340 F.R.D. 157
United States District Court, N.D. California.

Pamela SIINO, Plaintiff,
v.
FORESTERS LIFE INSURANCE AND ANNUITY COMPANY, Defendant.

Case No. 20-cv-02904-JST
|
Signed 01/12/2022

Synopsis

Background: Policyholder brought putative class action lawsuit alleging that insurer terminated life insurance policies for nonpayment without providing notice as required under California law, and seeking damages for breach of contract, restitution and injunctive relief for violation of California's unfair competition law (UCL), and declaratory relief. Policyholder moved to certify class.

Holdings: The District Court, Jon S. Tigar, J., held that:

[1] class certification was inappropriate on claims for declaratory relief;

[2] numerosity prerequisite for class certification was met;

[3] commonality prerequisite for class certification was met; but

[4] preponderance prerequisite for class certification was not met.

Motion denied.

Procedural Posture(s): Request or Application for Class Certification.

West Headnotes (21)

[1] **Federal Civil Procedure** Evidence; pleadings and supplementary material

The party seeking class certification bears the burden of demonstrating by a preponderance of the evidence that all necessary requirements of the class action rule are met. Fed. R. Civ. P. 23.

[2] **Federal Civil Procedure** Consideration of merits

The rule governing class action grants courts no license to engage in free-ranging merits inquiries at the certification stage. Fed. R. Civ. P. 23.

[3] **Federal Civil Procedure** Consideration of merits

On a motion to certify a class, merits questions may be considered to the extent, but only to the extent, that they are relevant to determining whether the prerequisites for class certification are satisfied. Fed. R. Civ. P. 23.

[4] **Federal Civil Procedure** Evidence; pleadings and supplementary material

In determining whether the prerequisites for class certification are satisfied, courts must take the substantive allegations of the complaint as true, but need not accept conclusory or generic allegations regarding the suitability of the litigation for resolution through class action. Fed. R. Civ. P. 23.

[5] **Declaratory Judgment** Representative or class actions

Federal Civil Procedure Consumers, purchasers, borrowers, and debtors

Class certification was inappropriate, under rule allowing for class action where party opposing class has acted or refused to act on grounds that apply generally to class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting class as whole, in action by policyholder alleging that insurer terminated life insurance policies for nonpayment without providing notice as required under California law, where monetary damages were primary

relief sought by policyholder. Cal. Ins. Code §§ 10113.71, 10113.72; Fed. R. Civ. P. 23(b)(2).

[6] **Declaratory Judgment** Representative or class actions

Federal Civil Procedure Common interest in subject matter, questions and relief; damages issues

Class certification under rule allowing for class action where party opposing class has acted or refused to act on grounds that apply generally to class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting class as whole, is appropriate only where the primary relief sought is declaratory or injunctive. Fed. R. Civ. P. 23(b)(2).

[7] **Constitutional Law** Class Actions

The absence of procedural protections of notification and an opt-out option in a class action predominantly for monetary damages violates due process. Fed. R. Civ. P. 23.

[8] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

Numerosity prerequisite for class certification of life insurance policyholders or beneficiaries was met, in action alleging that insurer terminated life insurance policies for nonpayment without providing notice as required under California law, where complaint alleged that there were over 500 putative class members. Cal. Ins. Code §§ 10113.71, 10113.72; Fed. R. Civ. P. 23(a)(1).

[9] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

For purposes of class certification requirement that there must be questions of law or fact common to the class, even a single common question is sufficient. Fed. R. Civ. P. 23(a)(2).

[10] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

When questions common to class members present significant issues that can be resolved in single adjudication, there is clear justification for handling dispute on representative rather than on individual basis, but common contention must be of such nature that it is capable of classwide resolution, which means that determination of its truth or falsity will resolve issue that is central to validity of each one of claims in one stroke. Fed. R. Civ. P. 23(a)(2).

[11] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Considering whether questions of law or fact common to class members predominate, as required for class certification, begins with elements of underlying causes of action. Fed. R. Civ. P. 23(b)(3).

