

**Friedman v Connecticut General Life Insurance  
Company**

2004 NY Slip Op 30089(U)

September 30, 2004

Supreme Court, New York County

Docket Number:

Judge: Richard B. Lowe

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_  
Justice

PART 54

Bruce Friedman

INDEX NO. 603058/01  
9118/03

- v -

MOTION DATE ~~6/18/03~~

Connecticut Gen'l Life Insurance Company

MOTION SEQ. NO. 603

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**FILED**  
OCT 08 2004  
NEW YORK  
COUNTY CLERK'S OFFICE

NOTIONAL IS PROVIDED AS A SERVICE  
WITH / WITHOUT THE COURT'S PERMISSION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/30/04

[Signature]  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK:

BRUCE FRIEDMAN, on Behalf of Himself

Index No.  
603058/2001

and All Others Similarly Situated,

Plaintiff,

-against-

CONNECTICUT GENERAL LIFE INSURANCE  
COMPANY,

Defendant.

**RICHARD B. LOWE, III, J.:**

Motion sequence numbers 02 and 03 are consolidated for disposition.

This is an action by a policyholder who alleges that his insurer's placement of a "Relation of Earnings to Insurance" ("REI") provision in the "General Provisions" section of a disability policy — rather than in the applicable benefits subsection — was unlawful, unfair, deceptive and misleading. Defendant Connecticut General Life Insurance Company ("Connecticut General") now moves for summary judgment (CPLR 3212) dismissing the complaint. Plaintiff Bruce Friedman ("Friedman") cross-moves for summary judgment on the third through seventh causes of action, which allege violations of insurance law, breach of contract, and unconscionability. Plaintiff also moves to certify a class consisting of all insureds, owners and beneficiaries who bought policies containing the improperly located REI benefits cap, except those who purchased their policies in Colorado, Louisiana, New Mexico, Ohio, North Dakota, Utah or Wisconsin.

Background

The complaint alleges that the defendant insurer reduced plaintiff's disability benefits from \$2,500 to \$543.33 per month upon receiving information regarding his past earnings, unlawfully relying on a benefits cap set forth in a misplaced REI clause. In August 2001,

defendant moved to dismiss the complaint for failure to state a claim and upon statute of limitations grounds. By order dated March 25, 2003 (the "Prior Order"), the court (Gammerman, J.) denied the motion in its entirety. As is relevant here, the court held that defendant's placement of the REI clause violated Insurance Law § 3216(c)(7). Specifically, the court ruled:

[O]n the plain face of the statute, the Relation of Earnings to Insurance clause was required to be included "with the benefit provision to which it applies," to wit, the Total Disability Benefit. Instead, Defendant placed it in the "General Provisions" section of the policy along with "general" terms such as claim forms, proof of loss, payment of claims, etc. As noted above, the Specification Page, which is the first substantive page of the policy, describes the benefit provided by the policy as \$2500 without making any mention of the prior earnings "cap."

Prior Order at 6-7. The court rejected defendant's argument that the REI clause, which is mandated by Insurance Law §

3216(d)(2)(F), was exempt from the placement requirement:

[O]n its plain face, the "particular benefit" proviso applies to all "exceptions or reductions" that apply only to a particular benefit, regardless of whether the "exception or reduction" is one of those listed in subsection (d) of the statute. The clause excepting "subsection (d)" provisions applies only to exceptions and reductions that are not applicable to a particular benefit, i.e., those that have general application to benefits under the policy.

Prior Order at 5.

In connection with the fourth cause of action for violation of the statute, the court rejected defendant's argument that the insurance law provisions did not support a private right of action. In addition to noting that the argument was made for the first time on reply, the court found that "it might well be concluded that the violation of these provisions estops defendant from invoking and enforcing the [REI] clause to defeat plaintiff's claims under the policy" (Prior Order at 11). The court likewise found that the statutory violations could support the sixth cause of action for unconscionability (Prior Order at 13).

[\* 4 ]

The court also upheld the seventh claim under Insurance Law § 4226, finding that the prohibition against pursuing a statutory penalty by way of class action did not defeat plaintiff's individual claims (Prior Order at 14). Finally, the eighth cause of action for breach of contract was sustained on the ground that, if the REI clause were enforceable, "plaintiff would still be entitled to the full benefit amount of the policy, in the absence of a showing that he has another disability policy providing loss of time benefits" (Prior Order at 16).

