DOCKET NO. X03 CV 99 0496761 S	: SUPERIOR COURT
LISA MACOMBER	: COMPLEX LITIGATION DOCKET
V.	: AT NEW BRITAIN
TRAVELERS PROPERTY & CASUALTY, ET AL.	: MAY 26, 2004

MEMORANDUM OF DECISION
MOTION FOR CLASS CERTIFICATION

This lawsuit, which the plaintiff, Lisa Macomber,[1] seeks to bring as a class action, arises out of the settlement of numerous underlying personal injury and other claims with insureds of the defendant, Travelers Property & Casualty Corporation ("Travelers Casualty"), a subsidiary of the defendant, Travelers Group, Inc. ("Travelers Group").[2] In her case, Macomber settled a personal injury claim comprised of a cash settlement of $70,000 plus a structured settlement with an estimated present value of $15,000.[3] The structured portion of the settlement was funded through Travelers Casualty's purchase of a life insurance product

[1] The original complaint named an additional plaintiff, Kathryn Huaman, as custodian for Joshua Adickes, who filed a withdrawal of her claim on May 17, 2004.

[2] The plaintiff claims that Travelers Group owns 83% of the common stock of Travelers Casualty.

[3] Specifically, the release stated the consideration as "a structured settlement. . .with an estimated present value of Fifteen Thousand ($15,000) Dollars, and then, more particularly, as "$1015.18 . . . annually for the remainder of her [Macomber's] life" with a thirty (30) year guaranty. (See Defendant's Exhibit 500.)

known as an annuity.[4]

Macomber proposes the class action on behalf of similarly situated individuals who received some portion of their settlement consideration in the form of a structured settlement funded with an annuity. The class action complaint ("the complaint") states that Travelers Casualty most often purchased these annuities from the defendant, Travelers Life and Annuity Company, using the services of Travelers-owned brokers such as the defendants, Travelers Equity Sales, Inc. ("Travelers Equity") and Salomon Smith Barney Holdings, Inc. ("Smith Barney"),[5] and other brokers with whom Travelers Casualty developed a rebating arrangement. The complaint alleges that Travelers Casualty routinely spent less on the purchase of the annuities than they agreed to spend and that this practice short-changed the claimants ("the short-changing scheme"). The complaint also alleges that upon generating commissions from the purchase of these annuities, Travelers Equity, Smith Barney and other brokers with whom Travelers Casualty developed an exclusive relationship, routinely paid or "rebated" portions of their commissions, up to fifty percent (50%), to Travelers Casualty ("the rebating scheme"). The complaint further alleges that the foregoing short-changing and rebating activities resulted in Travelers Casualty overstating the dollar amounts it used to fund the structured settlements and gives rise to claims of breach of contract (count three), violations of the Connecticut

[4] "A structured settlement is a release of personal injury or sickness claims in exchange for the promise by the defendant to make one or more future payments to the plaintiff. The payments are normally funded using an annuity or obligations of the United States." Macomber v. Travelers Property & Casualty Corp., 261 Conn. 620, 614 n.4, 804 A.2d 180 (2002).

[5] Travelers Life and Annuity Company, Travelers Equity Sales, Inc., and Salomon Smith Barney Holdings, Inc., are alleged to be wholly owned subsidiaries of Travelers Group.

Unfair Trade Practices Act and the Connecticut Unfair Insurance Practices Act ("CUTPA" and "CUIPA") (count four), common law fraud (count six), negligent misrepresentation (count seven), civil conspiracy (count eight) and unjust enrichment (count ten). All of the stated claims are made on behalf of the proposed class.[6]

Presently before the court is a motion for class certification. It proposes a plaintiff class consisting of "all persons who, since 1982, settled claims against Travelers Casualty insureds through structured settlements:

> a. which involved the purchase of annuities, where a portion of the amount to purchase the annuity was returned, granted, or otherwise given, directly or indirectly, to Travelers Property & Casualty, as commission, rebate, or otherwise (including any claimed as reimbursement for services), and/or
>
> b. as to which Travelers Property & Casualty spent less than the sums it represented as the costs or then-present values of the annuities used to fund the structured settlements."[7]

(Motion for Class Certification, p. 2.)

