

**Rabouin v Metropolitan Life Insurance Company**

2004 NY Slip Op 30155(U)

September 16, 2004

Supreme Court, New York County

Docket Number: 0111355/1998

Judge: Herman Cahn

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

PRESENT: Cahn  
Justice

PART 49m

Joyce Rabouin

INDEX NO. 111355

MOTION DATE 9/14/04

MOTION SEQ. NO. 003

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

- v -

Metropolitan Life Insurance

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 \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

**FILED**  
NOV 22 2004  
NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE .....**

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE

Dated: 11 16 104

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 49

-----X  
JOYCE RABOUIN,

Plaintiff,

-against-

Index No.  
111355/98

METROPOLITAN LIFE INSURANCE  
COMPANY,

Defendant.

-----X  
MARK QUIELLO,

Plaintiff,

-against-

METROPOLITAN LIFE INSURANCE  
COMPANY,

Defendant.

-----X  
**Herman Cahn, J.:**

Motion Sequence Nos. 003 and 004 are consolidated for disposition.

Plaintiff moves pursuant to Article 9, CPLR, to certify this action as a class action on behalf of the following proposed classes: (1) all persons who, before January 1, 1982, owned a Metropolitan Life Insurance Company participating ordinary life insurance policy that was in force at any time during the period June 24, 1992 to April 4, 2000 ("Breach of Contract Class"); and (2) all persons who, before January 1, 1982, owned a Metropolitan Life Insurance Company participating ordinary life insurance policy that was in force at any time during the period June

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NEW YORK  
COUNTY CLERK'S OFFICE

24, 1995 to April 4, 2000, and who resided in New York during that period at the same time that the policy was in force ("GBL § 349 subclass").

Plaintiffs, and the class they seek to represent, are owners of Metropolitan Life Insurance Company (MetLife) participating ordinary life insurance policies. They claim that, as participating policyholders, they are entitled to a distribution of "surplus," defined as excess premiums paid by participating policyholders, and investment earnings on those premiums, in the form of dividends. They assert that MetLife breached its contracts of insurance by undisclosed manipulation of the surplus, resulting in the unfair and inequitable dividend allocation to the policyholders which did not reflect the actual earnings potential of the amounts contributed to the surplus by whole life policyholders. They also assert, as an unfair business practices claim, that MetLife deceived them by misrepresenting that their premiums would be invested solely for their benefit, and that they would receive dividends from the investment earnings, when, in fact, the earnings were not so invested or distributed. Plaintiffs allege that MetLife siphoned off assets and earnings to shore up less profitable lines of insurance, in violation of GBL § 349.

In moving for class action certification, plaintiffs contend that with 7 million pre-1982 participating whole life policyholders, they meet the numerosity requirement.

Plaintiffs contend that the overriding issues are common issues with respect to the breach of contract claim, i.e. whether the dividends were appropriately allocated to the participating whole life policyholders. This question, plaintiffs urge, is governed by New York law, as the place of MetLife's incorporation, not by the laws of the state of residence of each class member, because this is an issue relating to the internal affairs of MetLife. They further urge that, in conducting its business, MetLife considers the dividend rights of all participating policyholders

to be the same, and does not recognize a state-by-state difference. It uses the contribution method to determine dividends, dividing the surplus amongst policyholders in the same proportion as the policyholders have contributed to that surplus. This method, plaintiffs argue, does not vary based on the policyholder's residence, or the policy wording used to describe the dividend. Plaintiffs also argue that the policy summary form does not make any difference to the dividend right of the policyholders, and is irrelevant to class certification, because MetLife's dividend obligation derives from New York Insurance Law.

Plaintiffs further assert that, with regard to the GBL § 349 claim, the annual dividend statement that MetLife sent to each policyholder was a uniform document, showing that the deceptive statements and omissions were identical, and that MetLife was not telling policyholders that it was transferring money earned on the whole life policies to other lines of its business. Therefore, common questions predominate.