#### Defendant's Motion to Dismiss

Defendant's motion for summary judgment is, in essence, a motion to reargue the prior motion to dismiss. The application does not rely upon any new, material evidence obtained through discovery. Rather, defendant has merely submitted additional legislative history as alleged proof of the policy's presumptive enforceability, and proffered legal arguments that were made, or could have been made, on the prior motion. Specifically, defendant argues that Insurance Law § 3216 does not confer a private right of action; that subsection (d) dictates the placement of the REI clause; and that the application subsection (c)(7) to the REI clause does not support a GBL § 349 claim.

As a preliminary matter, the motion is untimely. Under CPLR 2221(d)(3), a motion to reargue must be made within 30 days of service of a copy of the order determining the original application. The instant motion was made more than four months after that time.

Furthermore, reargument "is designed to afford a party opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979]). It is not a vehicle which permits a party to argue the very same questions previously decided, or to advance arguments different from those raised on the original motion (Foley, supra; Pahl Equipment Corp. v Kassis, 182 AD2d 22 [1st Dept 1992]). Defendant does not point to any legal error in the Prior Order. Rather, as noted, the motion simply bolsters arguments previously made with additional

references to the legislative history.

To avoid this conclusion (and the related argument that the motion is barred by law of the case), defendant argues that the Prior Order did not necessarily resolve the issues now raised. Specifically, defendant asserts that the unenforceability of the REI clause was addressed only in dicta as part of a discussion of the statute of limitations defense. Accordingly, defendant contends, the applicability of section 3216 was beyond the necessary scope of the court's determination and could not have been decided on the merits.

A court cannot, of course, resolve issues which are not properly before it, or which the parties have not had a full and fair opportunity to litigate (see, Gee Tai Chong Realty Corp. v GA Ins. Co., 283 AD2d 295 [1<sup>st</sup> Dept 2001]). Here, however, contrary to defendant's suggestion, the issue regarding the placement of the REI was heavily briefed by both parties and squarely before the court. It was resolved by the Prior Order not merely as dicta on the limitations issue, but as a direct holding on the legal question raised by the CPLR 3211(a)(7) motion to dismiss (see Prior Order at 6-7).

Defendant was free, of course, to raise factual defenses regarding the issuance and acceptance of the policy, the amount of payments made thereunder, or plaintiff's compliance with its terms. However, defendant has raised no serious issue turning upon the discovery conducted following joinder of issue. Instead, the motion centers solely on the application of the law to the policy, an issue fully briefed and decided on the prior application.

Notwithstanding the foregoing, defendant is entitled to judgment dismissing the first and second causes of action under GBL § 349 -- previously challenged on statute of limitations grounds only. In connection with its motion for class certification, plaintiff has effectively abandoned the first cause of action based on sister state deceptive practices statutes. With respect to the second cause of action, the record demonstrates that plaintiff never actually read the policy. Accordingly, there is no question of fact regarding whether the policy was likely to

[\* 6]

have misled him (cf. Sims v First Consumers Nat. Bank, 303 AD2d 288 [1<sup>st</sup> Dept 2003]).

Finally, for the reasons set forth below in the discussions of plaintiff's motions for summary judgment and class certification, defendant is entitled to dismissal of the third, fourth, sixth and eighth causes of action as duplicative or moot.

Plaintiff's Cross-Motion for Summary Judgment

Plaintiff's cross-motion is granted to the extent of declaring the REI clause unenforceable ab initio, and awarding plaintiff judgment on his claims for breach of contract and for a statutory penalty under Insurance Law § 4226. As was the case with its own motion, defendant's opposition to plaintiff's cross-motion is based primarily upon legal issues resolved by the Prior Order. To the extent new legal or factual matters have been raised, they are without merit.

*Fifth Cause of Action -- Breach of Contract*

The fifth cause of action alleges that defendant breached the "Conformity with State Statutes" clause of the policy. That section, which is required by Insurance Law § 3216, provides:

Any provision of the Policy which, on its Date of Issue, is in conflict with a statute of the state in which the Insured resides on such date is hereby amended to conform to the minimum requirements of such statutes.

