

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.

LARRY ZARRELLA, an individual,
ZARRELLA CONSTRUCTION, INC.,
a Florida corporation, on Behalf of
All Others Similarly Situated,

Plaintiffs,

vs.

Pacific Life Insurance Company,

Defendant.

CLASS ACTION COMPLAINT

Plaintiffs Larry Zarrella, an individual, and Zarrella Construction, Inc., a Florida corporation (collectively referred to herein as the “Plaintiffs”), on behalf of all others similarly situated, hereby make the following allegations against Defendant Pacific Life Insurance Company (“Pacific Life”) and state:

NATURE OF ACTION

1. This is a class action brought by Plaintiffs on behalf of themselves and all others similarly situated who purchased Flex XII life insurance policies from Defendant Pacific Life (the “Policies”). The Policies were structured, developed, marketed, and sold by Pacific Life and its agents as policies that were specifically appropriate for funding tax qualified defined benefit pension plans under 26 U.S.C 412(i) of the Internal Revenue Code (“412(i) Plans”). Defendant Pacific Life expressly represented to potential purchasers that: (a) the Policies were appropriate for use in funding 412(i) Plans; (b) the premiums paid on the Policies were fully tax deductible; and (c) the purchaser could pay five annual premiums and then purchase the policy for its

suppressed cash value, while taking tax-free loans against the policy. The Policies required extremely high premium payments from the purchasers, which not only increased the tax deductions allegedly available under the 412(i) Plan, but also grossly inflated the commissions and other compensation paid to Pacific Life and its agents.

2. The Policies, however, violated many, if not all, of the requirements for insurance contracts qualified to be used to fund 412(i) Plans and, accordingly, were not appropriate for their intended and expressly marketed purpose. Defendant Pacific Life knew, or should have known, that it structured, marketed, and sold Policies posing numerous material tax risks, including disqualification under § 412(i), the loss of tax deductions for plan contributions, Internal Revenue Service (IRS) audits of the 412(i) Plan and the concomitant fees and costs, and severe IRS financial penalties stemming from the failure to qualify under § 412(i). The failure to disclose the substantial risks associated with the Policies as marketed for use in 412(i) Plans demonstrates the Defendant's intent to misrepresent their investment product and mislead potential purchasers into buying these expensive policies. Ultimately, the IRS ruled that issuance of the Policies under a 412(i) Plan constituted an abusive and illegal tax shelter or transaction, and the Plaintiffs suffered substantial damages as a result.

THE PARTIES

3. Plaintiff Larry Zarrella ("Zarrella"), is, and was at all relevant times herein, a resident and citizen of Broward County, Florida. Zarrella is the sole officer, shareholder, and member of Zarrella Construction, Inc., the business that purchased the life insurance policies from Defendant Pacific Life.

4. Plaintiff Zarrella Construction, Inc. ("Zarrella Construction") is, and was at all

relevant times herein, a corporation organized under the laws of the State of Florida. Zarrella Construction, Inc. purchased the Policies to fund a defined benefit plan under § 412(i).

5. Pacific Life Insurance Company (“Defendant or “Pacific Life”) is a corporation duly organized under the laws of the State of Nebraska with its principal place of business at 700 Newport Center Drive, Newport Beach, California 92660. Pacific Life is one of the largest life insurance companies in the United States and engages in a variety of businesses generating billions of dollars in annual revenue. Pacific Life specifically structured and developed the Policies to be marketed and promoted by its agents as life insurance policies qualified to fund 412(i) Plans.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to the Class Action Fairness Act because the aggregate amount in controversy exceeds \$5 million and minimal diversity exists. 28 U.S.C. § 1332(d).

7. Venue is proper in the Southern District of Florida pursuant to 28 U.S.C. § 1391(a) because the claims herein arose as a result of Defendant Pacific Life’s marketing and sale of the Policies in Broward County, Florida.

FACTUAL ALLEGATIONS

A. Traditional 412(i) Plans

8. A defined benefit pension plan is one in which the benefits are first "defined" and the annual employer contributions needed to provide these benefits are then determined. A defined benefit pension plan must be carefully designed. To accomplish this, sophisticated actuarial calculations are required to determine a benefit formula that is consistent with the

employer's objectives and budget.

9. A section 412(i) Plan is a defined benefit pension plan created under § 412(i) of the Internal Revenue Code. A 412(i) Plan provides specified retirement benefits to its participants once they reach retirement and their plan contain assets sufficient to pay those retirement benefits. A 412(i) Plan must be funded exclusively by the purchase of individual insurance contracts such as life insurance policies or annuities.