As previously referenced, the complaint alleges two general theories of misconduct encompassed by this class definition, a "rebating scheme" and a "short-changing scheme." The latter refers to Travelers Casualty's alleged practice of making representations as to the cost or

---

[6] The complaint was originally brought in ten counts and was stricken in its entirety by the trial court (*Aurigemma, J.*). Upon appeal, the judgment entered by the trial court was affirmed as to count one (breach of the covenant of good faith and fair dealing), count two (breach of fiduciary duty), count five (CUIPA only) and count nine (conversion) and reversed as to the remaining counts with direction to deny the motion to strike as to them. Macomber v. Travelers Property & Casualty Corp., supra, 261 Conn. 620.

[7] Excluded from the plaintiff's proposed class are "a) the Defendants. . . b) any person, firm, trust, partnership, corporation, officer, director, or other individual or entity in which any Defendant has a controlling interest or which is related to, or affiliated with, any of the Defendants; and c) the legal representatives, agents, affiliates, heirs, successors-in-interest, or assigns of any such excluded party." (Motion for Class Certification, p. 2.)

present value of the annuities used to fund structured settlements and actually spending less than the amounts represented, while the former refers specifically to Travelers Casualty's alleged practice of receiving *rebates* that reduce its actual costs to less than the amounts represented.[8] The defendants essentially concede that Travelers Casualty had an agreement with the brokers it engaged to purchase annuities whereby the brokers would "remit" a portion of each commission to Traveler's Casualty. (See Defendants' Memorandum in Opposition to Plaintiff's Motion for Class Certification ("Defendants' Memorandum"), June 27, 2003, p. 7.)

As noted previously, the Supreme Court has had occasion to consider this case in an appeal of a previous order granting a motion to strike all ten substantive counts of the original complaint.[9] Macomber v. Travelers Property & Casualty Corp., 261 Conn. 620, 804 A.2d 180 (2002). In reinstating six of the original claims, the Court found several factors that bear significantly on the class certification issue. First, the Court referenced legal authority in support of the plaintiff's factual allegation that she was entitled to believe that the present value of her annuity was the same as its cost. Id., 633. Significantly, the Court also stated, in this regard, that "[w]hether the terms 'cost' and 'present value' were represented to be

---

[8] As originally alleged, the short-changing scheme was associated with the claim of the now withdrawn plaintiff, Kathryn Huaman, and the rebating scheme was associated with Lisa Macomber. However, Macomber also claims that she was short-changed. She testified both at her deposition and at the hearing that she understood that $15,000 would be invested on her behalf in an annuity. (Hearing on Motion for Class Certification, Transcript, 7/16/03, pp. 27-8.) In any event, since rebating is a form of short-changing, and both schemes arise out of claimed nondisclosures of the actual cost of annuities to Travelers Casualty, the loss of Huaman as a class representative is not a significant factor for purposes of this motion. Although the defendants claim that the loss of Huaman precludes class certification as to the short-changing scheme, the court rejects this contention.

[9] See note six, supra.

synonymous [by Travelers Casualty] is a question of fact to be resolved at trial." Id. Next, the Court found that if Travelers Casualty made an affirmative representation to Macomber as to the cost, or present value, of her annuity, then Travelers Casualty had a duty to disclose the true cost of the annuity.[10] Finally, based on these findings, the Court concluded that, "whether Travelers Casualty had a duty to disclose its agreements with various annuity brokers so that the plaintiffs could make an informed decision regarding whether to accept Travelers Casualty's annuity offer, and if so, whether it violated that duty, are mixed questions of fact and law that would require a more detailed factual matrix than is disclosed by the plaintiff's allegations. Id., 636.[11]

Upon remand, the plaintiff filed the instant motion for class certification. An evidentiary hearing was held on July 16 and 17, 2003. In an attempt to accommodate the

---

[10] Specifically, the Court stated: "A duty to disclose will be imposed . . . on a party insofar as he voluntarily makes disclosure. A party who assumes to speak must make a full and fair disclosure as to the matters about which he assumes to speak." (Internal quotation marks omitted.) Macomber v. Travelers Property & Casualty Corp., supra, 261 Conn. 636.

