public officials, other non-profit and faith-based organizations and a diverse range of entities – including insurance producers, insurers and trade associations to solve problems related to claims and coverage. UP's Executive Director is serves as an appointed consumer representative to the National Association of Insurance Commissioners ("NAIC"), and works closely with the

California Department of Insurance and Commissioner Jones on a variety of issues affecting California insureds.

A diverse range of policyholders throughout California communicate on a regular basis with UP, which allows us to provide important and topical information to courts via the submission of *amicus curiae* briefs in cases involving insurance principles that are likely to impact large segments of the public and business community. UP's *amicus curiae* brief was cited in the U.S. Supreme Court's opinion in *Humana v. Forsyth*, 525 U.S. 299, 314 (1999), and its arguments have been adopted by the California Supreme Court in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.*, 40 Cal.4th 19 (2006) and *Vandenberg v. Superior Court*, 21 Cal.4th 815 (1999).

UP has filed *amicus curiae* briefs on behalf of policyholders in over 360 cases throughout the U.S., including the following recent California cases: *Association of California Insurance Companies v. Dave Jones, Insurance Commissioner* (Case No. B248622, Court of Appeal, Second District, Division One, 2014); *Nickerson v. Stonebridge Ins. Co.* (Case No. S213873, California Supreme Court, 2014); and *Stephens v. Fireman's Fund Ins. Co.* (Case No. A135938 & A136740, Court of Appeal, First District, Division One, 2014).

Accordingly, UP seeks to fulfill the "classic role of amicus curiae in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). This is an appropriate role for amicus curiae. As commentators have often stressed, an amicus is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." Robert L. Stem, et al., *Supreme Court Practice* 570 71 (1986), quoting Ennis, *Effective Amicus Briefs*, 33 *Cath. U. L. Rev.* 603, 608 (1984).

UP has a particular interest in this case because of the predatory and confusing nature of the deferred annuity products at issue, especially with respect to the negative effect of bonuses and commissions on the rate of return for policyholders of deferred annuity products. As a voice and information resource for insurance consumers, including current and would-be deferred annuity policyholders, UP must work to ensure that the sale and execution of deferred annuity contracts do not take advantage of or mislead consumers. As discussed above and below, these products are risky,

relatively unrelated, and confusing and thus require judicial scrutiny as to fairness, equity, and consumer protection.

III. STANDARD OF REVIEW

An order on class certification and summary adjudication of purely legal issues are subject to the independent review of an appellate court. *See Wershba v. Computer* (2001) 91 Cal.App.4th 224; *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 972, respectively. Accordingly, this Court may review the legal issues – breach of contract and bad faith – and whether the trial court erred in refusing to certify the class and appoint a representative.

IV. ARGUMENT

A. Judicial oversight is necessary to determine whether the “Premium Bonus” scheme amounts to breach of contract under California law.

From a purely legal perspective, the indexed annuity products at issue violate a policyholders *reasonable expectations* and basic tenets of contract law. *White, supra*. The basic rule of contract interpretation is to effectuate the mutual intent of the parties. *Bank of the West v. Sup. Court* (1992) 2 Cal.4th 1254. In order to do so, a party to a contract is to understand contract terms in their ordinary and

popular sense. *See Founding Members v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944. In other words, the plain meaning of terms will prevail in the event of a legal dispute.

At issue here is the premium “bonus” would ordinarily be understood to mean that the policyholders receive monetary compensation above and beyond what they would normally receive. Not so here – where Equitrust’s annuity products roll the “bonus” into the costs that are ultimately passed on to the policyholder. Contracts should also be read as they would be understood by the average consumer. *See AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807. Would an average consumer understand that their “bonus” would be deducted from the principal? No. The tactic is deceptive certainly amounts to a breach of contract under California law. Cal. Bus. Prof. Code sec. 17200.³

Appellants’ brief contains a lengthy discussion about the nature of the contract and the legal precedents involved (some discussed above). *Amicus curiae* UP need not be repetitious of these arguments and analysis but believe it is helpful for the court to be reminded that

³ [unfair] competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising...

there are equities involved in insurance contracts, where consumers' financial assets are involved, that are often downplayed by the drafters of the contracts (the insurance companies) and ignored by courts.⁴

For example, the “premium bonuses” which are offered may show a higher starting paper value but that value is eventually offset by lower yields over the indexed annuity's term.⁵ Stepping back for a moment, what is exactly is an indexed annuity? According the California

Department of Insurance (“DOI”):

Fixed Annuities guarantee that your money will accumulate at a minimum specified rate of interest. However, the company may