10. To create a 412(i) Plan, an employer first establishes a trust to hold the plan's assets, and the trust uses employer contributions to purchase and maintain life insurance and/ or annuity policies for the plan. The employer funds the 412(i) Plan by making regular cash contributions to that trust in amounts equal to or greater than the amount of premiums due on the insurance policies. Those contributions are deemed tax deductible pursuant to the IRS Code. The trust uses the funds to purchase combinations of life insurance policies and annuities for the 412(i) Plan. The 412(i) Plan may hold the Policies until the employee dies or it may distribute or sell the Policies to the employee at a specific point, such as when the employee retires. Funding the 412(i) Plan may be accomplished by purchasing life insurance designed to meet the 412(i) plan's current and future contribution requirements.

B. Background on Pacific Life

11. Pacific Life is a national provider of universal and variable life insurance, and it is part of the Pacific Life family of companies, which includes Pacific Mutual Holding Company, Pacific Life Insurance Company, and Pacific Life & Annuity Company. These companies provide a wide variety of products and services, such as life insurance, fixed and variable annuities, mutual funds, 401(k) retirement plans, college savings plans, private equity

investments, high yield bonds, fixed and floating rate mortgage loans, commercial mortgage backed securities, unsecured debt to REIT's, and aircraft leasing services.

12. Pacific Life's life insurance products are primarily sold through a vast network of agents throughout the United States. These agents rely entirely on Pacific Life's marketing, product placement, and sales training. Pacific Life's marketing literature and sales training program are designed to promote the sale of its insurance products and educate its agents. Pacific Life's employees are instrumental in the sales and marketing efforts of its agents, as they formulate sales pitches to prospective purchasers and assist in closing individual contracts with these prospective purchasers.

C. Pacific Life's Scheme to Sell Risky Policies for 412(i) Plans

13. Pacific Life specially designed, promulgated, marketed, and sold the Policies as insurance policies that could fund 412(i) Plans. The Policies were marketed as special life insurance policies that could fund a 412(i) Plan entirely on its own, rather than with a combination of life insurance policies and annuities like a traditional 412(i) Plan. The Policies provided death benefits far in excess of the death benefits that can be paid to a participant under a traditional retirement plan. Stemming from the substantial benefits conferred, the Policies required a series of exceedingly high annual premium payments to Pacific Life paid by the entity establishing the pension plan. The entity in turn would receive tax deductions for premium payments made. These 412(i) Plans would be wholly-funded through life insurance policies on the lives of eligible participants, usually the owners or executives of the businesses. The exorbitant premiums provided Pacific Life and its agents with extraordinary compensation for the sale of the Policies.

14. Additionally, the Policies were designed to be transferred from the qualified retirement plan, which initially purchased them, to the plan participant or beneficiary at a price substantially below their fair market value. Specifically, the Policies were designed and marketed to be purchased by the beneficiary after five years of funding the 412(i) Plan; by that point in time, the Policy would have accumulated a substantial cash value as a result of its excessively high premiums, but a steep “surrender charge” would suppress its true cash value. Accordingly, the purchaser would pay only the Policy’s “surrender” value – the present cash value of the Policy reduced by the high surrender charge – in order to purchase the Policy.

15. Within a few years after the purchaser bought the Policy at the cash surrender value, the surrender charge would completely disappear under the terms of the insurance policy; thereby, the cash value of the Policy “explodes” and the beneficiary is free to either secure loans against this value or even cancel the policy and obtain the cash value, all largely tax-free. This is known as a “springing” cash value policy.

16. The extraordinarily high premiums coupled with the steep, but disappearing, surrender charge creates a fundamental disparity between the benefits provided by the insurance contracts and the benefits promised under a defined benefit plan. These are the notable characteristics that distinguish the Policies sold by Pacific Life from those sold for traditional 412(i) Plans. Ultimately, the Policies bear no economic relation to the 412(i) Plan’s supposed function as a retirement program.