[12] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

In determining whether common questions predominate, as required for class certification, court identifies key substantive issues related to putative class's claims, both causes of action and affirmative defenses, and then considers proof necessary to establish each element of claim or defense, and how these issues would be tried. Fed. R. Civ. P. 23(b)(3).

[13] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Predominance inquiry for class certification requires that putative class show that common questions predominate as to each cause of action for which they seek class certification. Fed. R. Civ. P. 23(b)(3).

[14] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

Commonality prerequisite for class certification of life insurance policyholders or beneficiaries was met in action alleging that insurer breached putative class members' contracts and violated California's unfair competition law (UCL) when it terminated life insurance policies for nonpayment without providing notice as required under California law; question of whether insurer maintained practice of not complying with notice statutes, and whether such conduct satisfied elements of class members' claims, were common to class. Cal. Bus. & Prof. Code § 17200; Cal. Ins. Code §§ 10113.71, 10113.72; Fed. R. Civ. P. 23(a)(2).

[15] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

In order to satisfy commonality requirement for class certification, the party seeking certification need only show that there is a common contention capable of classwide resolution, not that there is a common contention that will be answered, on the merits, in favor of the class. Fed. R. Civ. P. 23(a)(2).

[16] **Federal Civil Procedure** Evidence; pleadings and supplementary material

A model purporting to serve as evidence of damages in a class action must measure only those damages attributable to the relevant theory of liability. Fed. R. Civ. P. 23(b)(3).

[17] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Although predominance is not shown where questions of individual damage calculations inevitably overwhelm questions common to the class, the presence of individualized damages on its own is insufficient to defeat class certification. Fed. R. Civ. P. 23(b)(3).

[18] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

Preponderance prerequisite for class certification of life insurance policyholders or beneficiaries was not met in action alleging that insurer breached putative class members' contracts and violated California's unfair competition law (UCL) when it terminated life insurance policies for nonpayment without providing notice as required under California law, where named plaintiff failed to offer any model for calculating damages on classwide basis. Cal. Bus. & Prof. Code § 17200; Cal. Ins. Code §§ 10113.71, 10113.72; Fed. R. Civ. P. 23(b)(3).

[19] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Whether an injury suffices to establish an Article III injury for a putative class does not answer whether damages can be calculated on a classwide basis. U.S. Const. art. 3, § 2, cl. 1; Fed. R. Civ. P. 23.

[20] **Implied and Constructive Contracts** Restitution

Under California law, "restitution" is the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received.

[21] **Antitrust and Trade Regulation** Monetary Relief; Damages

Antitrust and Trade Regulation Measure and amount

Under California's unfair competition law (UCL), restitution returns to a plaintiff only those measurable amounts which were wrongfully taken by means of an unfair business practice; to that end, the amounts must be subject to some reasonable basis of computation, and be supported by evidence. Cal. Bus. & Prof. Code § 17200.

Attorneys and Law Firms

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ORDER DENYING CLASS CERTIFICATION

Re: ECF No. 70

JON S. TIGAR, United States District Judge

Before the Court is Plaintiff Pamela Siino's motion for class certification. ECF No. 70. ***160** Because Siino fails to identify a damages model capable of measuring damages on a classwide basis, the Court will deny the motion.

I. BACKGROUND

"In 2012, the Legislature enacted Assembly Bill No. 1747, grafting sections 10113.71 and 10113.72 [('the Statutes')] onto the Insurance Code." *McHugh v. Protective Life Ins. Co.*, 12 Cal. 5th 213, 225, 283 Cal.Rptr.3d 323, 494 P.3d 24 (2021) (citations omitted). These provisions "changed the grace period and notice requirements for life insurance policies in California." *Id.* The Statutes established a 60-day grace period for policyholders who miss a premium payment; granted policy owners the right to designate at least one other person to receive notices of an overdue premium or impending lapse or termination of their policy; and required insurers to mail (1) a notice to policyholders and their chosen designees (if any) about a lapse within 30 days of the missed payment and (2) a notice of any impending termination for nonpayment at least 30 days before the policy is terminated. Cal. Ins. Code §§ 10113.71, 10113.72. In *McHugh*, 12 Cal. 5th 213, 220, 283 Cal.Rptr.3d 323, 494 P.3d 24, the California Supreme Court held that these provisions "apply to all life insurance policies in force when [the Statutes] went into effect, regardless of when the policies were originally issued."