With respect to the issue of damages, plaintiffs assert that MetLife's actuaries apportion divisible surplus each year when refunding dividends to each policyholder, so the claimed difficulties in calculating each class member's money judgment are not real difficulties. They contend that they are just seeking the shortfall in dividends each year of the class period, and not specific performance. Whatever differences there are in damages do not override the common questions of law and fact.

On the statute of limitations issue, pursuant to which MetLife claims that New York's borrowing statute (CPLR 202) would require the determination of the statutes of limitations in all the states in which the class members reside, and would result in the lack of a predominate common issue, plaintiffs claim that New York is the place of injury, since the accounts were with

MetLife in New York, and, thus, that accrual occurred in New York. They further assert that only 30% of the class resides in states with limitations periods shorter than New York's, and that their damages could be limited to the applicable limitations periods.

As to the element of typicality, plaintiffs assert that all of their breach of contract claims derive from MetLife's breach of the identical insurance contract with respect to dividends. Similarly, with respect to the GBL § 349 claim, the named plaintiffs assert that their claims are identical to those of the class. They maintain that there is no conflict of interest, and that they have demonstrated their ability to adequately represent the class in the prior proceedings and appeals in this action. Plaintiffs urge that Mrs. Rabouin is an adequate representative because she has the general awareness of the case required by CPLR 901 (a) (4), citing to excerpts from her deposition.

In opposition, defendant MetLife argues that individual legal and factual issues predominate over any purported common issues with respect to both claims.

On the contract claim, MetLife contends that the named plaintiffs' claims are not identical of the putative class' claims. It asserts that Rabouin alleges that her policy includes her policy summary form, and that she claims that MetLife breached the obligation under the policy summary form. MetLife argues that the policy summary form is not a uniform policy provision actually contained in the putative class members' policies. Metlife submits the affidavit of Louis Juran, the Manager of the Individual Contract Bureau, who attests that this form was only provided by MetLife starting January 1, 1978, to purchasers of new participating life insurance policies. Affidavit of Louis Juran, dated June 23, 2004, ¶¶ 2-6. MetLife contends that plaintiff Quiello makes no claim that he received such a policy summary form.

MetLife also asserts that plaintiffs' reliance on MetLife's memorandum to its field force to establish its contractual obligations with regard to dividends, also presents individual issues with regard to each policyholder. Thus, it maintains that common issues do not predominate.

In addition, MetLife urges that, while issues relating to its internal affairs and decisions as to surplus, dividends, investments, and the allocation of investments to particular lines of business, are governed by New York law, other issues such as contract interpretation, parol evidence, and statutes of limitations, will be governed by the laws of the states where the class members reside or purchased their policies. It argues that the various jurisdictions have different contract interpretation and parol evidence rules. It contends that New York choice of law rules require the court to apply a grouping of contacts approach, which, it urges, establishes that each class member's home state has the most significant relationship to the transaction and the parties.

As to the statutes of limitations, MetLife argues that, under New York's borrowing statute, the out-of-state class member's claim is subject to the limitations of the state where the claim accrues if that statute is shorter than New York's six-year contract statute of limitations. MetLife contends that contract claims asserting purely economic injury accrue at the place of injury, which is usually where the plaintiff resides. It further contends that the various jurisdictions in which putative class members reside vary significantly in their rules as to these issues. Accordingly, it maintains that these issues would need to be resolved for each class member, and that common issues would not predominate.

Further, MetLife urges that the determination of whether a class member is entitled to damages, and the calculation of those damages, also involve individual inquiries into matters such as in which years the policy was in effect, the cash value of that policy, and which, out of

approximately five dividend options (cash, buying paid-up additions which increase the face amount of the policy, leaving dividends with MetLife to accumulate interest at a rate set by MetLife, and buying one-year term life insurance), each class member selected each year. See Affidavit of Gregory T. Snider, dated July 1, 2004. Other individual issues of damages arise, according to MetLife, concerning when or whether a class member surrendered his policy or let it lapse, or whether the insured died and the policy proceeds were paid to the beneficiaries. It asserts that plaintiffs' expert's approach for calculating damages improperly erases the significant differences among the class members.

