



AlaFile E-Notice

35-CV-1995-000066.00

Judge: EDDIE HARDAWAY

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF GREENE COUNTY, ALABAMA

AUBREY WAYNE TIDMORE, ET AL VS STATE MUTUAL INSURANCE CO. ET AL
35-CV-1995-000066.00

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**IN THE CIRCUIT COURT OF
GREENE COUNTY, ALABAMA**

AUBREY WAYNE TIDMORE, et al.,)

Plaintiffs,)

v.)

CIVIL ACTION NO.: CV-95-066

**STATE MUTUAL INSURANCE
COMPANY, et al.,**)

Defendants.)

CAROL BELL, et al.,)

Plaintiffs,)

v.)

CIVIL ACTION NO.: CV-96-040

**STATE MUTUAL INSURANCE
COMPANY, et al.,**)

Defendants.)

**PRELIMINARY INJUNCTION AGAINST PLAINTIFF CLASS MEMBERS AND
EXTENDED TEMPORARY INJUNCTIVE RELIEF AGAINST OTHER PARTIES**

THIS MATTER comes before the Court on the preliminary hearing requested in a November 23, 2015, verified Motion for Further Relief (the "Motion") that was filed by Defendant State Mutual Insurance Company. The Court granted State Mutual's request for a Temporary Restraining Order ("TRO") following a hearing on November 23rd.

The Court heard testimony and reviewed the evidence adduced at the December 2, 2015, hearing on the State Mutual's request for a preliminary injunction. The hearing focused solely on preliminary injunctive relief against the original class members because the 2010 Consent Decree policyholders and the newly added policyholders represented by Court-appointed Guardian Brenda Pompey consented to an extension of the November 23rd TRO until the Court's

December 29, 2015, hearing on the merits for the class members and 2010 Consent Decree policyholders.

The Court reviewed State Mutual's Motion pertaining to approximately 6,000 whole life dividend participating policies that were not included in the original 1998 class action or the 2010 Consent Decree. The Court has also heard testimony from Douglas M. Price, State Mutual's Consulting Actuary, and Richard Burton, the company's Vice President and Corporate Compliance Officer. Their testimony was consistent with the subject matter presented in the verified Motion.

Pursuant to Rule 65 of the Alabama Rules of Civil Procedure, State Mutual has clearly shown in (a) the verified Motion, (b) the record of the TRO hearing, and (c) the testimony adduced at the December 2nd hearing that immediate and irreparable injury, loss, or damage will result to State Mutual in the absence of a preliminary injunction. This irreparable injury, loss or damage is described in detail in the Court's finding below.

Based upon the Court's review of the testimony and evidence the 1998 class action members do not appear, at this juncture, to be adversely impacted by the relief requested by State Mutual in the Motion.

Based upon the findings of fact and conclusions of laws set forth below, the Court grants State Mutual's request for a preliminary injunction against the original class members:

1. The 1998 class action members are plaintiffs represented by attorney Alexander W. Jones, Jr., Esq. of the Pritchard, McCall & Jones, LLC, law firm in Birmingham and Frank Tomlinson, Esq. of the Red Mountain Law group in Birmingham. Plaintiffs' class counsel had advance notice of the TRO and preliminary injunction hearings. They did not appear at the November 23rd TRO hearing, or otherwise contest the issuance of the

TRO.

2. On December 1, 2015, Class counsel filed an objection to the Motion. The Court has excerpted their verbatim arguments in support of their objections and against the issuance of the Preliminary Injunction:

- a. This Court has no jurisdiction to entertain this motion filed by the Defendant. The relief requested has nothing to do with the facts set forth in the original complaint as admitted by the Defendant in their pleadings.
- b. Even Defendant's counsel admitted such in his email to Class Counsel of November 22, 2015, "The Motion seeks declaratory and injunctive relief on behalf of State Mutual in connection with a group of about 6,000 non-party dividend participating life insurance policyholders that are not currently covered by the Court's June 15, 1998, Order". (Emphasis added).
- c. The Court is wrongly being asked to provide relief to the Defendant for matters completely unrelated to the subject matter of the litigation. The Defendants have artfully requested that since this Court has jurisdiction of the Defendant under the terms of the settlement, then the Defendant can then come in here and request all kinds of different relief affecting the rights of policyholders of the Defendant that were never a part of this suit.
- d. The Defendant has chosen to have a court appointed guardian named in order to protect the rights of these policyholders who were never a part of this litigation. No notice is being given to the class members as is their right under *Phillips Petroleum Co. v. Shutts*, 105 U.S. 2965 (1985). This is a violation of due process.
- e. Defendant has set a motion for a preliminary injunction affecting the rights of thousands of policyholders and yet without allowing any discovery provides notice on the Sunday of the Thanksgiving weekend and asks for the motion to be heard 3 days later.
- f. The Temporary Restraining Order, in paragraph 9 provides that a preliminary injunction is set on December 2, 2015, "for the non-class member policyholders added as necessary parties, as well as any class members and the 2010 Consent Decree policyholders that may hold dividend participating life insurance policies in the category of policies that are the subject matter of this Motion." They are not the subject matter of this litigation.
- g. "This Motion before the Court involves certain dividend participating whole life policies/riders where the dividends were not lowered at the same time that the dividends on the LP95, LP90, LP65 and GPWL policies were lowered." ¶ 5 of the TRO.

- h. No basis exists to preliminarily enjoin any members of the original class from pursuing any action against State Mutual that is not the subject matter of the litigation in 1995.
 - i. Class Counsel strenuously objects to the motion for relief and ask the Court for more time to conduct discovery, provide sufficient notice to everyone, and do everything Class Counsel deems necessary to protect the rights of its class members, rather than have this Court conduct a sham “declaratory judgment action” brought against itself (State Mutual) in which the only person protecting the newly-added parties is a court-appointed GAL with no knowledge of the original litigation.
3. The Court has carefully considered the objections of class counsel on behalf of the class members and finds that they are without merit for several reasons. First, the Court has jurisdiction over the matters specified in the verified Motion for Further Relief. By Order and Final Judgment, dated June 15, 1998, the Court reserved and maintained **“continuous jurisdiction over State Mutual and the class members** with respect to all matters relating to the settlement or the consummation of the settlement; the validity of the settlement; **the construction and enforcement of the settlement** in any orders entered pursuant thereto; in any disputes which may arise between class members with respect to the persons entitled to receive the proceeds of any amounts payable to class members under the Settlement Agreement; and the entry and **enforcement of this final judgment** and the injunctions contained herein, including modification of this final judgment, jurisdiction to revoke this Order and Final Judgment in its entirety and reinstate all claims dismissed or claims, actions, causes of action and liabilities related pursuant to paragraph 5 hereof; to tax court costs, **and all other matters pertaining to the settlement or its implementation and enforcement**”. (Emphasis Added.)
4. The Court also retained jurisdiction in the 2010 Consent Decree “for the purpose of monitoring.....compliance with the injunctive relief against [the covered policyholders],

and otherwise to enforce this decree". See, March 1, 2010, Consent Decree, Paragraph 4, page 10.

5. Second, the Motion before the Court involves certain dividend participating whole life policies/riders where the dividends were not lowered at the same time that the dividends on the LP95, LP90, LP65 and GPWL policies were lowered, all of which policies and riders are covered in the subject matter of original class action lawsuit. The Motion also involves those Life Span policyholders covered under the 2010 Consent Decree.
6. Third, State Mutual, pursuant to 1998 Court Order, reserved unto itself the right to declare the amount of annual dividends in the future using its sound business judgment. Prior notices and explanations have been given to the class members setting forth the non-guaranteed nature of the dividends and the company's reservation of the rights to declare an amount of annual dividends in the future. State Mutual's contractual and adjudicated right in this regard is now the law of the case.
7. Fourth, the testimony of Douglas Price supports a projected dividend cut on all remaining dividend participating whole life term policies which said cuts track the "Contribution Principal" to bring the dividends of these policies/riders in line with the class action policies and the Life Span term policies covered in the 2010 Consent Decree. Actuarial Standard of Practice No. 15 supports using the same dividend factor between similar classes of policies and/or riders such as the ones referenced in the 1998 Order, the 2010 Consent Decree, and the Motion.
8. Fifth, it appears to the Court, at this juncture, that State Mutual's implementation of the same dividend factor between similar class of policies and/or riders is appropriate from a contractual, equitable, and business judgment standpoint.

