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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

National Western RICO Suit OK'd To Proceed

By **Morgan Bettex**

Law360, New York (June 16, 2009) -- A federal judge has ruled that the National Western Life Insurance Co. is not off the hook in a proposed class action alleging the insurer and a group of competing sales organizations and agents worked together to fraudulently market and sell annuity policies to senior citizens.

In an order signed Tuesday in the U.S. District Court for the Southern District of California, Judge Janis L. Sammartino denied NWL's motion for summary judgment, ruling that the plaintiffs have provided evidence to prove that the insurer, its national marketing organizations and thousands of independent sales agents share a "common purpose."

Proving the "common purpose" relationship is essential to the plaintiffs' claim that the defendants, NWL and its partners, violated the Racketeer Influenced and Corrupt Organizations Act, according to the court.

Filed in 2005 by five senior citizens, the nationwide class action alleges the defendants are part of an enterprise that works together to sell NWL's deferred annuity policies and maximize annuity sales for NWL, commissions for the sales agents and revenues for all defendants.

Specifically, the suit claims that the Austin, Texas-based NWL targets the elderly as prospective purchasers of deferred annuities and fails to properly disclose key risks and adverse material information.

The defendants induce seniors to purchase the deferred annuities, often convincing them to surrender or borrow against other investments to fund the purchase, the plaintiffs contend.

The deferred annuities force owners to incur massive “surrender charges” and penalties to access their funds within the first 10 to 15 years, which often means they will not live to see the benefit of their investment, according to the complaint.

In addition to violating federal RICO law, the defendants’ sales practices also violate California elder abuse and consumer protection statutes, the complaint states.

The suit is brought on behalf of all senior citizens who purchased one or more NWL deferred annuities either directly, by surrendering an existing permanent life insurance policy or annuity or by borrowing against an existing life insurance policy.

The plaintiffs seek damages, an injunction forbidding the defendants from engaging in the alleged sales practices and an order for the defendants to compensate the elderly victims.

In a motion for summary judgment filed in October 2008, NWL argued that the competitive nature of the industry and the absence of cooperation between different groups mean that NWL, the NMOs and agents do not share a common purpose.

But Judge Sammartino rejected this argument, noting that courts interpret the phrase “common purpose” according to its plain meaning, which does not require that the enterprise participants share all of their common purposes.

“The competition among NMOs and among agents is not a barrier to finding that those same NMOs and agents share a common purpose with defendant,” the court wrote.

The insurer’s relationships with the NMOs involve more than mere sales because NWL exerts control over the organizations and agents through screening, training, commissions and performance review, according to Judge Sammartino.

The court also rejected NWL’s argument that the common purpose requirement of a RICO associated-in-fact enterprise should be interpreted in the same way as the unity of purpose requirement under the Sherman Act.

Where the Sherman Act requires a contract, combination or conspiracy, a RICO violation requires an “enterprise,” the court said.

Phong Tran, an attorney for the plaintiffs, said the ruling was a “significant victory” that was consistent with U.S. Supreme Court and U.S. Court of Appeals for the Ninth Circuit authority.

Counsel for NWL could not be reached for comment Tuesday.

The plaintiffs are represented by Bonnett Fairbourn Friedman and Balint PC, Waters & Kraus LLP, Coughlin Stoia Geller Rudman & Robbins LLP and Barrack Rodos and Bacine.

National Western is represented by Barger and Wolen LLP and Fulbright and Jaworski LLP.

The case is In re: National Western Life Insurance Deferred Annuities Litigation, case number: 05-cv-01018, in the U.S. District Court for the Southern District of California.