On plaintiffs' GBL § 349 claim, MetLife similarly asserts that individual issues predominate over any common issues. It states that plaintiffs fail to point to any specific document or public pronouncement which was seen by all the class members. MetLife states that, without a uniform misrepresentation that was received by class members, class certification of a GBL § 349 claim is not appropriate. It further urges that there are individual issues as to whether the class members were reasonably misled, and whether they were induced to purchase their policy based on the misrepresentation, and, thereby, were harmed.

As to the remaining class action requirements, MetLife asserts that the named plaintiffs' claims are not typical, and that they cannot adequately represent the interests of the class. With regard to the contract claim, it contends that plaintiff Rabouin relies on a policy summary form, which was not available to any of the other class members whom she seeks to represent. With respect to the GBL § 349 claim, MetLife contends that plaintiffs have tailored this claim to avoid the problem of individual issues predominating, by excluding out-of-state residents. This, MetLife asserts, is claim-splitting, and will deprive the non-New York class members of the

ability to pursue consumer claims under their own states' laws.

MetLife further asserts that plaintiffs are inadequate representatives because the varying statutes of limitations applicable to the class members creates a conflict of interest between the named plaintiffs and the class members.

Finally, MetLife argues that plaintiff Rabouin will be an inadequate representative, because she is unfamiliar with the case and with her responsibility as a class representative.

It also states that a class action is not superior given all the individual issues, and that a trial of the claims here would be unmanageable. It contends that the Insurance Department provides an alternative forum for these claims, which is superior to a class action.

In its application to file a sur-reply, MetLife claims that plaintiffs have changed their breach of contract claim from reliance on the policy summary form and a field force memorandum, to reliance on MetLife's "contractual dividend obligation," allegedly derived from other MetLife internal memoranda. MetLife contends that this does not avoid, as plaintiffs claim, the individual issues of parol evidence, contract interpretation, damages, and statutes of limitations. It argues again that there are individual issues regarding the applicable statutes of limitations, asserting that plaintiffs are oversimplifying the complex individual issues raised by the need to apply differing limitations periods. MetLife also asserts in its sur-reply that plaintiffs are now relying on MetLife's omission in the dividend statements, that is, that it did not tell policyholders that they were entitled to higher dividends, for their GBL § 349 claim, to avoid individual issues raised by their claim.

Plaintiffs assert that this sur-reply is improper. They maintain that their argument that the summary form was irrelevant to class certification is not new, and that the form makes no

difference to the policyholders' dividend rights. They also maintain that this policy form is not alleged with respect to named plaintiff Quiello, and thus, that MetLife does not challenge him as a representative of the breach of contract class. With regard to the GBL § 349 claim, they assert that plaintiff Quiello's testimony, at his deposition, that the dividend statements were deceptive because they failed to tell the recipient anything, was in the record before their reply papers. They contend that MetLife submits a sur-reply affidavit from its actuary, Mr. Snyder, which simply repeats much of his prior testimony that damages would be difficult to calculate, and, thus, is unnecessary.

### **DISCUSSION**

The motion for class certification is granted. Defendant's motion for leave to file a sur-reply is also granted.

