

# Alert

September 10, 2020



## Class Certification Denied in Portion of COI Case Based on Argument That the Policies Are STOLI

The U.S. District Court for the Southern District of New York recently issued a decision denying class certification to sub-classes in a cost of insurance (COI) class action based upon the insurer's defense that certain of the claims were barred because "a substantial number of the policies at issue were obtained through stranger-originated life insurance (STOLI) schemes." *In re Axa Equitable Life Ins. Co. COI Litig.*, 16-CV-740 (JMF), 2020 U.S. Dist. Lexis 145948 (S.D.N.Y. Aug. 13, 2020).

The lawsuit alleged that the insurer improperly increased (and misrepresented in illustrations) the cost of insurance for flexible premium life insurance policies for reasons not authorized by the "Changes in Policy Cost Factors" provision in the policies. The plaintiffs alleged claims for breach of contract, California statutory claims for a systematic breach of contract, and California and New York statutory claims for misrepresentations made in the sale and maintenance of the policies.

Plaintiffs sought certification of a number of classes including a nationwide "Contract Class," a New York sub-class, and three California sub-classes. Although the court certified the nationwide Contract Class and the New York sub-class, it **denied certification of the California sub-classes, which was contested by the insurer based on the affirmative defense of unclean hands/STOLI**. The insurer alleged that STOLI schemes were common in California, and the policies at issue "were among those targeted ... in a widespread STOLI scheme based in California."

Under Rule 23 of the Federal Rules of Civil Procedure, a class can be certified if certain requirements are met including the requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b) (3). **Here, the court determined that this predominance requirement was not satisfied because the unclean hands/STOLI defense "precludes a finding that questions of law or fact ... predominate over any question affecting only individual members. That is because individual questions about each policy — when it was originated, to whom it was initially issued, why that individual took out a policy, whether and when the original policyholder sold the policy and to whom, and whether they had ever communicated and about what — will have to be litigated."** In so ruling, the court rejected several of plaintiffs' arguments including the argument that the STOLI defense was "speculative," explaining that when a defendant "point[s] to some evidence that a defense will indeed apply to some class members — as AXA does here — the common and individual issues of that defense must be considered."

This decision has a number of potential implications for insurers defending COI class actions. First, it establishes that a STOLI defense can defeat or limit class certification. Second, it demonstrates that insurers arguably only need to have a good faith basis for asserting the defense and should not be required to prove the merits of the defense at the class certification stage (which the court did not require here). And, third, denial of certification of much more expansive, nationwide classes of COI claims may be even more appropriate than the narrow California sub-classes denied certification here. In addition to the individual issues identified by the court in this



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decision, the policy-specific issues presented by a nationwide class would arguably include, among others, which state's law applies to the policy (choice of law); and whether, under the applicable state's law, (i) the transaction is a human life wager; (ii) STOLI is illegal and void; (iii) a post-contestable challenge based upon illegal wagering and/or lack of insurable interest is allowed; and (iv) what remedies are available.

Notably, a large percentage and number of the life insurance policies that are at issue in the various COI cases across the country appear to meet the basic criteria for STOLI and may indeed be subject to successful challenge. Also, STOLI challenges have recently become more common and more successful. Indeed, the lawyers at Cozen O'Connor have been involved with COI cases since even prior to the beginning of this litigation wave, and during this period of time, have successfully challenged a significant number of STOLI policies. Citations are available upon request.

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**The lawyers at Cozen O'Connor are available to discuss these issues and to provide additional background and legal support.**