⁴ See 16 Richard A Lord, *Williston on Contracts*, 49:15 (4th ed. 2014) “The fundamental reason which explains...judicial predisposition toward the insured is the deep-seated often unconscious but justified feeling or belief that the powerful underwriter, having drafted its several types of insurance contracts with the aid of skillful and highly paid legal talent, from which no deviation desired by an applicant will be permitted, is almost certain to overreach the other party to the contract. The established underwriter is magnificently qualified to understand and protect its own selfish interests. In contrast, the applicant is a shorn lamb driven to accept whatever contract may be offered on a ‘take-it-or-leave-it’ basis if he or she wishes insurance protection...insurance policies, while contractual in nature, are certainly not ordinary contracts, and should not be interpreted or construed as individually bargained for, fully negotiated agreements, but should be treated as contracts of adhesion between unequal parties. This is because...insurance contracts are generally not the result of the typical bargaining and negotiating processes between roughly equal parties that is the hallmark of freedom of contract.”

⁵ See *Congress Sells Out Seniors: No SEC Regulation for Indexed Annuities*, Jane Quinn, Moneywatch, CBS News (July 6, 2010).

pay you a higher rate of interest if its investment experience is better than the minimum guarantee. A fixed deferred annuity always contains guarantees. For example, it might guarantee that the interest rate on the funds accumulating in your policy will be at least 2%. The guarantees are conservative, so that the company will be able to pay you the guaranteed amounts, even if conditions are very bad.

The DOI describes two types of Fixed Annuities, including the equity-index annuity, and notes the complexity of these policies:

...a fixed annuity that pays interest linked to a stock market index [Standard & Poor's 500]. Unlike variable annuities, equity-index annuities cannot lose value. These are complex contracts. They typically offer a minimum guaranteed return with additional interest based on how the index performs.⁶

The U.S. Securities and Exchange Committee (“SEC”) provides detailed information about indexed annuities to potential investors, including the risks. But time and time again the NAIC has underscored the need for regulation of these products. Disclosures alone do not protect consumers or obviate the need for civil remedies for deceptive practices by the purveyors of annuity products.⁷

⁶ See California Department of Insurance, Senior Information Center, *Annuities: What Seniors Need to Know* (Revised 2012) (last visited April 16, 2015) (<http://www.insurance.ca.gov/0150-seniors/0600informationguides/seniorannuitiesguide.cfm>).

⁷ See U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, *Investor Bulletin: Indexed Annuities* (April 2011) (<https://www.sec.gov/investor/alerts/secindexedannuities.pdf>) (last visited April 16, 2015); See also NAIC Whitepaper: Suitability

UP contributes to the NAIC’s ongoing efforts to develop model regulations to help states protect consumers in connection with the sale of investment annuity products.⁸ The NAIC Life Insurance and Annuities Replacement Model Regulation (October 2005), for example, places fiduciary-like duties on life insurance and annuity insurers and their agents/producers with respect to the advertising and sale of life insurance and annuity products.⁹ The Model Regulation also prohibits and penalizes certain “unfair trade practices” related to the sale of such products, including: “...any deceptive or misleading information set forth in sale material.”¹⁰

UP urges this Court to carefully scrutinize the record on the question of whether the indexed annuity products at issue here actually deliver on the promises made. If the record is unclear, then

of Sales of Life Insurance and Annuities, adopted June 2000 (last visited, April 16, 2015) (<http://www.naic.org/store/free/SOS-LI.pdf>).

⁸ *See, e.g.*, NAIC Model Regulation Service: Annuity Disclosure Model Regulation (#245); Suitability in Annuity Transactions Model Regulation (#275); Advertisements of Life Insurance and Annuities Model Regulation (#570); and Life Insurance and Annuities Replacement Model Regulation (#613).

⁹ Life Insurance and Annuities Replacement Model Regulation at 613-9, Sec. 3-7 (<http://www.naic.org/store/free/MDL-613.pdf>) (last visited April 16, 2015).

¹⁰ *Id.* at Sec. 8(A)(1).

the court must find that summary adjudication on breach of contract and bad faith was improper and determine whether the Trial Court erred in its refusal to certify the class and appoint the specified representative. Evidence suggests that the products at issue do not deliver the bonus or the higher, stock-market type yields promised.

B. Costs disguised as premium bonuses and commissions that result in lower return on investment create incentives to defraud consumers

From a public policy perspective, the most troubling component of these deferred annuity products is the fact that the higher the premium bonuses and commissions are, the lower the return on investment is for the policyholder. This is because the premium bonuses and commissions are considered “costs” by design. This reality is not evident to the policyholder at the time the contract is executed but it is certainly known to the insurer and its actuaries.