In this motion for class certification, Plaintiff Pamela Siino seeks to represent a class of policyholders whose California life insurance policies were terminated by Defendant Foresters Life Insurance and Annuity Company for nonpayment without receiving the protections required by the Statutes. The class is defined as:

> All owners, or beneficiaries upon the death of an insured, of Defendant's individual life insurance policies issued or delivered in California and in force on or after January 1, 2013 where Defendant terminated the policies for non-payment of premium without first providing all of the following: a policy containing a 60-day grace period (and an actual 60-day grace period in practice); a 30-day notice of pending lapse and termination; and an annual notice of a right to designate at least one other person to receive notice of lapse or termination of a policy for nonpayment of premium.

ECF No. 70-1 at 7.

Siino claims that Foresters did not follow the Statutes' requirements with respect to policies issued before 2013, when the Statutes became effective, thereby wrongfully

depriving those policyholders whose policies were already in effect of those protections. She alleges that Foresters' failure to afford these protections breached its contract with policyholders and violated California's unfair competition law ("UCL"). She seeks damages for breach of contract; restitution and injunctive relief for her UCL claim; and declaratory relief.

Siino argues that class certification is proper under either Rule 23(b)(2) or 23(b)(3) of the Federal Rules of Civil Procedure and seeks the appointment of Nicholas & Tomasevic and Winters & Associates as class counsel.[1] Foresters opposes certification. As for Rule 23(b)(2), Foresters argues that it is not available for putative classes that seek monetary damages. As for Rule 23(b)(3), Foresters argues that Siino cannot represent the class because, among other things, individual questions predominate, necessitating hundreds of mini-trials to resolve class members' claims.

II. JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1332(a).

III. LEGAL STANDARD

To obtain class certification, a party must satisfy the requirements of Rule 23(a) – numerosity, commonality, typicality, and adequacy – and one of the requirements of Rule 23(b). Siino here invokes both Rule 23(b)(2) and Rule 23(b)(3). Rule 23(b)(2) requires the Court to find that "the party opposing the ***161** class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) requires the Court to find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

[1] **[2]** **[3]** **[4]** The party seeking class certification bears the burden of demonstrating by a preponderance of the evidence that all four requirements of Rule 23(a) and at least one of the requirements under Rule 23(b) are met. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Retirement Plans & Tr. Funds*, 568 U.S. 455, 466, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013). "Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 1195. Courts "must take the substantive allegations of the complaint as true" but "need not accept conclusory or generic allegations regarding the suitability of the litigation for resolution through class action." *Keilholtz v. Lennox Hearth Prods. Inc.*, 268 F.R.D. 330, 335 (N.D. Cal. 2010) (citations omitted).

IV. DISCUSSION

A. Rule 23(b)(2)

[5] The Court first addresses Siino's motion for certification under Rule 23(b)(2). To obtain class certification under Rule 23(b)(2), Siino must satisfy Rule 23(a)'s numerosity, commonality, typicality, and adequacy requirements and Rule 23(b)(2)'s requirement that class treatment here is appropriate because Foresters "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

[6] **[7]** Siino's claims for monetary damages prevent the Court from certifying this putative class under Rule 23(b)(2). "Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986 (9th Cir. 2011) (citation omitted); *see also Dukes*, 564 U.S. 338 at 362, 131 S.Ct. 2541 (stressing that "that individualized monetary claims belong in Rule 23(b)(3)" and not in Rule 23(b)(2)). As the Ninth Circuit has explained, "[u]nlike classes certified under Rule 23(b)(1) or (b)(2), a (b)(3) class is not mandatory" – "putative class

members [in a Rule 23(b)(3) class] are afforded the right to be notified of the action and to opt out of the class." *Ellis*, 657 F.3d at 987 (citation omitted). By contrast, Rule 23(b)(2) does not provide an opportunity for class members to opt out, "and does not even oblige the District Court to afford them notice of the action." *Dukes*, 564 U.S. at 362, 131 S.Ct. 2541. "The absence of these protections in a class action predominantly for monetary damages violates due process." *Ellis*, 657 F.3d at 987.