9. Sixth, the Court finds that the class members will suffer no economic harm by the uniform application of the “Contribution Principle” to all dividend participating life insurance policies. Based upon the record before the Court, the class members are not present in the category of policyholders adversely impacted by the declaratory and injunctive relief requested in the Motion. They may, however, be beneficiaries of the uniform application of the “Contribution Principle” going forward.
10. The Court has considered the factors necessary to support injunctive relief against the plaintiff class and finds that:
 - a. Class counsel received the required notice of State Mutual’s request for a preliminary injunction and they have been afforded a meaningful opportunity to be heard in opposition to the requested injunctive relief;
 - b. Class counsel represents a national class of policyholders that has already been defined and certified by the Court, as specified in paragraph 1 of the Motion;
 - c. Able and experienced attorneys who were designated by the Court as original class counsel represent the class members. These attorneys have lodged substantive and procedural objections on behalf of the class members;
 - d. Class counsel adequately represent the interests of the class members in the current proceedings that are primarily aimed at protecting the economic benefits to the class that are derived from the implementation of the Court’s 1998 Order and Judgment.
 - e. The Court-appointed Guardians Ad Litem for the policyholders covered

by the 2010 Consent Decree had the required notice of these proceedings and have consented to an extension of the TRO until the Court's December 29th hearing. The December 29th hearing on the preliminary injunction for this group of policyholders will be merged with a hearing on the merits of the Motion, including State Mutual's request for permanent injunctive relief;

- f. The 2010 Consent Decree group of policyholders has able representation in the form of two Co-Guardians Ad Litem. Each Guardian is an experienced and respected attorney in Alabama. The Guardians Ad Litem negotiated and won Court approval of a fair and reasonable settlement for this group of policyholders. This settlement is embodied in the Court's March 1, 2010 Consent Decree;
- g. The Guardian Ad Litem for the policyholders added to the litigation by the TRO had the required notice of the December 2nd hearing and has consented to an extension of the TRO until the Court's December 29th hearing, at which time the hearing on the preliminary injunction for this group of policyholders will be held;
- h. Attorney Brenda Pompey, the Guardian Ad Litem appointed by the TRO for the newly added group of policyholders, provides these parties with able and experienced representation. Attorney Pompey will have an ample opportunity to conduct discovery and lodge objections to the Motion, if this is in the best interest of her group of policyholders;
- i. Furthermore, the newly added policyholders may retain, at their own

expense, private counsel of their choice to represent their legal interests in future proceedings in this case;

- j. A descriptive notice of the Motion and of their procedural Due Process right to be heard at the December 29th hearing on the preliminary injunction against them and the subsequent hearing on the merits of the Motion (which will be scheduled early next year) will be mailed to the newly added policyholders, via First Class U.S. mail, on or about December 4, 2015.
- k. The evidence at the preliminary injunction hearing established that, in the absence of immediate injunctive relief against the 1998 class members, State Mutual would suffer irreparable harms and jeopardize the company's solvency;
- l. State Mutual has no adequate remedy at law;
- m. State Mutual has at least a reasonable chance of success on the ultimate merits of its case; and
- n. The hardships imposed on the 1998 class members by the issuance of a preliminary injunction would not unreasonably outweigh the benefit accruing to State Mutual.

11. There are approximately 6,000 additional dividend participating whole life policies that were not covered by the Court's two previous orders. All of these policies state that State Mutual has the contractual right to determine annually what dividend, *if any*, will be paid to this group of policyholders. Furthermore, the only relief sought in the motion against the newly added policyholders is declaratory and injunctive in nature. State Mutual is

making no claims for monetary damages against any of dividend participating life insurance policyholders.