CPLR Article 9, which sets forth the requirements for a class action, is modeled after Federal Rules of Civil Procedure, Rule 23, the policy of which is to favor class actions, and to construe the statute liberally. In re Colt Indus. Shareholder Litigation v Colt Indus., Inc., 155 AD2d 154 (1<sup>st</sup> Dept 1990), affd as modified 77 NY2d 185 (1991); Pruitt v Rockefeller Ctr. Props., Inc., 167 AD2d 14, 20-21 (1<sup>st</sup> Dept 1991). New York courts have regularly turned to Federal decisions for guidance in interpreting the five prerequisites. See e.g. Stern v Carter, 82 AD2d 321 (2d Dept 1981); Friar v Vanguard Holding Corp., 78 AD2d 83 (2d Dept 1980). “[A]ny error, if there is to be one, should be . . . in favor of allowing the class action.” Pruitt v Rockefeller Ctr. Props., Inc., 167 AD2d at 20-21 (quotation omitted); see Esplin v Hirschi, 402 F2d 94, 101 (10<sup>th</sup> Cir 1968), cert denied 394 US 928 (1969). It is a particularly appropriate form of action where class members have allegedly sustained damages in insufficient amounts to

justify individual actions. Pruitt v Rockefeller Props., Inc., 167 AD2d at 21; see also Godwin Realty Assocs. v CATV Enterprises, Inc., 275 AD2d 269 (1<sup>st</sup> Dept 2000).

The prerequisites to class certification are set forth in CPLR 901 (a), which provides that a class may be certified if:

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 interest of the class; and
5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Plaintiffs have the burden of establishing the propriety of class certification, with the determination being vested in the discretion of the trial court. Ackerman v Price Waterhouse, 252 AD2d 179 (1<sup>st</sup> Dept 1998).

**A. Numerosity**

This action, potentially involving millions of class members, clearly meets the numerosity requirement, and defendants do not dispute this. CPLR 901 (a) (1); see Affidavit of Paul Richter, dated July 2, 2004, ¶ 6 (over 7 million policies issued before 1982, and still in force as of year-end 1993, that fall within class definition). Thus, plaintiffs have satisfied the first element.

**B. Commonality**

The second element, whether common issues of fact and law predominate, is the pivotal

question here, and the one most seriously contested. In deciding whether common questions predominate, there is no requirement of identity or unanimity among class members. Friar v Vanguard Holding Corp., 78 AD2d at 98. Common issues of fact and law usually predominate over individual issues when the activity complained of involves one set of operative facts from which the class claims arise. CPLR 901 (a) (2); Green v Wolf Corp., 406 F2d 291, 299-300 (2d Cir 1968), cert denied 395 US 977 (1969). The fact that there may be some individual issues, such as the amount of damages, which remain after resolution of the common questions does not warrant denial of class certification. See Weinberg v Hertz Corp., 116 AD2d 1 (1<sup>st</sup> Dept 1986), affd 69 NY2d 979 (1987); Stellema v Vantage Press, Inc., 109 AD2d 423 (1<sup>st</sup> Dept 1985); Thompson v Whitestone Sav. and Loan Assn., 101 AD2d 833 (2d Dept 1984), appeal dismissed 64 NY2d 610, appeal and lv dismissed 65 NY2d 636 (1985). Generally, the focus in deciding whether the predominance requirement has been met, is on the issue of liability, and if liability issues are common to the class, common questions are held to predominate over individual issues. See In re Blech Securities Litigation, 187 FRD 97, 107 (SD NY 1999); Dura-Bilt Corp. v Chase Manhattan Corp., 89 FRD 87, 93 (SD NY 1981).

Here, common issues of law and fact predominate. As the plaintiffs assert, the class members raise common legal and factual issues about whether the dividends were appropriately allocated to the participating ordinary life insurance policy holders; whether MetLife breached the life insurance contracts, or engaged in deceptive acts, in manipulating the surplus from these policies and allocating it to other, less profitable lines of its insurance business; whether the dividend allocation reflected the actual earnings potential of the amounts contributed to the surplus by the participating ordinary life policyholders; and whether this manipulation of the

surplus, and the omission on the dividend statements that such manipulation was going on, violated the policies and GBL § 349. Plaintiffs assert that the class members were treated similarly with respect to the manipulation of the dividends, and MetLife fails to present any evidence to the contrary. The rights of each individual in the proposed class were allegedly violated in the same manner: the surplus that was generated by their excess premiums, and investment earnings on those premiums, which was to be paid to them as dividends, instead, was being allocated to other lines of MetLife's business. The alleged wrongs were not individual in nature, and are not subject to individual defenses. Cf. Mitchell v Barrios-Paoli, 253 AD2d 281, 291 (1<sup>st</sup> Dept 1999). They have each suffered a similar harm in the loss of dividends. These are the kind of common operative facts that warrant class action treatment.