Siino's motion for class certification of her declaratory relief claim is therefore denied. [2]

B. Rule 23(b)(3)

The Court next considers Siino's motion for certification under Rule 23(b)(3). To obtain class certification under Rule 23(b)(3), Siino must satisfy Rule 23(a)'s numerosity, commonality, typicality, and adequacy requirements and Rule 23(b)(3)'s requirement "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Given the relationship between Rule 23(a)'s commonality requirement and Rule 23(b)(3)'s predominance requirement, courts ***162** often analyze those requirements together. *See, e.g., Aberin v. Am. Honda Motor Co., Inc.*, No. 16-CV-04384-JST, 2021 WL 1320773, at *7 (N.D. Cal. Mar. 23, 2021).

1. Numerosity

[8] "Numerosity" refers to Rule 23's requirement that "the class [be] so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Siino argues, and Foresters does not dispute, that the numerosity prong of Rule 23(a) is satisfied because there are over 500 putative class members. The Court finds that numerosity is met because the joinder of over 500 plaintiffs would be impracticable. *See Floyd v. Saratoga Diagnostics*, Inc., No. 20-CV-01520-LHK, 2021 WL 2139343, at *3 (N.D. Cal. May 26, 2021) (explaining that "as a general rule ... classes of 40 or more are numerous enough).

2. Commonality and Predominance

[9] **[10]** "Commonality" is a shorthand way of describing Rule 23's requirement that "there [be] questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "[F]or purposes of Rule 23(a)(2) [e]ven a single [common] question will do." *Dukes*, 564 U.S. at 359, 131 S.Ct. 2541 (internal citation omitted). When questions common to class members present significant issues that can be resolved in a single adjudication, "there is clear justification for handling the dispute on a representative rather than on an individual basis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quotation marks and citation omitted). But the common contention "must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350, 131 S.Ct. 2541.

[11] **[12]** **[13]** "Predominance" is a shorthand way of describing Rule 23's requirement that common questions "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "Considering whether questions of law or fact common to class members predominate begins ... with the elements of the underlying causes of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809, 131 S.Ct. 2179, 180 L.Ed.2d 24 (2011). In determining whether common questions predominate, the Court identifies the key substantive issues related to the putative class's claims (both the causes of action and affirmative defenses), and then considers the proof necessary to establish each element of the claim or defense, and how these issues would be tried. *See* Schwarzer, et al., Cal. Prac. Guide Fed. Civ. Pro. Before Trial Ch. 10-C § 10:412. The predominance inquiry requires that the putative class show that common questions predominate as to each cause of action for which they seek class certification. *Amchem*, 521 U.S. at 620, 117 S.Ct. 2231.

In short, "Rule 23(a)(2) asks whether there are issues common to the class," and "Rule 23(b)(3) asks whether these common questions predominate." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (quoting *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010)).

a. Commonality

[14] Siino argues commonality is satisfied because "each class member's claim is premised on the same core conduct by [Foresters] – lapsing or terminating a policy after enactment of the Statutes, for the same reason (non-payment of premium), without providing all the same three protections enumerated in the Statutes (i.e., without providing a proper 60-day grace period, without providing proper 30 days' notice of termination, and/or without affording the opportunity to name a secondary notice designee)." *See* ECF No. 70-1 at 15-16. In short, Siino argues that whether Foresters harmed class members by violating the Statutes is a common question capable of classwide resolution.