The Prior Order did not specifically address this particular provision, insofar as defendant challenged the claim upon statute of limitations grounds only. However, the court unambiguously found elsewhere in the decision that "the clause is placed in the policy in a manner violative of the very statute that authorizes its inclusion in the policy at all" (Prior Order at 13). That being the case, the misplaced REI clause was clearly "in conflict with a statute of the state" -- notwithstanding defendant's argument that its language was otherwise in conformance with that required by section 3216. Accordingly, the policy should be deemed amended to reflect that the REI clause was unenforceable, and plaintiff is entitled to judgment for breach of defendant's resulting obligation to pay the full disability benefit.

[ 7 ]

Judgment on the contract claim is warranted on the related ground that defendant's violation of the relevant statutes and regulations estops it, as a matter of law, from enforcing the REI clause (see, Prior Order at 11; Trainor v John Hancock Mut. Life. Ins. Co., 54 NY2d 213 [1981]; Tannenbaum v Provident Mut. Life Ins. Co. of Philadelphia, 41 NY2d 1087 [1977]; Presbyterian Hosp. v Maryland Cas. Co., 90 NY2d 274 [1997]). Relying on cases applying general common law estoppel principles (see Wood v Cordello, 91 AD2d 1178 [4<sup>th</sup> Dept 1983]; Sheridan Suzuki, Inc. v Caruso Auto Sales, Inc., 110 Misc2d 823 [Sup Ct NY Co 1981]), defendant objects that plaintiff did not rely on the policy to his detriment because he never read it. Defendant also contends that the doctrine is inapplicable where it would create a windfall, in this case an award of the full disability benefit rather than a reduced one. In the context of insurance coverage, however, the courts have found an estoppel where, as here, the statute or regulation violated is designed to protect the public, and have imposed coverage liability and nullified exclusions even where the insured made material misrepresentations in procuring the policy (see Tannenbaum, 41 NY2d at 1089).

*Third and Fourth Causes of Action -- Statutory and Regulatory Violations; Sixth Cause of Action -- Unconscionability; Eighth Cause of Action -- Breach of Contract*

The third and fourth causes of action assert a private right of action for violation of the relevant insurance statutes and regulations. The fourth claim is premised upon violation of New York law while the third rests on the laws of other states. In the Prior Order, the court declined to dismiss the third cause of action pending class-wide discovery on the laws of other states. As to the fourth cause of action, the court declined to consider defendant's new arguments regarding the availability of a private right of action, but opined that recovery could be had in contract under a theory of estoppel even if monetary damages could not be sought pursuant to the statutes and regulations alone.

8 ]

As noted above in connection with the contract cause of action, under New York law a violation of statute or regulation estops the insurer from enforcing the REI clause. Since no different or additional recovery would be available if a statutory private right of action were pursued, the fourth cause of action is dismissed as duplicative. The same analysis applies to the sixth cause of action, insofar as a finding of unconscionability would merely provide an additional ground for the estoppel giving rise to the contract claim. The eighth cause of action, premised upon a finding that the REI was enforceable, is moot in view of the court's contrary conclusion. The third cause of action must also be dismissed, for the reasons set forth below in connection with the motion for class certification.

*Seventh Cause of Action -- Insurance Law § 4226(d)*

Insurance Law § 4226 provides, in pertinent part:

a) No insurer authorized to do in this state the business of life, or accident and health insurance, or to make annuity contracts shall:

(1) issue or circulate, or cause or permit to be issued or circulated on its behalf, any illustration, circular, statement or memorandum misrepresenting the terms, benefits or advantages of any of its policies or contracts . . .

\* \* \*

(d) Any such insurer that knowingly violates any provision of this section, or knowingly receives any premium or other compensation in consequence of such violation shall, in addition to any other penalty provided in this chapter, be liable to a penalty in the amount of such premium or compensation, which penalty may be sued for and recovered by any person aggrieved for his own use and benefit, in accordance with the provisions of the civil practice law and rules.