Given the nature and uniformity of MetLife's offer of dividends, based on the earnings from premiums that contributed to a surplus, to these participating ordinary life insurance policyholders, any matters relating to individual reliance and causation, with regard to the GBL § 349 claim, are relatively insignificant, and do not preclude class certification. See Taylor v American Bankers Ins. Group, Inc., 267 AD2d 178 (1<sup>st</sup> Dept 1999); Pruitt v Rockefeller Ctr. Props., Inc., 167 AD2d 14, supra. This dividend offer or obligation, coupled with the alleged omission in the dividend statements that the dividends were not being equitably allocated, did not differ materially among the class members. Therefore, class certification of this claim is appropriate. See e.g. Broder v MBNA Corp., 281 AD2d 369 (1<sup>st</sup> Dept 2001); Taylor v American Bankers Ins. Group, Inc., 267 AD2d 178, supra.

Contrary to MetLife's contentions, the court need not apply the substantive laws of the various states of plaintiffs' residences with respect to contract interpretation or parol evidence.

As MetLife concedes, under a traditional choice-of-law analysis, the law of New York applies to the substantive issue of whether MetLife appropriately allocated dividends to the proposed class. The decision of MetLife directors about whether and how much dividends to pay policyholders relates to the internal affairs of the corporation. Under the internal affairs doctrine, a conflict of law principle, only the state of incorporation has the authority to regulate the internal affairs – “matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders” (Edgar v MITE Corp., 457 US 624, 645 [1982]) – because otherwise the corporation would be subject to conflicting demands. Id. The declaration and payment of dividends relates to the internal affairs of a corporation, see State Farm Mut. Auto. Ins. Co. v Superior Court, 114 Cal App 4<sup>th</sup> 434 (2003), and is to be decided under the internal affairs doctrine. Therefore, the common issue as to MetLife’s allocation of dividends is governed by one law – New York – because that is the place of MetLife’s incorporation. “Courts, moreover, routinely certify multi-State or nationwide classes in instances where common questions of law or fact predominate over those affecting only individuals, and in such cases the substantive law of the forum State is applicable, except when inconsistent with otherwise applicable State law.” Taylor v American Bankers Ins. Group, Inc., 267 AD2d at 178 (citations omitted).

The potential individual issues raised as to damages are not a reason to deny class certification. See Godwin Realty Assocs. v CATV Enterprises, Inc., 275 AD2d 269, supra. “To the extent that there may be differences among the class members as to the degree in which they were damaged, the court may try the class aspects first and have the individual damage claims heard by a special master or create subclasses.” Id. at 270, citing Weinberg v Hertz Corp., 116 AD2d at 6-7; see also Stellema v Vantage Press, Inc., 109 AD2d 423, supra; Thompson v

Whitestone Sav. and Loan Assn., 101 AD2d 833, supra. While MetLife contends that the damages calculation is complex, its actuaries did these kinds of calculations in distributing dividends and calculating statutory reserves for the class. Moreover, the claimed complexity of the damage issue is not a bar to class action certification. Pruitt v Rockefeller Ctr. Props., Inc., 167 AD2d at 23.