In response, Foresters argues that "commonality is not satisfied merely because the class members 'have all suffered a violation of the same provision of law.' " ECF No. 80 at 18. (citing *United States ex rel. Terry v. Wasatch Advantage Grp., LLC*, 327 F.R.D. 395, 414 (E.D. Cal. July 30, 2018)). In Foresters's view, whether it violated the Statutes when it canceled life insurance policies "does not answer the critical question of whether ***163** the breach of contract or [ ] UCL ... claims [Siino] asserts can be adjudicated as a class" because such a violation, even if proven, does not by itself establish any claim. ECF No. 80 at 18. Instead, class members will still need to prove their own performance, the materiality of Foresters's breach, and actual harm or damage. *Id.* Thus, Foresters argues, determining whether it violated the Statutes will not "drive the resolution of the litigation" for the class, as commonality requires. *Id.*

[15] The Court is not persuaded by Foresters's commonality argument. The party seeking certification "need only show that there is a common contention capable of classwide resolution – not that there is a common contention that will be answered, on the merits, in favor of the class." *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1053 (9th Cir. 2015) (internal quotation omitted). In other words, Siino's burden at this stage is merely to show that a common question permeates the liability question for the class as a whole – not that each class member of the class will succeed in their claims. And here, Siino argues that Foresters is liable for breach-of-contract and UCL claims because it maintained a practice of not complying with the Statutes for policies issued before the Statutes went into effect in 2013. *See* ECF No. 70-1 at 6-7 (describing this theory). Whether Foresters engaged in this practice is a common question for the class. So too is whether that conduct satisfies an element of class members' breach-of-contract or UCL claims. *See* *Dukes*, 564 U.S. at 350, 131 S.Ct. 2541 (a common issue is one whose "truth or falsity will resolve *an issue* that is central to the validity of each one of the claims in one stroke") (emphasis added). The commonality test is satisfied here.

b. Predominance

Under Rule 23(b)(3), plaintiffs must show "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The Rule 23(b)(3) predominance requirement is "even more demanding" than Rule 23(a)'s commonality counterpart. *Comcast Corp. v. Behrend*, 569 U.S. 27, 34, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013).

[16] **[17]** In *Comcast*, the Supreme Court held that in order to establish predominance, the named plaintiff must put forward a damages model establishing that "damages are capable of measurement on a classwide basis." *Id.* And "a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable" to the relevant theory of liability. *Id.* at 35, 133 S.Ct. 1426; *see also* *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1182 (9th Cir. 2017) (a party seeking certification "must show a classwide method for damages calculations as a part of the assessment of whether common questions predominate over individual questions"), *rev'd and remanded on other grounds*, —— U.S. ——, 139 S. Ct. 710, 203 L.Ed.2d 43 (2019). "Moreover, while predominance is not shown where questions of individual damage calculations ... inevitably overwhelm questions common to the class, the presence of individualized damages on its own is insufficient to defeat

class certification." *Schneider v. Chipotle Mexican Grill, Inc.*, 328 F.R.D. 520, 540–41 (N.D. Cal. 2018) (ellipsis in original) (citations and quotations omitted).

[18] Foresters argues that Siino has failed to satisfy this requirement because she has not offered any model for calculating damages on a classwide basis. ECF No. 80 at 27. Nor could she, Foresters argues, because there is no "rational way of assessing and quantifying on a classwide basis the damages associated with a life insurance policy wrongfully lapsing" for the vast majority of class members. *Id.*

For the breach-of-contract claim, there is very small number of life insurance policyholders – two out of 526[3] – for whom Siino has offered a viable damages model: those who are deceased. "If the insured has passed, [Siino proposes that] the quantum of damage will be the face amount of the policy required ***164** to be paid when an insured has died." ECF No. 70-1 at 23. Foresters contends, however, that Siino "offers no damages model across the class" for "the remaining 523 policies (including [her own]) [who] are believed to be alive." *Id.* "Where the insured is still alive, which is the case for the overwhelming majority of the proposed class," Foresters contends that "Plaintiff offers no mechanism for readily assessing the alleged damages." ECF No. 80 at 12. "Plaintiff's Complaint seeks money damages for the 'value' of the lost insurance coverage for living policyholders. But Plaintiff has offered no mechanism to assess such value, even for her own policy." *Id.*

For the UCL claim, Foresters argues that although Siino's complaint seeks "un-refunded premiums, withheld benefits, and diminution of value of policies" as remedies, Siino "offers no evidence whatsoever in her Motion regarding the alleged diminished value of class members' policies or how it might be calculated on a class-wide basis." *Id.* at 27-28 (emphasis omitted). Nor could she, in Foresters' view, because "[t]he value of life insurance policy is highly dependent on a number of factors (such as the insured's current health and life expectancy, the premiums required to be paid, and many others), all of which require individualized inquiries." *Id.* at 28.