[11] Although there was an evidentiary hearing on the motion for class certification, the issues of fact noted by the Supreme Court remain unresolved. For example, the release executed by Macomber was entered into evidence as part of her claim file at the hearing as Defendants' Exhibit 500. The consideration stated in the release references "a structured settlement in accordance with Exhibit A with an estimated present value of Fifteen Thousand ($15,000.00) Dollars." Although the exhibit, as explained by counsel for the defendants, purportedly contains the most relevant portions of the claim file, the referenced Exhibit A and at least one important letter from Macomber's attorney to the Traveler's Casualty claims adjuster, dated April 4, 1990, referenced in paragraph 22 of the complaint, are omitted from the file. In this vein, as discussed more fully infra, the court notes that there has been very limited discovery thus far in this case and only in connection with the motion for class certification. By the defendants' own statement, the "claim files" produced by the defendants as class discovery are not the complete files but were apparently culled to contain only the most pertinent information relating to the class action motion. Other than the release language contained in Exhibit 500, most of the communications contained therein refer to the structured portion of the settlement as having a value of $15,000 as opposed to an "estimated present value of $15,000." In fact, the Travelers Casualty "Payment and Information Record," contained in Exhibit 500, references a check for $15,000 in payment for the structured portion of the settlement.

plaintiff's request for class discovery and the defendants' concerns about the potential production of thousands of claim files, the court randomly selected twenty-eight sample files, in addition to those of Macomber and Huaman, for review. These were eventually entered as Defendants' Exhibits 500-529. All of them were admittedly culled by the defendants to include only the documents pertinent to the motion for class certification. Most of the sample files contain evidence of a statement or representation by Travelers Casualty to the claimant or his or her representative as to either the cost of his or her annuity, its present value, or both. In addition, as previously noted, the defendants concede that Travelers Casualty had agreements with brokers it engaged to purchase annuities whereby the brokers would "remit" a fee or rebate for "services" Travelers Casualty claims to have performed in connection with each structured settlement. Anthony Torsiello, the former chief financial officer of the claim department, testified that during his tenure in that position (1996-2003), Travelers Casualty concluded approximately 2000 claims per year by way of structured settlements.[12] When viewed in light of that testimony, discovery has been very sparse as the proposed class is likely to contain thousands of potential members.[13] In opposition to the motion for class certification,

---

[12] The other witnesses at the hearing were Lisa Macomber, George L. Priest, a professor at Yale Law School, whose testimony as a legal expert on class actions was substantially limited by the court, in that the proffered testimony essentially constituted legal argument from a non-appearing lawyer, and Billie Sage, a claim representative employed by Travelers Insurance Company, by way of deposition.

[13] The exhibits in question are Defendants' Exhibits 500-529. Although, the defendants claim that it was Travelers Casualty's policy not to disclose the cost of annuities, the claims files contained in the foregoing exhibits indicate otherwise. As many as seventeen files (including Macomber's) arguably contain representations as to Travelers Casualty's cost to obtain or a statement of the present value of the annuities. (Defendants' Exhibits 500, 502, 503, 505, 506, 507, 509, 511, 518, 520, 521, 523, 524, 525, 527, 528 and 529.)

the defendants claim that the plaintiff has not met the essential requirements of numerosity, typicality, predominance and superiority.

The Law of Class Certification

In two relatively recent opinions, Collins v. Anthem Health Plans, Inc., 266 Conn. 12, 33, 836 A.2d 1124 (2003) and Rivera v. Veterans Memorial Medical Center, 262 Conn. 730, 738, 818 A.2d 731 (2003), our Supreme Court has articulated the basic elements a trial court must find before certifying a class action: "numerosity" - that the proposed class is so numerous that joinder of all members is impracticable; "commonality" - that there are questions of law or fact common to the class; "typicality" - that the claims of the representative parties are typical of the claims of the class; and "adequacy of representation" - that the representative parties will fairly and adequately protect the interests of the class. See also Practice Book § 9-7; Fed. R. Civ. P. 23(a). In addition, the party seeking certification must also demonstrate that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Collins v. Anthem Health Plans, Inc., supra, 266 Conn. 48; Practice Book § 9-8; Fed. R. Civ. P. 23(b)(3).