Defendant issued a Disclosure Statement to plaintiff which, in violation of NYCRR §§ 52.54 and 52.60, announced a monthly benefit of \$2,500 failed to note the benefit reduction or limitation set forth in the REI clause. The Disclosure Statement thus constituted a "statement . . . misrepresenting the . . . benefits" within the meaning of 4226(a)(1). That, in turn, constituted a violation of the statute under 4226(d), triggering a penalty equal to the premiums paid.

Defendant argues that statute must be construed otherwise to avoid the "absurd and

unconscionable” result of plaintiff receiving benefits for which he has paid no premiums, especially insofar as plaintiff has already received more in benefits than he paid in premiums. However, the plain language of the statute states that the refund of premiums is not only a “penalty,” but a penalty “in addition to any other penalty.” Accordingly, its purpose is not merely to return the parties to the status quo, and statutory damages under section 4226 may be properly awarded in addition to compensatory and even punitive damages (see, Unibell Anesthesia, P.C. v Guardian Life Ins. Co., 256 AD2d 252 [1<sup>st</sup> Dept 1998]).

Defendant’s further contention that it did not “knowingly” violate the statute is without merit. The violation of the express terms of the statute is sufficient to establish knowledge, without proof of specific intent. This is not a case where defendant intended to pay the full benefit, but remitted a lesser amount through “inadvertence or honest mistake” (see, e.g., Norstar Bank v. Pickard and Anderson, 155 AD2d 911 [4<sup>th</sup> Dept 1989]).

#### Plaintiff’s Motion for Class Certification

In its original moving papers, plaintiff sought class certification, in all fifty states, on its claims for breach of contract, statutory violations and deceptive practices. On reply, plaintiff has abandoned the request for certification as to the deceptive practices claim and limited the scope to forty-

three states. For the reasons set forth below, the motion is denied.

A party seeking class certification must demonstrate that “(1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) a class action is superior to other available method for the fair and

\* 10 ] .

efficient adjudication of the controversy” (CPLR § 901[a]). The statute is “to be liberally construed to accommodate claims that would not be economically litigable except by means of a class action” (Godwin Realty Assocs v CATV Enterprises, Inc., 275 AD2d 269, 269 [1<sup>st</sup> Dept 2000]), and any errors should be resolved in favor of class status (Pruitt v Rockefeller Center Prop., Inc., 167 AD2d 14 [1<sup>st</sup> Dept 1991]). However, all five requirements must be satisfied by competent evidence in admissible form (Feder v Staten Island Hosp., 304 AD2d 470 [1<sup>st</sup> Dept 2003]).

The court concurs with plaintiff that the misplacement of the REI clause within the policy raises a common factual issue, that his claim is typical, and that he is an adequate class representative. The element of commonality is satisfied because the insurer has employed the identical, unenforceable language in all of its policies (see, e.g., Broder v. MBNA Corp., 281 AD2d 369 [1<sup>st</sup> Dept 2001]); Taylor v Amer. Bankers Ins. Group, 267 AD2d 178 [1<sup>st</sup> Dept 1999]; Pruitt v Rockefeller Center Props., 167 AD2d 14 (1<sup>st</sup> Dept 1991). Insofar as the claims rest on per se violations of the Insurance Law, individualized proof of reliance would not be required (cf. Solomon v. Bell Atlantic Corp., 9 AD3d 49 [1<sup>st</sup> Dept 2004]; Gaidon v Guardian Life Ins. Co. of Amer., 2 AD3d 130 [1<sup>st</sup> Dept 2003]; Russo v Massachusetts Mut. Life Ins. Co., 192 Misc2d 249 [Sup Ct Tompkins Co 2002]). For this same reason, plaintiff’s reliance on a sales presentation rather than on a reading of the policy would not render his statutory and contract claims atypical.

However, plaintiff has failed to meet the remaining requirements for certification. First, the proposed class is not sufficiently numerous. Although there are approximately 5,500 policies in force containing REI clauses, the provision has been invoked only three times in New York. Nationwide, the clause has been applied only an additional thirteen times: six times in California, twice in Connecticut, twice in Ohio and once each in Massachusetts, Washington state and Missouri. Moreover, one of those claims has been settled. The class size is plainly insufficient to justify certification (see, e.g., Klakis v Nationwide Leisure Corp., 73 AD2d 521 [1<sup>st</sup> Dept

1979]). Insofar as “the mere existence of the policy of the clause on which the insurer relies, is not enough to constitute an injury” (Prior Order at 9), certifying a class encompassing all policyholders regardless of whether they have been, or are likely to be, subject to the REI provision based upon their past income would be inappropriate. Given the low rate at which the clause has been invoked -- in only .8% of the 1,939 claims reviewed -- there is no reason to believe that more than a handful of claimants will qualify in the future.