Siino's reply offers almost nothing in response to Foresters's arguments about the absence of a classwide damages model. Siino instead argues that her "claims for breach of contract and under California's UCL do not require any one kind or amount of damage," and that even "nominal" damages for a breach-of-contract claim and "a trifling" for a UCL claim can support a finding of an Article III injury. ECF No. 83 at 12-13. Siino further argues that "questions about money damages [for those claims] are simply irrelevant at this stage." ECF No. 83 at 13.[4]

[19] Siino misapprehends the requirements of Rule 23. To begin, whether an injury suffices to establish an Article III injury for a putative class does not answer whether damages can be calculated on a classwide basis. And as the previous discussion of *Comcast* and its progeny shows, "questions about money damages" are not "simply irrelevant" to certification. Although the Ninth Circuit has emphasized that "the need for individualized findings as to the *amount* of damages does not defeat class certification," *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016) (citing *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013); *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014)) (emphasis added), a plaintiff must still proffer a common methodology for *calculating* damages or restitution. *See, e.g.*, *Leyva*, 716 F.3d at 514 ("Medline's computerized payroll and time-keeping database would enable the court to accurately calculate damages and related penalties for each claim."); *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) ("Pulaski's principal method for calculating restitution employs Google's Smart Pricing ratio, which ... set[s] advertisers' bids to the levels a rational advertiser would have bid if it had access to all of Google's data ...."); *see also* *Lambert*, 870 F.3d at 1182 (9th Cir. 2017), *rev'd and remanded on other grounds*, —— U.S. ——, 139 S. Ct. 710, 203 L. Ed. 2d 43 (2019). In other words, although the existence of individualized damages and any attendant difficulty calculating them cannot defeat certification, the absence of a methodology for calculating damages on a classwide basis can. The Court finds that Siino has not shown that "damages ... [can] feasibly and efficiently be calculated once the common liability questions are adjudicated" for either her breach-of-contract or UCL claim. *Leyva*, 716 F.3d at 510.

i. Breach-of-contract Damages

Siino's motion argues that the damages "assessment [for beneficiaries] will be uniform across the class" because "the

quantum of damage will be the amount of the policy ***165** required to be paid when an insured has died." ECF No. 70-1 at 23. But Siino's motion says nothing about how damages would be calculated for policyholders who are still alive. Yet living policyholders comprise more than 99% of the putative class.

When pressed about this problem at the hearing, Siino suggested using Foresters's reserve values[5] to measure the damages for these members of the class – an idea relegated to a footnote in her motion for class certification and unanchored to any theory of liability. *See* ECF No. 70-1 at 20, n.7. Invoking *Caminetti v. Pacific Mut. Life Ins.* 23 Cal.2d 94, 102, 142 P.2d 741 (1943), Siino argued that Foresters's reserves would properly measure the damages living policyholders suffered when Foresters terminated their policies without first complying with the Statutes.

The Court is not persuaded by Siino's argument. To begin, the California Supreme Court confined *Caminetti* to its facts. *Caminetti* concerned a challenge to the California Insurance Commissioner's plan to liquidate the assets of an insurance company that had become insolvent during the Great Depression. *Id.* at 97-98, 142 P.2d 741. Discharging the authority California law provides to the Insurance Commissioner when an insurance company becomes insolvent, the Commissioner gave the policyholders of noncancelable disability policies the choice of being reinsured or opting out and receiving the value of their noncancelable policies. *Id.* For the opt-outs, the Commissioner decided to value the policies by looking to the reserve values. *Id.* at 108, 142 P.2d 741. The *Caminetti* court approved the Commissioner's method of valuing the policies, but emphasized that it was doing so only for *noncancelable* disability policies when an "insurer becomes insolvent." *Id.* at 110, 142 P.2d 741. Far from saying that reserve values are an accurate measure of damages for all prematurely canceled insurance policies, the court said that it "did not express any views with respect to the proper measure [of damages] to be used in life or disability policies where the insurer has repudiated a policy but is not prevented by insolvency from being compelled to continue the insurance." *Id.* In other words, although the *Caminetti* court upheld the Commissioner's use of reserve values to value the policies at issue there, it confined its holding to the facts: when the Insurance Commissioner liquidates an insurance company that has become insolvent and the policyholders have noncancelable policies. *Caminetti* therefore does not help Siino establish a damages model for policyholders who are still alive.