" '[I]n determining whether to certify [a] class, a [trial] court is bound to take the substantive allegations of the complaint as true.' " Collins v. Anthem Health Plans, Inc., supra, 266 Conn. 24, quoting Rivera v. Veterans Memorial Medical Center, supra, 262 Conn. 743. " 'In determining the propriety of a class action . . . the question is not whether the plaintiff or

plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of [the class action rules] are met . . . . Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) . . . . [D]oubts regarding the propriety of class certification should be resolved *in favor* of certification.' " (Emphasis in original.) Collins v. Anthem Health Plans, Inc., supra, 266 Conn. 24-5, quoting Rivera v. Veterans Memorial Medical Center, supra, 262 Conn. 743. "Although it may be impossible to isolate the merits of the case from the issue of class certification, [t]he determination whether there is a proper class . . . does not depend on the existence of a cause of action." (Internal quotation marks omitted.) Rivera v. Veterans Memorial Medical Center, supra, 262 Conn. 745. While the plaintiffs bear the burden of proving that they satisfy the elements justifying class certification, "they need not prove that their claims ultimately will succeed." Id., 746.

Also, since the requirements for maintaining a class action under Practice Book §§ 9-7 and 9-8 are substantially identical to the requirements of rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, our state courts have traditionally looked to federal case law for guidance in construing our own class certification requirements. Collins v. Anthem Health Plans, Inc., supra, 266 Conn. 33, 48. Further, our Supreme Court has adopted an approach similar to that of the federal rule, "which permits the trial court to revisit the issue of class certification throughout the proceedings." Rivera v. Veterans Memorial Medical Center, supra, 262 Conn. 739. Since the court is required to required to conduct a "rigorous analysis" and to exercise its discretion as to each of the required elements for class certification, a discussion of each of the requirements for class certification follows. Collins v. Anthem Health Plans, Inc.,

supra, 266 Conn. 23.

A

Numerosity

"There is no magic number that automatically fulfills the numerosity requirement . . . because numerosity is tied to the impracticability of joinder under the particular circumstances of the case." (Citation omitted; internal quotation marks omitted.) Arduini v. Automobile Ins. Co. of Hartford, 23 Conn. App. 585, 590, 583 A.2d 152 (1990). Neither our Supreme Court nor Appellate Court has explored any particular contextual elements to be considered in weighing that impracticability, but analogous federal cases suggest geographic disbursement of class members and potential ignorance of claimants as to the existence of a cause of action are relevant, in addition to the obvious concerns about judicial economy. Ellis v. Elgin Riverboat Resort, Inc., 217 F.R.D. 415, 421 (N.D. Ill. 2003) (geographic disbursement); U.S. ex rel. Morgan v. Sielaff, 546 F.2d 218, 222 (7th Cir. 1976) ("[o]nly a representative proceeding avoids a multiplicity of lawsuits and guarantees a hearing for individuals . . . who by reason of ignorance. . . or lack of counsel may not have been in a position to seek one on their own behalf"). The leading treatise on class actions states that "when the class is very large, for example, numbering in the hundreds, joinder will be impracticable; but in most cases the number that will, in itself, satisfy the Rule 23(a)(1) prerequisite [of numerosity] should be much lower." 1 A. Conte & H. Newburg, Newberg on Class Actions, (4th Ed. 2002) § 3.5, p. 246.

Preliminary to class discovery, Travelers Casualty provided a list of thousands of possible class members, who had underlying accidents geographically disbursed throughout the country and who were presumably ignorant of their potential cause(s) of action. (See Plaintiff's Exhibit 1.) As discussed supra, an examination of the thirty redacted claim files entered as exhibits at the class certification hearing suggests that a substantial percentage of the thousands of claims contained in the list fall within the criteria set forth in the class definition. In addition, as also discussed, supra, the former chief financial officer of the Travelers Casualty claim department (1996-2003), testified at the evidentiary hearing that approximately 2000 personal injury claims of various types per year are concluded by way of structured settlements. To join those hundreds or thousands of cases from across the country and to manage them as joint actions is presumptively impracticable. Therefore, the court finds that the numerosity element is satisfied.

B

Commonality

"[T]he commonality requirement is met if [the] plaintiffs' grievances share a common question of law or fact." Collins v. Anthem Health Plans, Inc., supra, 266 Conn. 34. Collins stated that an allegation of a general business practice, which, if it exists, would breach a duty to a plaintiff, is sufficient to meet this requirement. Id., 41-46. Whether the practice in question was actually applied to a particular plaintiff is relevant only to the question of damages, and variation in damages does not affect commonality. Id., 42,44, 45, 67. See also Marr v. WMX Technologies, Inc., 244 Conn. 676, 682, 711 A.2d 700 (1998). To satisfy the

commonality requirement, the plaintiff need not share *every* legal claim in common with the class members, so long as the common ones predominate. Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982).