Second, plaintiff has failed to show that common legal principles would govern the claims of its proposed nationwide class. “To establish commonality of the applicable state law, nationwide class action movants must credibly demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles” (Potchin v Prudential Home Mortg. Co., Inc., 1999 WL 1814612, \*10 [EDNY 1999][internal quotations and citations omitted]; see, Steinberg v Nationwide Mut. Ins. Co., 2004 WL 1959251 [EDNY 2004][plaintiff satisfied burden of proving commonality by submitting 50-state breach of contract analysis, including categorization of the states into four groups concerning the state law principles of ambiguous contract construction]; In Re Ford Motor Co. Ignition Switch Products Liability Litigation, 174 FRD 332 [DNJ 1997]). Plaintiff has not presented the court with any analysis of the relevant statutory and regulatory sister state insurance schemes, other than a conclusory assurance that “a legal violation of New York’s statutory scheme is a simultaneous violation of the statutory schemes in all of the 50 states.” Indeed, plaintiff first identified the relevant insurance statutes only on reply, and even then merely listed them without engaging in a substantive analysis of their provisions under the corresponding state law. Similarly, plaintiff has not addressed the governing contract principles, relying merely upon the bald assumption that “all states apply the same general principles with regard to the breach of a contract.”

As indicated in the Prior Order, it is a close question even in New York as to whether a private right of action arises from the state’s statutory scheme. The court cannot lightly assume

that in the closely regulated industry of insurance, all other states would apply the same construction. Differences in legislative history and common law could well dictate a different result. Likewise, it is far from certain that in connection with the contract claim all states would adopt the doctrine of estoppel.

Plaintiff's reliance upon Taylor v Amer. Bankers Ins. Group, 267 AD2d 178 (1<sup>st</sup> Dept 1999) is misplaced. There, although the defendant asserted that the laws of all 50 states were relevant, all plaintiffs were residents of Florida and that there was no conflict between the laws of New York and Florida (Taylor, supra at 178-79). Here, plaintiff is seeking certification in forty-three states but has failed to supply any serious analysis of the governing laws.

Plaintiff has also failed to demonstrate that he is an adequate class representative. His initial showing on that element of certification consists of nothing but a rote, conclusory recitation of the statutory standard. Plaintiff's reply papers ignore the adequacy requirement altogether, without any attempt to address defendant's objections regarding plaintiff's commitment to the litigation and financial arrangements with counsel (see, Pruitt v Rockefeller Ctr. Props., Inc., 167 AD2d 14 [1<sup>st</sup> Dept 1991]; Stern v Carter, 82 AD2d 321 [2d Dept 1981]). Finally, given the small number of potential claims subject to the REI clause, it does not appear that a class action would be the superior method of prosecution. The stare decisis effect of this decision will allow for quick adjudication of any future claims which may arise, subject to whatever distinguishing factual or legal defenses may be available.

#### Conclusion

For the reasons set forth above:

(1) Defendant's motion to dismiss is denied except as to the first and second causes of action.

(2) Plaintiff's cross-motion for summary judgment is granted as to the fifth cause of action for breach of contract.

(3) Plaintiff is entitled to a judgment declaring the REI clause void ab initio, together with payment of the full disability benefit including reimbursement of any amounts deducted from past payments under the REI clause.

(4) Plaintiff is entitled to judgment for payment of a statutory penalty equal to the amount of premiums paid under Insurance Law § 4226.

(5) The third, fourth, sixth and eighth causes of action are dismissed as duplicative and/or moot.

(6) The motion for class certification is denied.

Settle order.

Dated: September 30, 2004

ENTER:

J.S.C.

NEW YORK COUNTY CLERK, NY

**FILED**  
OCT 08 2004  
NEW YORK  
COUNTY CLERK'S OFFICE