12. It is appropriate that the Court bifurcate the hearing on State Mutual's motion by addressing and adjudicating first the issues relating to the class members (as well as those policyholders who are subject to the 2010 Consent Decree), and reserving all other issues on the requested permanent injunctive relief pending a determination of the rights of the newly added dividend participating whole life policyholders represented by Attorney Pompey during a hearing on the merits of the Motion as these policyholders may be adversely impacted by the issues raised in the Motion.
13. The Court recognizes that State Mutual's exercise of its dividend declaration rights must be applied uniformly. The Court also finds that State Mutual must act to declare its dividend on or before December 31, 2015, in order to establish the company's liabilities for 2016. The establishment of these liabilities is critical from a financial management standpoint.
14. The Court finds and concludes that State Mutual has met its burden of proof to support the issuance of a preliminary injunction against the class members that enjoins them from instituting, prosecuting or maintaining any legal proceedings in any court relating to the issues before the Court in the Motion For Further Relief. Using its equitable powers to protect its decrees and injunctions, as recognized in *Ex Parte State Mutual Insurance Company* (re: *Aubry Wayne Tidmore, et al, v. State Mutual Insurance Company, et al*); *State Mutual Insurance Company v. Betty J. Payne et. al.*, 715 So.2d, 207 (Ala. Sup. Ct.1997), the Court's preliminary injunction effectively authorizes State Mutual to make its dividend declaration on or before December 31, 2015, across-the-board on all whole

- life participating insurance products, whether they are riders or free-standing policies.
15. The Court appointed a Guardian Ad Litem to represent the interest of the newly added policyholders whose policies are the subject of the Motion for Further Relief for the purpose of giving notice to this group of policyholders of the pendency of the Motion, as it applies to them, and for affording these policyholders representation and a meaningful opportunity to be heard on the Motion. The Court recognizes that members of this policyholder group may retain their individual counsel to respond to the Motion as they see fit. The Court finds that this procedure comports with the due process requirements enunciated in *Phillips Petroleum Co. v. Shutts*, 105 U.S. 2965 (1985).
 16. The Court requires State Mutual to pay the reasonable attorney's fees and cost of the appointed Guardian Ad Litem, as well as the reasonable attorney's fees for the Guardians Ad Litem appointed for the 2010 Consent Decree policyholders.
 17. The Court finds that it is appropriate to bifurcate the proceeding on the Motion for several reasons. First, the relief sought does not appear, at this juncture, to adversely impact the economic interests or rights of the class members. Second, State Mutual's right to cut dividend on the policies held by the class members and policyholders covered by the 2010 Consent Decree has already been established by prior Orders of the Court. It is now the law of the case. As such, the Court has set an early hearing on the merits on the Motion for the class members and policyholders covered by the 2010 Consent Decree in the first phase of the bifurcated proceeding. This hearing was scheduled in the TRO for December 29, 2015.
 18. In the bifurcated proceedings, the Court will hear State Mutual's request for preliminary injunction against the newly added policyholders during the December 29th hearing. A

hearing on the merits will be scheduled in February or March of 2016 for the newly added policyholders represented by Attorney Pompey.

ACCORDINGLY, IT IS THEREFORE ORDERED, ADJUDGED and DECREED as follows:

1. The Court declares that State Mutual retained the right to declare the amount of annual dividends on the policies at issue in the Motion for Further Relief and that State Mutual has in the past and may continue to follow the Contribution Principal authorized in the June 15, 1995 Order and Final Judgment for the development of all dividend scales for all policy issues and their related policies/riders which may increase or decrease for the projections of current dividends scales.
2. The Court's June 15, 1995 Order and Final Judgment is expressly modified to approve State Mutual's use of its prudent business judgment when declaring dividends for the remaining whole life participating policies/riders at issue in the Motion for Further Relief.
3. Class members holding additional whole life dividend participating policies/riders are enjoined and prohibited from prosecuting, filing, maintaining, pursuing or participating as a litigant in any separate action asserting any claim arising from or relating to the subject matter of State Mutual's Motion for Further Relief and the lowering or reduction of the dividends on such additional whole life dividend participating policies.
4. By virtue of the agreed upon extension of the TRO, non-class member policyholders covered by the 2010 Consent Decree who are holding whole life dividend participating policies/riders are enjoined and prohibited from prosecuting, filing, maintaining, pursuing or participating as a litigant in any separate action asserting any claim arising from or

relating to the subject matter of State Mutual's Motion for Further Relief and the lowering or reduction of the dividends on such additional whole life dividend participating policies.

