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DAILY REPORT
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Court of Appeals allows class action against insurer

TRIAL COURT'S SANCTION over discovery abuse allegations also upheld against Chicago-based company

GREG LAND gland@alm.com

IN A RESOUNDING defeat for the defendant insurance company, the Georgia Court of Appeals has upheld a lower court's decision allowing a class action to proceed on behalf of potentially hundreds of thousands of customers who bought credit insurance when financing their vehicles, but who—in cases in which the loans were paid off early or the cars were wrecked and the loans canceled—were not provided refunds of those premiums.

The appeals court also upheld a stiff sanction order levied by the trial court over allegations of discovery abuse, which Chicago-based Resource Life Insurance Co. had argued could cost it hundreds of millions of dollars if allowed to stand.

"This was a well-deserved opinion," said plaintiffs' attorney Joel O. Wooten Jr. of Butler, Wooten & Fryhofer. "The fact is, Resource Life tried to keep money that didn't belong to it and it didn't earn."

As to the sanctions, he said, "unfortunately for the defendants, they got just what they asked for."

The case began with an auto purchase by Dorothy Buckner in 2001. According to the court's order, that same year Buckner's car was totaled in a wreck, canceling out the balance of her loan. The premium for such a credit insurance policy is a one-time, up-front payment that covers the term of the loan; thus, if the loan is canceled, the insured is due a return of the prorated balance of the premium.

Buckner was owed a refund of $1,213 but, based upon an alleged mathematical error by the automobile dealer who issued the refund, did not get the entire amount.

In 2004, she filed a class action in Muscogee County Superior Court asserting that Resource Life, although able to determine when each of its policyholders' accounts had been cancelled, made no effort to determine when unearned premiums were owed and to repay the same.

The complaint said that failure constituted a "breach of contract, unjust enrichment, negligence, and willful, wanton, and intentional misconduct."

The suit sought compensation for any Resource Life policyholder whose loans were terminated early, and an injunction ordering the company to provide such refunds to those whose loans would be cancelled early in the future.

Resource Life argued that its

Plaintiffs' attorney Joel Wooten called the court's opinion "well-deserved."

insurance certificates contained a "written notice" section stating that it was the responsibility of the insured to notify it of any early cancellation, and asked the court for partial summary judgment and to deny class certification.

The trial court declined to do so, and during discovery ordered Resource Life to turn over information on each potential class member, including "the amount of any unearned premium refunded or credited to the insured and the date of such refund or credit."

The court also ordered the insurer to turn over the loan termination date (LTDs) for any potential member, but Resource Life responded that it had not received any written notice of LTDs for any such policies and

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"continued to assert, throughout the course of the litigation, that it could not obtain LTDs from lenders or anyone else, including the automobile dealers who acted as its agents."

In 2008, the plaintiffs learned that Resource Life had obtained LTDs from at least 82 lenders as far back as 2005, and that the Texas attorney general had provided the company "with several thousand LTDs that his office had obtained from lenders."

The defense then claimed the information was privileged and, facing a plaintiffs' motion for sanctions, asked the court to appoint a special master to review it privately. The special master found that, while some of the documents were privileged, others were subject to discovery; the special master also recommended sanctions against Resource Life for discovery abuse.

On Oct. 29, 2009, Chattahoochee Circuit Superior Court Judge Douglas C. Pullen granted the sanctions motion, ruling that the insurer had provided only 4 percent of the information he had ordered disclosed, and that its failure to comply "was not accidental or unavoidable, it was either willful or the result of a conscious indifference to the consequences."

The sanctions consisted of the trial court's ruling that any member of the class who, according to Resource Life's records, could not be shown to have received an unearned premium refund "'shall be presumed to have terminated early' and be owed such a refund."

The average payment for such refunds, according to the order, was $491.

Resource Life appealed on numerous grounds, arguing that the trial court had erred in its summary judgment ruling and class certification, and taking issue with its sanctions order, among others.

A June 30 order by Judge G. Alan Blackburn, in concurrence with Presiding Judge Anne Elizabeth Barnes and Judge Debra Bernes, upheld Pullen's rulings in their entirety.

The court was correct to rule that Resource Life's "written notice" language in its policies does not relieve the insurer of its obligation to refund unearned premiums, it said, "unless it expressly states that a failure to provide such notice will result in a forfeiture of the insured's rights."

"Taken to its logical conclusion, Resource Life's notice argument is that regardless of its knowledge that it is holding unearned premiums, it is nevertheless free to retain those funds unless and until an insured provides the company with written notice of the fact that it is entitled to a refund."

Such a rule, it said, would be "contrary to public policy, because it would allow an insurer to avoid the contractual obligations of good faith and fair dealing owed to its insured."

Blackburn also dismissed Resource Life's arguments that variations among state laws governing unearned premiums is not sufficient to bar class certification.

Even assuming that one state's law may impose an "affirmative duty" on the company to monitor loan terminations while another does not, he wrote, "we cannot say that any variance among state laws (if it exists) would, standing alone, be sufficient to predominate over the common legal questions."

Blackburn's order takes a particularly dim view of Resource Life's conduct that led to the discovery abuse sanctions.

Given that the company was in possession of some of the material ordered turned over by the court even as it denied having it, and "has not done so, despite having in excess of six years to meet its obligation," the trial court was justified in levying the sanctions.

Quoting the appeals court's decision in 2008's *MARTA v. Doe* opinion, Blackburn wrote: "An interrogatory answer that falsely denies the existence of discoverable information is not exactly the equivalent to no response. It is worse than no response."

Resource Life is represented by Joel S. Feldman of Sidley Austin in Chicago, Frank C. Jones of Macon's Jones, Cork & Miller, and Benjamin A. Land of Columbus' Buchanan & Land; efforts to reach all three were unsuccessful.

Wooten said that, while the potential class size probably will be in excess of 1.4 million, the number will be substantially less because many will not be owed a refund. Even so, he estimated "hundreds of thousands" of refunds will be due.

He said that he had not spoken with opposing counsel prior to the appellate order, but that both sides had been engaged in "some settlement discussions" prior to its release.

Wooten's co-counsel includes partner James E. Butler and firm associates Kate S. Cook, John C. Morrison and Brandon L. Peak; Gregory S. Ellington of Columbus' Hatcher, Stubbs, Land, Hollis & Rothschild; Samuel W. Oates Jr. of Columbus' Oates & Courville; and Frank M. Lowrey IV and Michael B. Terry of Bondurant, Mixson & Elmore.

"The more important issue here is that, as far as sanctions, you had a defendant that was caught concealing evidence and refusing to comply with the court's orders," Wooten said. "And as the trial court said, when a defendant does that, they must face the consequences of their actions." DR