The only other California case this Court could find addressing the relationship between reserve values and damages is *In re Executive Life Ins. Co.*, 32 Cal. App. 4th 344, 384, 38 Cal.Rptr.2d 453 (1995), *as modified on denial of reh'g* (Mar. 15, 1995). But that case, like *Caminetti*, also dealt with insolvency. The court of appeal there approved the California Insurance Commissioner's plan to offer policyholders "the value of the policy" – or "each policyholder's share of the reserve" – as one option after a life insurance company became insolvent, analogizing the company's insolvency to a breach of its guarantees to policyholders. *Id.* But the court approved the Commissioner's plan given California law's vesting of "broad discretion" in the Insurance Commissioner to protect "the public interest and to protect policyholders and creditors" when an insurer becomes insolvent and did so only with the benefit of expert analysis. *Id.* at 356, 385, 38 Cal.Rptr.2d 453. "Expert testimony established that CDSR: (1) values the contract holders' claims for breach of their insurance contracts as of the conservation date; (2) is uniform among the contract holders; (3) fully reflects all future guaranteed benefits in the contract as of the conservation date; (4) is based upon nonsubjective methods and assumptions; and (5) is practical and capable of implementation." *Id.* Not only is this case not an insolvency case, but Siino has failed to provide expert testimony of the kind considered by the *Executive Life* court and required by *Comcast.* Thus, although reserves may share some connection to the value of a life insurance policy, the Court is not persuaded that a ***166** policyholder's share of the reserves automatically equals the measure of damages a living policyholder suffers – and only those damages, *see* *Leyva*, 716 F.3d at 514 – when a company prematurely terminates their life insurance policy.

Moreover, the Ninth Circuit has instructed that courts must analyze "whether [a plaintiff's cause of action] permit[s] recovery based on [the proposed damages model]" – said differently, whether the proposed "damages model is ... cognizable" – before approving it. *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 817 (9th Cir. 2019). California law

provides that "in life ... insurance, the only measure of liability and damage is the sum or sums payable in the manner and at the times as provided in the policy to the person entitled thereto." Cal. Ins. Code § 10111. In other words, California law limits breach damages to the monetary benefits each policy guarantees – often, that will be limited to the death benefit.[6] *See US Bank Nat'l Ass'n v. PHL Variable Ins. Co.*, No. CV-123046-RGKMRWX, 2012 WL 12895839, at *3 (C.D. Cal. Nov. 29, 2012) (holding that California law "limit[s] breach of insurance contract damages to the policy benefit with the contractually agreed upon interest"). Yet Siino does not explain how using reserve values to measure damages aligns with that limitation.

ii. UCL Restitution

[20] **[21]** Under California law, restitution is "the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received." *Pulaski & Middleman*, 802 F.3d 979 at 988. Restitution thus returns to a plaintiff only those "measurable amounts which [were] wrongfully taken by means of an unfair business practice." *See* *Tucker v. Pacific Bell Mobile Servs.*, 208 Cal. App. 4th 201, 229, 145 Cal.Rptr.3d 340 (2012). To that end, the amounts must be subject to "some reasonable basis of computation," and be "supported by evidence." *Pulaski & Middleman*, 802 F.3d at 989; *Colgan v. Leatherman Tool Grp.*, Inc., 135 Cal.App.4th 663, 698, 38 Cal.Rptr.3d 36 (2006).