5. By virtue of the agreed upon extension of the TRO, non-class members holding whole life dividend participating policies/riders that were not subject to the Court's 1998 Order and the 2010 Consent Decree are temporarily restrained, enjoined and prohibited from prosecuting, filing, maintaining, pursuing or participating as a litigant in any separate action asserting any claim arising from or relating to the subject matter of State Mutual's Motion for Further Relief and the lowering or reduction of the dividend on such whole life dividend participating policies.
6. The Court affirms the permanent injunction in the 1998 Order and 2010 Consent Decree that permanently enjoined and prohibited policyholders from prosecuting, filing, maintaining, pursuing or participating as a litigant in any separate action asserting any claim arising from or relating to the subject matter of those Orders and the lowering or reduction of the dividends on the dividend participating policies covered by Orders.
7. State Mutual shall be responsible for the payment of reasonable attorney's fees and costs for the newly appointed Guardian Ad Litem, as well as the payment of reasonable attorney's fees and cost for the Guardians Ad Litem representing the 2010 Consent Decree policyholders (which State Mutual agreed to do during the TRO hearing).
8. State Mutual's Court-ordered payment of such reasonable attorney's fees and costs for the Court-appointed Guardians Ad Litem shall be deemed by the Court to constitute adequate security under Rule 65(c) for the Preliminary Injunction issued in this Order, since the policyholders that appear to be the parties adversely affected by the relief

sought in the Motion for Further Relief are the policyholders represented by Attorney Pompey.

9. The Court directs the newly appointed Guardian Ad Litem and counsel for State Mutual to continue meeting and conferring for the purpose of developing and giving a mutually agreed upon notice to the non-class member necessary parties who hold the additional whole life dividend participating policies. The notice shall inform these added necessary parties of the following: (a) the pendency of State Mutual's Motion for Further Relief, together with a summary of the relief sought; (b) the Court's issuance and extension of a Temporary Restraining Order against them, together with a copy of the TRO and this Order; (c) their right to a meaningful opportunity to be heard on the relief requested by State Mutual, including the right to retain independent counsel, the right to conduct discovery, the right to present witnesses at the hearing on the preliminary and permanent injunction hearings. The notice shall be mailed to the added necessary parties/non-class member policyholders by first-class mail no less than fourteen days from the date of the preliminary hearing set forth below. State Mutual shall bear all costs associated with mailing the notice.
10. The Court sets the preliminary injunction hearing for December 29, 2015 at 9 a.m. at the Green County Courthouse, 400 Morrow Avenue, Eutaw, Alabama 35462, for the non-class member policyholders added by the TRO as necessary parties.
11. The Court sets December 29, 2015, at 9 a.m. at the Green County Courthouse, 400 Morrow Avenue, Eutaw, Alabama 35462, for the hearing on the merits on the Motion for Further Relief for the class members and policyholders covered by the 2010 Consent Decree that do not hold dividend participating life insurance policies in the category of

policies that are the subject matter of this Motion. As noted earlier, the 2010 Consent Decree policyholders agreed to merge the hearing on the preliminary injunction against these policyholders with the hearing on the permanent injunction.

12. All of the objections raised and advanced by class counsel to the issuance of the Preliminary Injunction are hereby overruled.

13. After the hearings on the merits for class members and 2010 Consent Decree members have been held, further proceedings on the State Mutual's Motion will be limited to those newly added parties who hold dividend participating life insurance policies in the category of policies that are the subject matter of this Motion.

Done this 2nd day of December 2015, at 9:05 ~~pm~~ ^{A.M. 4th}



Hon. Eddie Hardaway, Jr.
CIRCUIT JUDGE