The class complaint alleges general business practices of Travelers Casualty, including a rebating scheme and a short-changing scheme, which allegedly give rise to the various causes of action set forth therein. Macomber v. Travelers Property & Casualty, supra, 261 Conn. 623-25. The fact that the surviving counts are inextricably intertwined and are all rooted in the challenged general business practices of the defendants, leads to the inescapable conclusion that there are common issues of both fact and law shared by the plaintiff and the potential class. Indeed, the Supreme Court has held that the complaint raises valid questions of law and fact as to (1) whether Travelers Casualty made representations to Macomber and the other putative plaintiffs as to the cost and/or present value of their annuities, (2) whether those representations gave rise to a duty to disclose Travelers Casualty's true costs, and (3) whether Travelers Casualty violated that duty by failing to disclose the actual present value of the annuities and/or any rebates it received on commissions paid to brokers. Id., 635-36. These questions present a common thread of law and fact running through all of the plaintiff's claims and are common to the potential class as defined by Macomber.

C

Typicality

"Typicality . . . requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of

events, and each class member makes similar legal arguments to prove the defendant's liability. . . . The typicality criterion does not require that the factual background of each named plaintiff's claim be identical to that of all class members; rather, it requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." (Citation omitted; internal quotation marks omitted.) Collins v. Anthem Health Plans, Inc, supra, 266 Conn. 34.

The rebating scheme and short changing schemes, as alleged in the complaint and as evidenced by the testimony and exhibits presented at the hearing on the motion for class certification, reflect an ongoing course of similar events giving rise to each putative class member's claim--not a separate course for each claim. That is, if events occurred as the plaintiff alleges and as the preliminary evidence suggests, Travelers Casualty did not develop an individual policy of non-disclosure of its true cost to purchase structured settlements each time a claim arose, rather, it followed a general business practice of seeking and not disclosing rebates it received on annuities placed with certain brokers or the actual cost or present value of annuities it purchased in connection with the structured settlement of personal injury and other similar claims. Because these allegations are central to all the claims made on behalf of the putative class, arise out of a general course of business practices and are based on similar and interrelated legal theories, the typicality requirement is satisfied.

D

Adequacy of Representation

"The adequacy-of-representation requirement tend[s] to merge with the commonality

and typicality criteria," as each requirement concerns whether the named party is well situated to prosecute the common aspects of the complaint; that is, whether the named plaintiff's claim and the class claims are "so interrelated that the interests of the class members will be fairly and adequately protected in their absence." Collins v. Anthem Health Plans, Inc., supra, 266 Conn. 54. However, adequacy analysis also "requires courts to ask whether [a representative] plaintiff's interests are antagonistic to the interest of other members of the class." (Internal quotation marks omitted.) Id. Adequacy analysis "also factors in competency and conflicts of class counsel." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 626, n. 20, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

The defendants contend that Macomber is not well suited to prosecute the claims of the class members in that she had no direct contact with Travelers Casualty, no understanding of the phrase "estimated present value," is unfamiliar with the technical aspects of her claim, and her settlement with Travelers Casualty is "atypical an unique," all of which render her inadequate to properly represent the defined class . (Defendants' Memorandum, pp. 15-17.) The defendants also assert that certain statutes of limitations are applicable to some of Macomber's claims, which do not apply to the claims of other potential class members.

The court finds these contentions to be specious for several reasons. First, because she was represented by legal counsel, Macomber's contact with Travelers Casualty representatives was obviously through her former attorney and not the company directly. In addition, it is the written communications reflected in her claim file rather than oral communications which constitute the essential evidence of the Macomber's claims and not any direct contact that she

may have had with Travelers Casualty. Second, whether Macomber understood the concept of present value is immaterial. If Travelers Casualty made a disclosure to her about the present value of her structured settlement, as her claim file (Exhibit 500) reflects, it had a duty to make a "full and fair disclosure" as to that value. See Macomber v. Travelers Property & Casualty Corp., supra, 261 Conn. 636. Further, Macomber's attorneys have demonstrated ample technical knowledge about the nature of the proposed class claims, have extensive litigation and class action experience and are fully capable of prosecuting this case as a class action. 1 A. Conte & H. Newburg, Newburg on Class Actions, (4th Ed. 2002) § 3.21, pp. 408-9. Third, even if some of the specific legal theories promulgated in the complaint are barred as to Macomber, she and the others still would share the same core grievance, a claimed violation of a duty by Travelers Casualty to disclose that it received rebates on commissions and/or the actual costs of the annuities it purchased in the settlement of class members' underlying claims. Given the class period proposed, many, if not all, potential class members are also likely to have statute of limitations issues similar to those of Macomber.