D. Pacific Life Knew or Should Have Known the Policies Violated the IRS Code

17. Since the 1980s, “springing” cash value policies – such as the Policies sold by Pacific Life – had been under intense scrutiny and proscribed by the IRS under federal tax laws

and regulations. In 1989, the IRS issued Notice 89-25 stating that the practice of using the stated cash surrender value as the fair market value of a policy is not appropriate where the total policy reserves represent a much more accurate approximation of the fair market value of the policy. In the 1990s, several insurance companies, including Pacific Life, designed specialized insurance policies under the auspices of § 419(a) of the IRS Code, which were “springing” cash value policies similar to the current Policies at issue in this class action litigation. In 2000, the IRS issued Notice 2000-15, which announced that those policies sold to fund § 419(a) benefit plans were designated “listed transactions” and abusive tax shelters.

18. Based on the well-documented history of IRS scrutiny and proscription of “springing” cash value policies, Pacific Life knew or should have known that the Policies would be heavily scrutinized by the IRS, likely be designated abusive tax avoidance transactions by the IRS, and would expose participants to costly IRS audits including substantial tax liabilities, penalties and interest. Nonetheless, Pacific Life could not pass up the potential financial windfall that it would obtain through the design, promotion, and sale of the Policies for 412(i) Plans. The exceedingly high premiums and commissions obtained through the sale of the Policies outweighed the substantial, previously identified risk that Pacific Life would be placing upon purchasers of the Policies. Accordingly, Pacific Life marketed and sold the Policies without disclosing the significant risks, knowing that such disclosure would discourage participation in such arrangements.

19. Pacific Life, through its authorized agents, promoted the sale of the Policies to businesses and their owners, touting the tax and retirement benefits that they would provide. Specifically, when marketing and selling the Policies, Pacific Life instructed its authorized

agents to represent that: (a) the Policies were appropriate for use in funding a 412(i) Plan; (b) the exceedingly high premiums paid on the Policies were tax deductible; and (c) that the purchaser, through the 412(i) Plan, could pay five annual premiums and then purchase the policy for its suppressed cash value and take tax-free loans against the policy. Pacific Life and its agents did not disclose the risks associated the Policies. In fact, Pacific Life developed a scripted, form-like sales pitch for its salesmen by providing their agents with uniform marketing materials and scripts – none of which contained or disclosed any of the risks inherent to purchasing the Policies for their express purpose.

E. The 2004 IRS Revenue Rulings Regarding the Pacific Life Policies

20. In February 2004, the IRS issued two revenue rulings declaring that the Policies marketed and sold by Pacific Life, among others, constituted illegal and abusive tax shelters. Revenue Rulings 2004-21 and 2004-20 (the “Revenue Rulings”) essentially banned most of the abusive practices involving the “specially designed life insurance policies in retirement plans, section ‘412(i) plans.”

21. In summary, the new Revenue Rulings provided that: (a) any life insurance contract transferred from an employer or a tax-qualified plan to an employee must be taxed at its full fair market value as opposed to the cash value scheduled on such policies as were sold to Plaintiffs herein; (b) an employer cannot buy excessive life insurance (i.e., insurance contracts where the death benefits exceed the death benefits provided to the employee’s beneficiaries under the terms of the plan, with the balance of the proceeds reverting to the plan as a return on investment) in order to claim large tax deductions; and (c) a 412(i) Plan cannot use differences in life insurance contracts to discriminate in favor of highly paid employees. The IRS also

indicated that defined benefit plans holding such policies would be disqualified as 412(i) Plans.

22. The IRS highlighted unique “markers” that identified abusive 412(i) policies:
- (a) An abusive 412(i) plan is designed so that the cash surrender value is temporarily depressed, so that it is significantly below the premiums paid;
 - (b) After a short period, usually five (5) years, the abusive policy is sold to the named insured (employee) for the amount of the current cash surrender value during the period the cash surrender value is depressed;
 - (c) The policies are structured so the cash surrender values increase significantly after they are transferred to the employee;
 - (d) Use of the “springing” cash value life insurance gives employers (like Plaintiffs) tax deductions for amounts far in excess of what the employee would have recognized in income; and
 - (e) In an abusive 412(i) plan, the plan assets consist entirely of life insurance policies that provide death benefits far in excess of the death benefits which can be paid to a participant under the retirement plan.

23. The Policies sold by Pacific Life are characterized by all of the above “markers” identifying life insurance policies constituting “listed transactions” pursuant to the Revenue Rulings. Pacific Life acted knowingly in marketing and selling such impermissible policies.