As to the statute of limitations issue, “[w]hen a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued. This prevents nonresidents from shopping in New York for a favorable Statute of Limitations.” Global Fin. Corp. v Triarc Corp., 93 NY2d 525, 528 (1999) (citations omitted). Although the borrowing statute might require the court to apply other states’ limitations periods for about 30% of the class, who reside in states where the period is shorter than in New York, this does not override the common issues that predominate, as discussed above. Cf. Ackerman v Price Waterhouse, 252 AD2d 179, supra (limitations defenses was only one of a number of issues that were not common to the global class). If this limitations issue, alone, were enough to require the denial of certification, it would be difficult to imagine any nationwide class action that would be certifiable.

The cases relied upon by MetLife are unpersuasive. Sirica v Cellular Tel. Co. (231 AD2d 470 [1<sup>st</sup> Dept 1996]), is distinguishable. There, the court found that the defendant’s contractual liability was individual in nature, and, that, together with its credit policy, and the plaintiffs’ inability to quantify the actual losses, the conclusion of a lack of common issues was warranted. Here, in contrast, MetLife’s contractual liability is not individual, but rather, class-based, and

common issues predominate.

Similarly, in Tegnazian v Consolidated Edison, Inc. (189 Misc 2d 152 [Sup Ct, NY County 2000]), the court found that there was a lack of standing and typicality, and again, individual issues as to liability. In addition, the court found that the action would require considerable inquiry into whether the damages alleged were caused by the blackout. Here, there are no issues as to standing, common issues of liability predominate, and no need for the same kind of damages causation inquiry on these facts.

Finally, Solomon v Bell Atlantic Corp. (9 AD3d 49 [1<sup>st</sup> Dept 2004]), is distinguishable on the grounds that the court found individual issues of proof, extent, and cause of injury, and individual defenses to liability. Solomon v Bell Atlantic Corp. also primarily involved claims of false advertising. In discovery, it became apparent that the class members had been exposed to different advertisements, and some saw no advertisements at all. In contrast, the plaintiffs here were exposed to the same conduct, and MetLife's dividend obligation to them was identical.

### C. Typicality

Plaintiffs Rabouin and Quiello have demonstrated that they meet the typicality requirement as well. Since both of these plaintiffs claim that they suffered economic losses from MetLife's actions in manipulating the surplus from their policy premiums, they are plainly typical of the entire class. Their claims arose out of the same course of conduct, and are based on the same theories as those of the remainder of the class. See Ackerman v Price Waterhouse, 252 AD2d at 201; Pruitt v Rockefeller Ctr. Props., Inc., 167 AD2d at 22; Friar v Vanguard Holding Corp., 78 AD2d at 99. MetLife's contention that plaintiff Rabouin relies on a policy summary form and a field force memorandum for her contract claim, which was not typical for the class, is

belied by MetLife's own evidence that her policy was the same as all other policies for dividend purposes. See Deposition of Anthony Amodeo, vice president and senior actuary at MetLife, at 774-75, annexed as Exhibit A to Affirmation of Jared B. Stamell, dated May 13, 2004.

Moreover, the form and memorandum are not the basis of her claim – it is MetLife's actions in distributing the dividends. Similarly, the named plaintiffs' unfair business practices claim is also based on the same course of conduct and theory.

**D. Adequacy**

CPLR 901 (a) (4) requires that “the representative parties will fairly and adequately protect the interests of the class.” The factors to consider in determining adequacy are the representative's familiarity with the lawsuit, his or her financial resources, whether any conflict exists between the representative and the class members, and the competence and experience of counsel. The court is not persuaded by MetLife's argument that plaintiff Rabouin's alleged lack of sophistication renders her claim atypical. See Ackerman v Price Waterhouse, 252 AD2d at 201-02. She is not required to have detailed knowledge of the matters at issue, just a general awareness of the claims and the litigation. Id. at 202; Brandon v Chefetz, 106 AD2d 162, 170 (1<sup>st</sup> Dept 1985). In her deposition, Mrs. Rabouin demonstrated that she knew her dividend rights, and understood how the premium payments are supposed to generate dividends. Exhibit G to Reply Affirmation of Jared B. Stamell. Mr. Quiello also demonstrated his understanding of the claims and the lawsuit. Exhibit F to Stamell Reply Affirm. That is sufficient.