Although the defendants further claim that Macomber is not an adequate representative of members of the class with short-changing claims, as previously discussed supra at note 8, rebating is a form of short-changing and Macomber did testify both at her deposition and at the hearing that she was also short-changed. (Hearing on Motion for Class Certification, Transcript, 7/16/03, pp. 27-8.) Further, as earlier stated in connection with the discussion of commonality, the representative plaintiff in a class action need not share each and every claim of the class, "so long as the common ones predominate." Stewart v. Winter, supra, 669 F.2d

335. Finally, Macomber's claims pertain to general business practices of the defendants and are typical of the claims of other class members. No evidence has been presented that suggests that any claims or interests that may be specific to Macomber are antagonistic to the interests of the class and her testimony demonstrates that she is determined to prosecute her complaint vigorously. Finally, Macomber's legal counsel do not have any apparent conflicts of interest. For all these reasons, Macomber is an adequate representative of the proposed class.

E

Predominance

Predominance analysis includes some of the same considerations as commonality, but "is far more demanding." Collins v. Anthem Health Plans, Inc., supra, 266 Conn. 48. Specifically, predominance is concerned in part with the nature of proof of the claims. " 'Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case . . . can be achieved through generalized proof, and . . . these particular issues are more substantial than the issues subject only to individualized proof.' " Id., quoting Moore v. PaineWebber, Inc., 306 F.3d 1252, 1247 (2d Cir. 2002).

The predominance requirement is essentially "an inquiry into whether the economies of class certification can be achieved" by means of a class action. Collins v. Anthem Health Plans, Inc., supra, 266 Conn. 50. "In adding predominance and superiority to the qualification-for-certification list, the Advisory Committee [on the Federal Rules of Civil Procedure] sought to cover cases in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing

procedural fairness or bringing about other undesirable results . . . . As with the requirements of commonality, typicality and adequacy of representation, the predominance requirement also tests whether the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." (Citations omitted; internal quotation marks omitted.) Id. "[W]hen individual rather than common issues predominate, the economy and efficiency of class action treatment are lost." Id., 51.

Of all the issues raised by the defendants in opposition to the motion for class certification, predominance is the one on which the parties have directed most of their attention. As previously suggested in connection with commonality, common questions of the existence of the rebating scheme, of the defendants' putative duty to disclose the real costs and/or present values of annuities, and whether the defendants were engaged in general business practices which constituted a breach of that duty are all susceptible to generalized proof. At least as to the breach of contract (count three), CUTPA/CUIPA (count four), civil conspiracy (count eight) and unjust enrichment (count ten) counts, the only issue requiring individualized proof is the amount of damages attributable to each plaintiff. "[I]ndividual consideration of the issue of damages has never been held to bar certification of a class." Collins, supra, 266 Conn. 36, 37, 42, 67. However, as to the fraud (count six) and negligent misrepresentation (count seven) claims, while the element of false statement may well be proven in a generalized way, the essential element of reliance, by contrast, necessarily requires an individualized inquiry that defies class treatment. Because reliance cannot be presumed on a class-wide basis from the fact that the underlying cases were settled, as the plaintiff suggests,

the court finds that as to counts six (fraud) and seven (negligent misrepresentation), a finding of predominance as to these claims cannot be made.[14]

The defendants further claim that because this court would be required to apply the laws of fifty states if this case was certified as a class action, the plaintiff has not satisfied the predominance requirement because individual issues of law will necessarily predominate. Specifically, the defendants contend that because absent class members reside throughout the country, entered into structured settlement throughout the country and were allegedly injured throughout the country, individual issues of state law and proof will predominate in any class treatment of the plaintiff's claims. The defendants also claim that the plaintiff should have to demonstrate, at the class certification stage, either that the laws of the states in question do not vary or that any such variations will not present "insuperable obstacles" in any trial of this case as a class action.

