



# Life Settlements

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## The New Wave of Life Settlement Litigation: Attacks on Cost of Insurance Rate Increases

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### Introduction

Starting in 2015 and continuing into 2016, a number of insurance carriers raised the cost of insurance ("COI") rates on universal life insurance policies, resulting in dramatic increases to the premiums required to keep the policies in force. Insurers that raised COI rates include AXA Equitable Life Insurance Company, Transamerica Life Insurance Company, Lincoln Life & Annuity Company (as successor to Aetna Life Insurance and Annuity Company), Lincoln National Corporation (as successor to Jefferson-Pilot Life Insurance Company), Voya Retirement Insurance and Annuity Company (ReliaStar and Security Life of Denver policies), and Legal & General (Banner Life and William Penn policies). Of these, the increases by AXA, Transamerica, and Lincoln National have garnered the most attention in the life settlement space. This article will focus on litigation in the U.S. court system against those insurers.

While insurers generally have some discretion to raise COI rates, most policy forms restrict the exercise of that discretion to certain enumerated conditions or occurrences. The new wave of COI rate increases, however, may not have been based entirely—if at all—on enumerated factors. Rather, the COI increases may be an attempt by the insurers to target certain types of policies believed to be owned by investors who purchased the policies on the secondary or tertiary life settlement markets. In some instances, insurers have limited their COI increases to policies issued to insureds of a certain age and above a certain face value. In other words, policies that meet certain criteria associated with being investor-owned life insurance policies.

## **Policyholders React to COI Increases by Filing Lawsuits**

In response to the COI rate increases, policyholders have filed lawsuits in New York, California, Florida, Pennsylvania, Arizona, and Maryland. Each of AXA, Transamerica, and Lincoln National have been named as defendants in putative class actions brought on behalf of all owners of policies that have been the subject of COI rate increases and separate lawsuits brought by individual owners of policies who have chosen to fight the carriers on their own. The status of these cases is discussed below.

### **AXA Equitable**

In October 2015, AXA Equitable announced that it would be implementing a COI rate increase on approximately 1,700 Athena Universal Life II policies issued to insureds who were 70 years and older at the time of issuance with a policy face amount of \$1 million or more, with the increases ranging from 25% to 70%. According to AXA, the increase was prompted by less favorable expectations of future mortality and investment income than originally anticipated for this block of policies. As explained in a statement circulated by AXA to insurance agents: "[T]he impact of changes in our future mortality and investment income expectations was most pronounced for the class of policies issued age 70 and above and with face amount of \$1 million and above. Therefore those are the policies that will be affected by this change."

Even before the increase became effective in March 2016, a putative class action attacking the increase was filed in the United States District Court for the Southern District of New York on behalf of all affected policyholders, and other lawsuits were filed after the increase took effect. At the present time, there are a total of eight COI increase lawsuits pending against AXA Equitable. This includes the *Brach Family Foundation, Inc. v. AXA Equitable Life Insurance Company* class action filed in New York and another putative class action filed in federal court in Arizona. There have also been six lawsuits filed by individual investors—two in federal court in California and four in New York State Court. The two California actions were recently transferred to New York and will be heard by the same federal court judge overseeing the *Brach Family Foundation* case. Also pending at this time is a motion filed by AXA to transfer the Arizona federal court class action to the Southern District of New York.

Essentially, the plaintiffs that have filed lawsuits against AXA are alleging that the insurer breached its contracts of insurance in two ways. First, AXA violated the provision that says any changes in COI rates must be based on "reasonable assumptions" as to certain enumerated factors. According to the plaintiffs, neither of the factors cited by AXA (adverse expectations for mortality and investment income) justifies the COI rate increase. Second, by targeting policies with an issuance age over 70 and a face value of \$1 million plus, AXA violated the policy provision that says any COI changes must be "equitable to all policyholders of a given class."

### **Transamerica**

In June 2015, Transamerica announced that it was raising COI rates (which it refers to as Monthly Deduction Rates) on certain universal life insurance products "by as much as 100%." Although Transamerica stated that the changes were "based on our current expectation regarding our future

costs of providing this coverage," Transamerica did not provide any information as to which factors it was relying on to raise the COI rates.

