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Conseco Can't Decertify Class In Fee Overcharge Action

By **Sindhu Sundar**

Law360, New York (January 30, 2013, 7:06 PM ET) -- A California federal judge on Tuesday denied Conseco Life Insurance Co.'s bid to decertify a class of policyholders accusing the insurer of charging higher fees in violation of its policy agreements.

U.S. District Judge Susan Illston rejected Conseco's argument that the class should be dismissed if the court finds that certain terms about cost of insurance deductions by Conseco are ambiguous, saying such a potential vagueness affects only one of six of the plaintiffs' breach of contract arguments.

A potential lack of commonality on one claim cannot be used to upend class certification on all the claims, she said.

"Even if the ambiguity Conseco describes actually does prove fatal to one claim, the drastic remedy of decertification is inappropriate here, where there are multiple, viable, breach of contract claims that have common issues under Rule 23," Judge Illston said.

The judge also denied a summary judgment bid by Conseco, which argued that its cost of insurance and expense charges, which the plaintiffs are challenging, are consistent with the terms of its policies.

The case centers on a letter Conseco sent to policyholders in October 2008, notifying them that their policies were underfunded and couldn't cover increased fees and expenses that Conseco was planning to charge. The letter prompted an investigation by state insurance regulators, which led to a May 2010 settlement in which Conseco agreed not to demand one-time payments to cover the sudden shortfalls.

The plaintiffs sued, claiming that notwithstanding the agreement, Conseco was still soliciting one-time payments and that it was charging higher fees in breach of its policy agreements.

In rejecting Conseco's summary judgment bid Tuesday, Judge Illston said that the clash over why the insurer imposed the cost of insurance charges was a factual dispute that could not be resolved on a summary judgment motion. The plaintiffs had argued that the insurer had instituted those charges to cover its other losses, which Conseco denied, the judge said.

An attorney for the plaintiffs declined to comment Wednesday. Attorneys for Conseco could not immediately be reached for comment.

The court first certified the class in October 2010, including both current and former

policyholders in it. Consecos then challenged the certification after the [U.S. Supreme Court's](#) Dukes ruling, which found that monetary claims could not be certified under Rule 23(b)(2), as the Consecos class had, unless such claims were incidental to injunctive or declaratory relief claims.

The court then partly granted the decertification bid at the time, dropping the former policyholders from the class after finding that they had sought monetary relief that was not incidental to such claims.

The plaintiffs are represented by David J. Millstein of Millstein & Associates and Craig J. Litherland, Andrea K. Hopkins, Michelle A. Price, Emily P. Grim and Daniel I. Wolf of [Gilbert LLP](#).

Consecos is represented by Raoul D. Kennedy, James Carroll, David Clancy and Christopher Lisy of [Skadden Arps Slate Meagher & Flom LLP](#).

The case is In re: Consecos Life Insurance Co. Life Trend Insurance Marketing and Sales Practices Litigation, case number [3:10-md-02124](#), in the U.S. District Court for the Northern District of California.

--Additional reporting by Rachel Slajda. Editing by Andrew Park.