The court rejects the defendants' argument on the foregoing issue for two primary reasons. First, because the defendants were successful in prevailing upon the court to limit the class discovery based on their assertion that there were thousands of claimants who arguably fall within the plaintiff's class definition, the discovery in this case was limited to a random sample of twenty-eight claim files. Beyond those claim files and a deposition, very little other

[14] Although the defendants contend as to all six counts that the plaintiff's claims are essentially "misrepresentation-based," and will require individualized factual inquiries into the negotiations of each underlying claim which will "overwhelm" any issues that the plaintiff may have in common with other putative class members, as discussed supra, the court disagrees and finds that as to counts three, four, eight and ten, that the critical issues and common threads running through all the putative plaintiffs' claims in those counts is susceptible to generalized proof on behalf of the potential class in the form of discoverable evidence contained defendants' own records and from other evidence within the control of the defendants.

discovery has yet been done pending resolution of the class certification issue. There has been essentially no discovery on the issue of the rebating scheme and none as to any defendant other than Travelers Casualty. Without the benefit of full class-wide discovery involving all the parties, the court has no definitive idea from which jurisdictions class members may emanate, and therefore, no way of knowing if Connecticut law conflicts with the state laws of the various members of the potential class.[15] Therefore, the court declines to deny class certification on this basis. The questions of what state law to apply and whether variations in state law, if they exist, present insurmountable obstacles to maintaining the class remain to be seen and is an issue that the court may revisit as the litigation progresses.[16] See Rivera v. Veterans Memorial Medical Center, supra, 262 Conn. 739.

Second, in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985), the seminal case on the issue of a multistate class action, the United States Supreme Court found that to apply the law of the forum state in claims unrelated to that state (Kansas), was "sufficiently arbitrary and unfair as to exceed constitutional limits." Id., 822. However, unlike the plaintiffs in Shutts who chose a forum foreign both to the defendants and

---

[15] Where forum courts find that they cannot apply their own state law across the board, they have addressed this issue in a variety of ways including dividing the class into subclasses or redefining the class after discovery once the parties have had an opportunity to explore the contacts that potential class members have with Connecticut. 4 A.Conte & H. Newberg, Newberg on Class Actions (4th Ed. 2002) §§ 13:35-13:36, pp. 434-38.

[16] Although Plaintiff's Exhibit 1 contains a list provided by the defendants of structured settlements in excess of $3500 entered into by Travelers Casualty from July 1, 1992 until December 31, 1998, which denotes the state where the underlying accident occurred, there is no information about where the claimants reside. This list is the one from which the court selected the sample files. The court notes that it took several attempts to get at the number twenty-eight because many of the files listed were disqualified for several reasons. For example, some involved subrogation claims. The lack of definitive information as to how many and which files may ultimately prove ineligible for class participation highlights the need for further discovery.

to the vast majority of the gas leases at issue in the case, the transactions herein, as well as the defendants, are firmly rooted in the state of Connecticut where they have "significant contacts or significant aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts creating state interests." (Internal quotation marks omitted.) Id., 821. After all, the home office of Travelers Casualty is in Connecticut, as is the nationwide management of the claims and structured settlement departments. Connecticut is where the company policies are set from which the challenged actions of the defendants derive. Therefore, the court cannot conclude that this case suffers from the "constitutional limitations" that concerned the Supreme Court in Shutts.[17] Id., 822. For this reason, at least at this stage of the proceedings, Connecticut choice of law rules need not be invoked to determine each absent class member's claim based on the facts and circumstances of his or her individual case. The court therefore finds that the fact that the underlying class claims arose and were settled throughout the country does not undermine the predominance of the relationship of Connecticut law to this case.[18]

For all the foregoing reasons, the court finds that the plaintiff has satisfied the element of predominance as to counts three (breach of contract), four (CUTPA/CUIPA), eight (civil

---

[17] In Shutts, the Kansas court applied Kansas contract and equity law to every claim in the case, "notwithstanding the fact that over 99% of the gas leases and some 97% of the plaintiffs . . . had no apparent connection to the State of Kansas." Phillips Petroleum v. Shutts, supra, 472 U.S. 815-16. The court went on to find that, under the circumstances, applying Kansas law across the board to the entire class was fundamentally unfair.