The court discerns no conflict between either Mrs. Rabouin or Mr. Quiello and the class. Plaintiffs have not engaged in claim-splitting, nor have they artificially limited the suit to meet class requirements. Cf. Small v Lorillard Tobacco Co., 252 AD2d 1 (1<sup>st</sup> Dept 1998), affd 94

NY2d 43 (1999) (plaintiff class of smokers limited claims to purchase price of cigarettes and limited class period just to make it a negative value suit). If some kind of conflict arises because of a limitations issue, a subclass could be created to resolve that conflict. Finally, plaintiffs' counsel has demonstrated its experience and skill in class action litigation, and that it will adequately represent the interest of all class members. See Ackerman v Price Waterhouse, 252 AD2d at 202.

**E. Suitability**

Plaintiffs have also satisfied their burden of showing that a nationwide class action is superior to other methods of adjudicating this dispute, and that this action is suitable for such treatment. CPLR 901 (a) (5) and 902. Since adjudication of the common issues in this case – whether MetLife's actions in removing the surplus generated by these policyholders' life insurance policies to other lines of its business, constituted a breach of the insurance agreements and/or a deceptive business practice under GBL § 349 – would dispose of most, if not all, of the issues in the case, a class action is clearly the superior method. Id. Moreover, the court is convinced that the class action may be the only way by which a claim challenging the practices herein complained of, with regard to the dividends, will be adjudicated. The purpose of the class action is to provide “a means of inducing socially and ethically responsible behavior on the part of large wealthy institutions. Without the benefit of the class action, these institutions could act with impunity . . . ‘since, realistically speaking, our legal system inhibits the bringing of suits based upon small claims.’” Pruitt v Rockefeller Ctr. Props., Inc., 167 AD2d at 24 (citation omitted). Here, because the potential individual recovery is small, the claimants are likely to have little interest in bringing an individual action, particularly since attorney's fees would likely

exceed the amount of the recovery. With respect to the manageability of a trial, the action is not so complex that the disposition of several key issues would not resolve the larger part of the allegations against defendant. See Brandon v Chefetz, 106 AD2d 162, supra.

Based on the foregoing, this court finds that plaintiffs have satisfied the prerequisites of CPLR 901 and 902.

Accordingly, it is

ORDERED that the action listed in the caption above is to be maintained as a class action under Article 9 of the CPLR by the plaintiffs commencing the action for themselves and as representative parties for the following classes:

1) all persons who, before January 1, 1982, owned a Metropolitan Life Insurance Company participating ordinary life insurance policy that was in force at any time during the period June 24, 1992 to April 4, 2000 ("Breach of Contract Class"); and

(2) all persons who, before January 1, 1982, owned a Metropolitan Life Insurance Company participating ordinary life insurance policy that was in force at any time during the period June 24, 1995 to April 4, 2000, and who resided in New York during that period at the same time the policy was in force ("GBL § 349 subclass");

and it is further

ORDERED that within 15 days of filing of this Order, the plaintiffs shall present a plan for giving notice to the class and proposed form of notice to the class, and attached proof of claim designed to meet the requirements of CPLR 904 which shall indicate to the class members that unless they "opt out" within a fixed time their claims will be barred. Within 15 days thereafter, the defendant shall file with the court and serve upon the plaintiffs its suggestions and objections, if any, to the forms of notice and proof of claim submitted; and it is further

ORDERED that this court retains jurisdiction under Article 9 of the CPLR to correct, modify, annul, vacate, and supplement this Order from time to time before the decision on the merits of the common questions, as it may deem proper.

Dated: November 16, 2004

ENTER:

  
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J.S.C.

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