The first putative class action against Transamerica was filed on February 28, 2016 in the Central District of California, with additional suits brought in the Southern District of Florida on March 25, 2016 and the Southern District of California on April 25, 2016. Transamerica moved to transfer and consolidate all of these actions in the Northern District of Iowa, where Transamerica is based. However, before a ruling on Transamerica's transfer motion was issued, the latter two class actions were voluntarily dismissed and refiled in the Central District of California. On June 10, 2016, all of the named plaintiffs filed a consolidated class action complaint in that district under the caption *Gordon Feller, et al. v. Transamerica Life Insurance Company*. The *Feller* class purports to include 70,000 policies that were the subject of COI rate increases and is brought on behalf of five subclasses: California and national current and surrendered policyholders and California senior policyholders.

The plaintiffs' consolidated class action complaint in *Feller* asserts that the COI rate increases were based on Transamerica's desire to offset the burden of paying guaranteed interest rates to policyholders on the accumulated value in their policy accounts and to recoup past losses. Transamerica allegedly depleted its own policy reserves by diverting cash flows to its parent company in the form of dividends and by engaging in "shadow" reinsurance transactions with captive affiliates. According to the plaintiffs, the rate increase was intended to recoup losses resulting from these transactions and restore lost profits from the precipitous fall of interest rates over the past decade. Finally, the class plaintiffs alleged that the purpose of the steep increase in COI rates was to force policyholders, particularly the elderly, to lapse their policies by making the premiums cost-prohibitive. Plaintiffs allege that Transamerica's actions constitute a breach of express and implied terms of the policies, and violate California Unfair Competition Law and California's elder abuse statute.

There are also three non-class actions filed against Transamerica in the Central District of California—one by an individual LLC, one by life settlement investors, and one on behalf of a group of church parishioners.

To date, the progress of the cases against Transamerica has largely been positive from the standpoint of policyholders. Motions to dismiss the *Feller* class action and the life settlement investors' lawsuit have been denied. A motion filed by the plaintiffs in *Feller* for a preliminary injunction to prevent lapses due to non-payment of MDR increases is pending, as is the plaintiffs' amended motion for class certification.

### **Lincoln National**

Lincoln National increased COI rates on its legacy Jefferson-Pilot policies beginning in August 2016. The COI rate increases ranged between 60% and 190%.

There are currently two COI increase lawsuits pending against Lincoln National. Several putative class actions were consolidated into one class action currently pending in the United States District Court for the Eastern District of Pennsylvania, captioned *In re Lincoln National COI Litigation*. Lincoln National filed a motion to dismiss in June 2017, but no decision has yet been reached by the court. Another action was filed by life settlement investors in federal court in California, but was

subsequently transferred to Pennsylvania for coordination with the aforementioned class action. That case also has a pending motion to dismiss.

Similar to the claims in the cases pending against AXA and Transamerica, the plaintiffs in these cases allege that Lincoln National breached the policy contracts because the COI rate increases were not based on factors enumerated in the policies. While Lincoln has asserted that the increases were a result of lower investment income, updated mortality assumptions, and updated expenses relating to reinsurance, the plaintiffs allege that the COI rate increases were, in fact, Lincoln National's attempt to recoup past losses and that the increases were not uniform. The plaintiffs have also alleged a claim for injunctive relief related to Lincoln National's refusal to provide illustrations.

### **What Comes Next**

The COI cases that are part of this new wave of life settlement litigation are mostly in their early stages. Motions to dismiss the claims against AXA and Transamerica in their entirety have been denied, and the expectation is that the same will happen when the court decides the motions to dismiss the two cases against Lincoln National. This is an important step for policyholder plaintiffs, as it confirms the viability of the claims and allows them to proceed with discovery to prove the facts asserted. But it is only one step in a multi-step process to bring these cases to completion. Discovery in these cases will be lengthy. The expectation is that the process of retrieving and producing documents and electronic files and then taking the pre-trial depositions of witnesses will take anywhere from 18 months to two years. After discovery is completed, the insurers (and possibly some or all of the plaintiffs) will likely file summary judgment motions, and only after those motions are decided will the courts set the cases for trial—assuming that at least some of the claims are not decided as a matter of law through summary judgment.

In the meantime, policyholders and insurers will be closely monitoring all of these lawsuits to see how this new wave of life settlement litigation develops.