Siino's restitution model proposes returning the premiums paid and the death benefits Foresters withheld to the beneficiaries of policyholders whose policies were wrongfully terminated before they died. ECF No. 1 ¶ 80. But much like Siino's proposed damages model for her breach-of-contract claim, Siino does not explain how the Court would calculate "restitution of the money or property acquired" by Foresters on a *classwide* basis, including both policyholders who died and those who are still alive. ECF No. 1 at ¶ 81. Siino, for example, suggests "un-refunded premiums, withheld benefits, and diminution of value of policies" could be the basis of any restitution. *Id.* For policyholders who are still alive, the likeliest restitution remedy would be for diminution of the value of their policies. *Pulaski*, 802 F.3d at 988-89. But Siino does not explain what methodology the Court would use to assess the diminution of value resulting from wrongful termination, let alone how the Court would assess that diminution on a classwide basis for policies with different terms, timelines, and benefits.[7]

Siino does suggest in a footnote that "a return of all past premiums paid" would be an appropriate remedy. But neither of Siino's cited authorities support that remedy. *Caminetti v. Manierre* recognizes return of premiums as one of several potential remedies identified by certain courts – although not California courts – and legal commentators, but notes "[t]hat rule is subject to criticism," including that "no allowance was made to the insurer for the value of the protection afforded during the time prior to the repudiation." 23 Cal. 2d 94, 105, 142 P.2d 741 (1943). And in *Korbholz v. Great-W. Life & Annuity Ins. Co.*, the plaintiff sought as a remedy either reinstatement of his life insurance policy or "the amount of premiums paid, plus compound interest from the date each premium ***167** was paid," 2009 WL 159869, at *2 (N.D. Cal. Jan. 20, 2009). The court, however, reinstated Korbholz's policy without reaching his request for return of premiums.[8]

Without a proposed method of calculating restitution value on a classwide basis for policyholders who are still alive, the Court cannot conclude that restitution will be able to be "feasibly and efficiently" calculated after "the common liability questions are adjudicated." *Leyva*, 716 F.3d at 514.

CONCLUSION

For the reasons explained, Siino's motion for class certification is denied. The Court sets a further case management conference on February 1, 2022 at 2:00 p.m. An updated joint case management statement is due January 25, 2022.

IT IS SO ORDERED.

All Citations

340 F.R.D. 157, 111 Fed.R.Serv.3d 1237

Footnotes

1 In the alternative, Siino's motion seeks certification under Rule 23(c)(4) of whether the Statutes applied to policies Foresters issued before 2013. Because *McHugh* has now answered that question conclusively, Siino's alternative request for certification is denied as moot.

2 In seeking certification of a Rule 23(b)(2) class, Siino apparently also reprises her claim for injunctive relief. But as the Court explained in its order granting in part Foresters's motion to dismiss, Siino lacks standing to seek injunctive relief. *See* ECF No. 41 at 15.

3 ECF No. 80 at 11 n.4; *see also* ECF No. 80 at 27 (explaining that those two policyholders held three policies).

4 Siino also argues that "the declaratory relief claims [she] seeks to certify have no standalone or specific causation/damages requirements." *Id.* (citing 28 U.S.C. § 2201). The Court does not address this argument because, as explained earlier, Siino cannot certify a class for declaratory relief in a class action that seeks individualized monetary relief.

5 Reserves are the funds state law requires insurance companies to hold to cover their potential liabilities. *See generally* Loss Reserves, 17A Couch on Ins. § 251:29; *see also* Cal. Ins. Code §§ 10479 (describing the reserves process).

6 When the case against the insurer sounds in tort, however, § 10111 does not restrict recovery to the amounts due under policy. *Fletcher v. W. Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 400, 89 Cal.Rptr. 78 (1970).

7 The Court notes that "[a]lthough the 'price less value received' method is commonly employed, it is not the *only* measure of restitution." *Krueger v. Wyeth, Inc.*, 396 F. Supp. 3d 931, 951 (S.D. Cal. 2019). Siino does not identify another method, however.

8 To the extent Siino intended to rely on Foresters's reserves to also measure her UCL damages, Siino has offered the Court no explanation of how reserves could be used to measure a life insurance policy's diminution in value or any other restitutionary measure.