[18] Although the defendants have not specifically raised the issue of personal jurisdiction of non-resident class members, the court notes that notice and an opt-out procedure general provide an opportunity for class members to consent to the personal jurisdiction of the forum. Phillips Petroleum v. Shutts, supra, 472 U.S. 812.

conspiracy) and ten (unjust enrichment).

F

Superiority

As noted previously in this decision, under both rule 23(b)(3) of the Federal Rules of Civil Procedure and Practice Book § 9-8, "class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy." (Internal quotation marks omitted.) Collins v. Anthem Health Plans, Inc. supra, 266 Conn. 56. Along with predominance, the superiority requirement is intended to identify cases in which " 'a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.' " Id., quoting Amchem Products, Inc. v. Windsor, supra, 521 U.S. 615. Factors to be considered in determining superiority include: (a) "the interest of the members of the class in individually controlling the prosecution or defense of separate actions;" (b) "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;" (c) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum;" and (d) "the difficulties likely to be encountered in the management of a class action." Collins v. Anthem Health Plans, Inc., supra, 266 Conn. 56-7.

Based on the proceedings thus far, the maintenance of a class action will likely save considerable time, energy and expense as compared to individual actions. It does not appear likely that individual class members will have an interest in controlling their own cases.

Rather, it is more probable than not that a class action will enable many more of these plaintiffs to have their cases adjudicated than would individual suits, as many of the claims appear too small in value to pursue individually. The court is not aware of pending litigation on behalf of proposed class members with which this action would interfere. Further, for the reasons discussed supra in connection with the requirement of predominance, this forum does not appear to be an undesirable one for any of the parties to this litigation. Nor does it appear that there will be any extraordinary difficulties in managing this case as a class action. Class counsel appear to have sufficient resources and the experience to address likely defenses to the class claims, afford notice to the class and organize and present the claims of potential class members. In addition, resolution of the issues by way of a class action will avoid duplicative lawsuits involving multiple jurisdictions, protracted proceedings involving extensive judicial resources, and the risk of inconsistent results with far-reaching and incongruous consequences at tremendous expense to the defendants. Most importantly, a class action will allow the court to evaluate the efficacy of the alleged claims of inappropriate and/or illegal general business practices on the part of the defendants as asserted on behalf of the class in a consistent and relatively cost-efficient manner. For all these reasons, the court finds that a class action is superior to other forms of adjudicating this controversy.

Conclusion

Since the defendants concede that it is the policy of Travelers Casualty to collect "service fees" or rebates in virtually every case in which they employ a structured settlement, almost every potential class member may be a victim of the so-called rebating scheme. As

heretofore discussed, since rebating is a form of short-changing, every putative class member is likely to be a victim of short-changing of one form or another. In other words, all putative class members have arguably been short-changed by the practice of brokers rebating portions of their four percent commissions, while others have allegedly been short-changed because Travelers Casualty disclosed amounts greater than the true amounts actually invested on behalf of claimants in structured settlements.

Because the issue of reliance would have to be proven individually as to each class member as to the claims of common law fraud and negligent misrepresentation, the motion for class certification is denied as to count six (common law fraud) and count seven (negligent misrepresentation). The court having found that the requirements of Practice Book §§ 9-7 and 9-8 have been met, the motion for class certification is granted as to count three (breach of contract), count four (CUTPA/CUIPA), count eight (civil conspiracy) and count ten (unjust enrichment).

Order

Accordingly, the court having found that the plaintiff has met each of the requirements set forth in Practice Book §§ 9-7 and 9-8, as to counts three, four, eight and ten, it is hereby ORDERED that:

1. The claims alleged in counts three, four, eight and ten of the operative complaint are certified as class action claims; and
2. Lisa Macomber is certified as the representative of the class she seeks to represent (subject to the exclusions set for in ¶¶ 3(a)-(c) of the plaintiff's motion

for class certification), that is, all persons who settled claims with Travelers Casualty through structured settlements,

a. which involved the purchase of annuities, where a portion of the amount paid to purchase the annuity was returned, granted, or otherwise given, directly or indirectly, to Travelers Casualty, as commission, rebate, or otherwise (including any claimed as reimbursement for services), and/or

b. as to whom Travelers Casualty spent amounts less than the sums it represented as the costs or then-present values.

A status conference will be held on Monday, June 28, 2004 at 3:30 p.m. to discuss the further progress of this case.

BY THE COURT,

PECK, J.