E. Plaintiffs’ Purchase of Pacific Life Policies for its 412(i) Plan

24. On or about March 1, 2003, Plaintiff Zarrella Construction purchased nine (9) individual policies from Pacific Life to be used to fund the company’s 412(i) Plan (the “Zarrella Construction Policies”). The Zarrella Construction Policies purchased from Pacific Life were labeled as “412(i) Defined Benefit Qualified Plan” policies.

25. The Zarrella Construction Policies possess all the characteristics and attributes of a federally proscribed “springing” cash value policy improperly used to fund an abusive 412(i) Plan, as highlighted by the IRS:

- (a) The cash surrender value is temporarily depressed, so that it is significantly below the premiums paid;
- (b) The policies can be sold to the named insureds (Plaintiff Zarrella and employees of Zarrella Construction) for the amount of the current cash surrender value during the period the cash surrender value is depressed;
- (c) Once transferred to a participating employee of Zarrella Construction, the Policy is structured so the cash surrender value increases significantly after the transfer;
- (d) The “springing” cash value life insurance provides Plaintiff Zarrella Construction with tax deductions for amounts far in excess of what the employee would have recognized in income; and
- (e) The plan assets consist entirely of a life insurance policy that provides death benefits far in excess of the death benefits which can be paid to the participant under the retirement plan.

26. The above “special” attributes or benefits of the Policies, all of which violate Section 412(i), were prohibited by the IRS through the Revenue Rulings and were the featured aspects of the Policies as marketed, promoted, and sold by Pacific Life and its authorized agents. Pacific Life marketed and expressly touted the Policies by highlighting these “special” benefits and/ or incentives that – they knew or should have known – violated the IRS Code and presented substantial tax risks to Plaintiffs. Pacific Life featured the proscribed aspects of the Policies in their marketing and sales efforts to Plaintiffs because, ultimately, they were the sole reason or basis for the purchase of these high-premium, expensive policies. Pacific Life did not, however, notify or disclose to Plaintiffs that the purchase of these Policies presented any material risks.

27. The inherently flawed design of the Zarrella Construction Policies is clearly apparent from the “Policy Specifications” section found in the policies. The Policy Specifications expressly set forth: the exceedingly high premiums to be paid on the policy, the initial “surrender” charge, the policy’s “explosion” or “spring” in cash value in tenth year of the

policy, and that there is an “Internal Revenue Code 412(i) Life Insurance Rider” enclosed with policy. Further, the “Table of Minimum Guaranteed Cash Values and Reduced Paid-Up Insurance” explicitly illustrates the “springing” cash value of the policy over time.

28. The Policy Specifications evidence that the Policies are structured as abusive tax shelters, and they are a component and express representation within the policy contract, as highlighted by the language of the policy:

General Provisions

Entire Contract – This policy is a contract between you and us. This policy, the attached copy of the initial application, any applications for reinstatement, all subsequent applications to change the policy, any endorsements, benefits, or *riders*, and *all other policy information sections added to this policy are the entire contract.*

29. The Zarrella Construction Policies include an “Internal Revenue Code 412(i) Life Insurance Rider” (“Policy Rider”) that expressly represents that the policies are intended to be qualified insurance contracts under § 412(i):

Internal Revenue Code 412(i) Life Insurance Rider

Tax Status: *This rider and any Policy covered by it are intended to qualify as part of tax-qualified retirement plan or arrangement that meets the requirements of Code Sec. 401(a) and 412(i) and any regulations relating to it that apply.* To that end, the provisions of this rider (including any amendment to it that does not expressly override this provision) and any such Policy (including any rider or endorsement to it) are to be interpreted to ensure or maintain such tax qualification, despite any other provision to the contrary.

30. The billing statements sent by Pacific Life to Zarrella Construction for the premiums on the Zarrella Construction Policies expressly state:

The Internal Revenue Code §412(i) Annuity Rider (“The Rider”) is intended to allow your policy / contract to qualify as part of a tax-

qualified retirement plan that meets the provisions under Code Sections 401(a) and 412(i), provided the provisions of The Rider are met.

31. In sum, through representations made in its marketing and promotion of the Policies to Zarrella Construction, in the express language of the Zarrella Construction Policies, and in the billing statements sent to Zarrella Construction, Pacific Life – at all times – represented that the Zarrella Construction Policies were appropriate funding vehicles for a 412(i) Plan. Zarrella Construction purchased the policies based upon these express representations and guarantees, without being apprised of any associated risk.