California is a particularly consumer-friendly state. Californians enjoy some of the strongest protections in the nation with respect to disclosure requirements for financial institutions, insurance, and other important transactions. A perfect example of this consumer-friendly public policy is Assembly Bill 2347 (“AB 2347”), sponsored by the California Department of Insurance and signed into law by Governor

Jerry Brown this year.¹¹ AB 2347 requires, *inter alia*, that investment annuities are sold with a cover sheet disclosure, which includes a specified notice of cancellation rights. As a result, the California Insurance Code, with the amendments provided by AB 2347, now requires such a disclosure for *both* deferred and immediate investment annuity products. Cal Ins. Code § 786.

In 2011, California Insurance Commissioner Dave Jones sponsored AB 689, which was signed into law by Governor Jerry Brown. AB 689 requires document and product suitability reviews for annuity sales and documentation of the review to protect the consumers. While UP is unaware of whether Equitrust has even been subject to a market conduct exam under AB 689, the mere fact that the Department of Insurance has made indexed annuities sold to seniors an enforcement priority speaks volumes. In fact, the Department of

¹¹ See Department of Insurance Bulletin: *Seniors win more protection with new annuity disclosure requirements* (July 23, 2014) <http://www.uphelp.org/marketplace/2014-07-31/seniors-win-more-protection-new-annuity-disclosure-requirements>); See also (http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2347&search_keywords) (last visited April 16, 2015).

Insurance recently took enforcement action against another indexed annuity provider for unfair business practices.¹²

The NAIC's ongoing work on indexed annuity products, as discussed above, reflects the reality that annuity products with investment features tend to be confusing and misleading to policyholders, and support Appellants' contention that many policyholders, including the "class members" here, have fallen victim to a scheme of empty promises— a scenario that can be avoided by proper regulation and judicial oversight when needed. By granting summary judgment on Appellant's legal claims and refusing to certify the class the trial court overlooked this reality and abdicated the important consumer protection role of state courts.

The U.S. Congress has of late decided taken regulatory authority over indexed annuities away from the SEC and conferred it on the states.¹³ This heightens state court's responsibility. One of many consequences of a lack of uniform regulation over indexed annuities is that the end user, the consumer, like Tabares et al here, is

¹² See California Department of Insurance Bulletin: *Department of Insurance investigation reveals insurer took advantage of seniors with deceptive annuity sales tactics* (February 4, 2015).

¹³ See *Quinn*, *supra* note 3.

left to take the word of the agent/producer at face value *vis a vie* commissions. Are they paid by the insurance company? In many cases, as here, the answer is no. They are paid out of the returns.¹⁴

We respectfully ask this Court to recognize that there are issues in this appeal that reach far beyond the specific facts and the plaintiffs in this case. Private equity investors and insurance entrepreneurs are rushing to concoct and sell “creative” and new types of annuities with investment features and regulators cannot keep up. This Court has an important role in allowing the civil justice system and private bar to supplement regulators’ efforts.

Appellees contend that their products are fiscally sound and that Appellants “realized the benefits provided by [Appellee] Equitrust’s annuities.”¹⁵ Appellees then proceed to attack the credibility of the class representatives based on the contention that they did not read or *understand* the promotional materials included in the contracts.¹⁶ Whether true or not, this does not excuse, and actually helps to make the case that Equitrust has designed and sold products

¹⁴ *Id.*

¹⁵ *See* Respondent’s Brief at 13-15

¹⁶ *Id.* (emphasis added).

which are inherently misleading. This alone warrants judicial oversight rather than dismissal.

V. CONCLUSION

For the foregoing reasons, *amicus curiae* United Policyholders respectfully requests the this Court overturn Trial Court's Order granting Summary Judgment in favor of Appellees and reinstate Appellant's causes of action.

Dated: April 17, 2015

UNITED POLICYHOLDERS

By _____s/_____

Daniel R. Wade

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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to California Rule of Court, rule 8.360 and rule 8.412,
I certify that this Amicus Curiae Brief of United Policyholders in
Support of Appellants is proportionately spaced, has a typeface of 14-
point, proportionally-spaced font, and contains 3,819 words according
to the word count feature of Microsoft Word 2010.

Dated: April 16, 2015

UNITED POLICYHOLDERS

By ___s/_____

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PROOF OF SERVICE

I, declare that I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is 381 Bush Street, 8th Floor, San Francisco, California 94104. On April 16, 2015, I served the attached *amicus curiae* brief on the parties listed below by electronic submission to the Court of Appeals, Second Appellate division:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 17, 2015, at Oakland, California.

____s/____¹⁷

Daniel R. Wade

¹⁷ Printed copy signed per Cal. Rule of Ct. 8.77(a).