F. The IRS Audits Zarrella Construction and its Pacific Life Policies to Violate 412(i)

32. In late 2005, the IRS began a nationwide audit campaign directed at abusive 412(i) plans. On March 8, 2006, the Internal Revenue Service (“IRS”) issued a letter to Zarrella Construction indicating that the company’s retirement plan under Pacific Life had been selected for examination for the year ending on December 31, 2003. The audit resulted in substantial audit-related fees and expenses for Zarrella Construction, which it continues to incur at the present time in order to deal with the tax ramifications of the flawed policies.

33. In September 7, 2007, the IRS sent Zarrella Construction a memorandum stating that “[t]he Internal Revenue Service believes your Plan fails 412(i)(3).” The tax liability from the flawed Policies sold by Pacific Life is significant, including disallowed deductions for the high premiums paid, harsh penalties, and interest. Further, Zarrella Construction incurs substantial expenses and fees associated with handling the potential IRS penalties.

CLASS ACTION ALLIGATIONS

34. Plaintiffs bring this action on their own behalf and, pursuant to the Federal Rules of Civil Procedure Rules 23(b)(2) and/ or 23(b)(3), as a class action on behalf of themselves and the following class of similarly situated persons (the “Class”):

- a. All persons and entities that purchased Flex XII life insurance policies from Pacific Life to be used to fund a defined benefit plan under Section 412(i) of the IRS Code.

Upon completion of discovery with respect to the scope of the Class, Plaintiffs reserve the right to amend the Class definition.

35. The members of the Class are so numerous and geographically diverse that joinder of all of them is impracticable. Plaintiffs believe and, therefore aver, that there are at least thousands of members of the Class throughout the United States.

36. There are questions of fact and law common to members of Class that predominate over any questions affecting any individual members including, inter alia, the following:

- a) Whether Pacific Life designed the subject insurance polices to fund § 412 (i) plans;
- b) Whether Pacific Life knew or should have know that the Policies would be used by the Class to fund 412(i) Plans;
- c) Whether Pacific Life knew or should have known that the subject insurance policies, when incorporated or used to fund 412(i) Plans, were likely to be deemed by the IRS as abusive tax shelters or non-qualified by the IRS;
- d) Whether the policies sold by Pacific Life to other Class Members were substantially similar to each other;

- e) Whether Pacific Life employed the services of actuarial and consulting firms to act as its agents in marketing and selling the subject policies to the Class Members;
- f) Whether Pacific Life provided uniform marketing and sales information to its agents for the Policies;
- g) Whether Pacific Life used standardized, uniform, and generic marketing scripts to solicit the sale of the Policies for § 412(i) Plans without regard to the suitability of these investments to its tax clients;
- h) Whether the misrepresentations made to Members of the Class were sufficiently uniform such that reliance could be established by evidence of Class-wide reliance;
- i) Whether Pacific Life and its agents failed to disclose the known materials risks associated with the Policies, including, but not limited to, that they would likely fail in their essential purpose as funding vehicles for 412(i) Plans for the Class and carried substantial tax liability;
- j) Whether Defendant is liable for breach of contract;
- k) Whether Defendant is liable for equitable fraud, negligence, negligent misrepresentation, fraudulent concealment and/or common law fraud in connection with the marketing, promotion, and sale of the Policies; and
- l) Whether Plaintiff and the Class were damaged by Defendant's improper conduct and, if so, what is the proper measure of damages or equitable relief.

37. The Claims of Plaintiffs are typical of the claims of the other members of the Class, and Plaintiffs have no interests that are adverse or antagonistic to the interests of the other members of the Class.

38. Plaintiffs will fairly and adequately protect the interests of the Class. Plaintiffs are committed to prosecuting this Class Action and have retained competent counsel experienced in litigation of this nature.

39. This action is brought under Rule 23(b)(2) because Defendant acted or refused to

act on grounds generally applicable to all members of the Class, thereby making final injunctive and/or declaratory relief concerning the Class, as a whole, appropriate. Upon information and belief, Defendant Pacific Life sells thousands of the Policies every year. Defendant's uniform conduct towards Plaintiffs and the other members of the Class makes certification under Rule 23(b)(2) appropriate.

40. Defendant engaged, and continues to engage, in the practice of selling Policies that it knew or should have known presented substantial tax risks to purchasers, and it did so based on uniform marketing and promotional materials and standardized, generic scripts touting the very features of the policies that rendered it in violation of § 412(i). The marketing and sale of the Policies to members of the Class was simple and uniform – Pacific Life expressly represented that the Policies provide substantial tax benefits and serve as a proper funding mechanism for a 412(i) Plan. The Defendant's conduct towards Plaintiffs and the Class makes certification under Rule 23(b)(2) appropriate. Plaintiffs envision no unusual difficulty in the management of this action as a Class Action.

41. This action is also brought under Rule 23(b)(2) because common questions of law and fact predominate over questions of law and fact affecting individual Class members. Defendant's course of conduct affected, and continues to affect, thousands of Class members. In addition, the expense of litigating each Class member's claim individually would be so cost prohibitive as to deny the Class members a viable remedy. Certification under Rule 23(b)(2) is appropriate because a Class Action is superior to the other available methods for the fair and efficient adjudication of these claims.

CLAIMS FOR RELIEF

COUNT I
(Breach of Contract)

42. Plaintiffs hereby adopt and incorporate by reference paragraphs 1-41, as if fully set forth herein.

43. Pacific Life contracted with Plaintiffs to provide Policies that were intended to “qualify as part of a tax-qualified retirement plan” that met the “requirements of Code Sec. 401(a) and 412(i).” Plaintiffs purchased the Policies based on the express representation made in the contract with Pacific Life that the Policies could be used to fund 412(i) Plans. The Policies expressly provide that they constitute a contract between Pacific Life and the Plaintiff.

44. Pacific Life breached the contract entered into with Plaintiffs because the Policies, when used to fund 412(i) Plans, did not and could not satisfy the requirements of Section 412(i).

45. Plaintiffs and all other members of the Class suffered and will suffer significant damage as a result of this breach of contract by Pacific Life, as they are subject to substantial tax liability, penalties, and the expenses and costs associated with handling IRS audits and all other tax-related matters pertaining to the Policies.

46. All conditions precedent to this claim have been waived or were satisfied.

47. Plaintiffs retained undersigned counsel and are obligated to pay them a reasonable fee for their services.

WHEREFORE, Plaintiffs, on behalf of themselves and the Class as defined herein, respectfully demand a trial by jury and pray for judgment as follows:

A. Certifying that this civil action may be maintained as a Class Action by the named Plaintiffs as representatives of the Class;

- B. Awarding damages to the Class as a result of Defendant's breach of contract;
- C. Awarding pre-judgment and post-judgment interest to the Class, as allowed by law;
- D. Granting such other and further relief as is just and proper; and
- E. Awarding legal fees to the Class.

COUNT II
(Equitable Fraud)

48. Plaintiffs hereby adopt and incorporate by reference paragraphs 1-41 as if fully stated herein.

49. On or about March 2003, Pacific Life, through its agent, made to Plaintiffs the following false representations:

- a. That the Policies issued by Pacific Life were appropriate for use in funding the Zarrella Construction defined benefit 412(i) plan;
- b. That the Policies would qualify the Zarrella Construction defined benefits plan as a 412(i) Plan;
- c. That the Policies provided a permissible death benefit under the Zarrella Construction 412(i) Plan;
- d. That the premiums to be paid on the Policies by Zarrella Construction were tax deductible contributions;
- e. That the Zarrella Construction 412(i) Plan could be funded entirely by the Policies under applicable law, including Section 412(i) of the IRS Code;
- f. That Plaintiff Zarrella could lawfully recover most of the already tax-deductible premiums paid towards the Policies by taking tax-free loans against the increasing cash value of the policy after purchasing it from Zarrella Construction; and
- g. That Plaintiff Zarrella could eventually purchase the Policy from the 412(i) plan for its net cash value, and report the policy's net cash value as the taxable income.

50. While Pacific Life promoted the tax advantages of the Policies for use in a 412(i) Plan, it knew or should have known, and failed to disclose, that such plans and polices carried with them the known risk that the Policies could be deemed to violate § 412(i) and thereby fail to provide the insurance benefits and tax advantages they claimed to offer. Specifically, Defendant did not disclose:

- (a) That the plans and policies would fail in their essential purpose to provide the projected tax benefits;
- (b) That the 412(i) Plan funded by the Policies would be declared invalid by Internal Revenue Service and declared a “listed transaction” and abusive tax shelter;
- (c) That the premiums for such plans were in excess of the amount required to provide the permissible death benefit and would therefore be disallowed as a tax deduction;
- (d) That there were significant tax risks associated with funding a 412(i) Plan with the Policies; and
- (e) That the IRS had issued numerous announcements and notices over the years indicating that “springing” cash value policies, such as the Policies, had been proscribed and were contrary to federal tax laws and regulations.

51. Plaintiffs justifiably relied upon each of the misrepresentations set forth in paragraph 49 herein, and/or the omissions set forth in paragraph 50 herein, in purchasing the Policies.

52. As a proximate result, Plaintiffs suffered damages.

53. Defendant’s misrepresentations and/or omissions were willful, wanton and malicious and designed to damage Plaintiffs.

WHEREFORE, Plaintiffs, on behalf of themselves and the Class as defined herein, respectfully demand a trial by jury and pray for judgment as follows:

- A. Certifying that this civil action may be maintained as a Class Action by the named Plaintiffs as representative of the Class;
- B. Awarding damages to the Class as a result of Defendant's fraudulent concealment and fraudulent misrepresentations;
- C. Alternatively, rescinding all such insurance agreements entered into by and between Plaintiffs and Pacific Life;
- D. Awarding costs, pre-judgment and post-judgment interest to the Class, as allowed by law;
- E. Awarding punitive damages to the Class; and
- F. Granting such other and further relief as is just and proper.

COUNT III
(Fraud in the Inducement)

54. Plaintiffs hereby adopt and incorporate by reference paragraphs 1-41, as if fully stated herein.

55. On or about March 2003, Pacific Life made to Plaintiffs the following false representations regarding the Policies:

- a. That the Policies issued by Pacific Life were appropriate for use in funding the Zarrella Construction defined benefit 412(i) plan;
- b. That the Policies would qualify the Zarrella Construction defined benefits plan as a 412(i) Plan;
- c. That the Policies provided a permissible death benefit under the Zarrella Construction 412(i) Plan;
- d. That the premiums to be paid on the Policies by Zarrella Construction were tax deductible contributions;

- e. That the Zarrella Construction 412(i) Plan could be funded entirely by the Policies under applicable law, including Section 412(i) of the IRS Code;
- f. That Plaintiff Zarrella could lawfully recover most of the already tax-deductible premiums paid towards the Policies by taking tax-free loans against the increasing cash value of the policy after purchasing it from Zarrella Construction; and
- g. That Plaintiff Zarrella could eventually purchase the Policy from the 412(i) plan for its net cash value, and report the policy's net cash value as the taxable income.

56. While Pacific Life promoted the tax advantages of the Policies for use in a 412(i) Plan, it knew, and failed to disclose, that such plans and policies carried with them the known risk that the Policies would be deemed to violate § 412(i) and thereby fail to provide the insurance benefits and tax advantages promoted. Specifically:

- (a) That the plans and policies would fail in their essential purpose to provide the projected tax benefits;
- (b) That the 412(i) Plan funded by the Policies would be declared invalid by Internal Revenue Service and declared a "listed transaction" and abusive tax shelter;
- (c) That the premiums for such plans were in excess of the amount required to provide the permissible death benefit and would therefore be disallowed as a tax deduction;
- (d) That there were significant tax risks associated with funding a 412(i) plan with the Policies; and
- (e) That the IRS issued numerous announcements and notices over the years indicating that "springing" cash value policies, such as the Policies, had been proscribed and were contrary to federal tax laws and regulations.

57. Pacific Life made the false representations and statements above in order to induce Plaintiffs and the members of the Class to purchase the Policies to fund their 412(i) Plans. Plaintiffs and the Class justifiably relied on these misrepresentations made by Pacific Life to

their detriment, as the Policies failed to confer the benefits that were promised and are subjecting them to substantial tax liability and other associated costs, expenses, and risks.

58. As a result of being fraudulently induced by Pacific Life to purchase the Policies, Plaintiffs and the Class suffered substantial damages.

WHEREFORE, Plaintiffs, on behalf of themselves and the Class as defined herein, respectfully demand a trial by jury and pray for judgment as follows:

- A. Certifying that this civil action may be maintained as a Class Action by the named Plaintiffs as representative of the Class;
- B. Awarding damages to the Class as a result of Defendant's fraudulent inducement;
- C. Alternatively, rescinding all such insurance agreements entered into by and between Plaintiffs, and Pacific Life;
- D. Awarding costs, pre-judgment and post-judgment interest to the Class, as allowed by law;
- E. Awarding punitive damages to the Class; and
- F. Granting such other and further relief as is just and proper.

COUNT IV
(Negligent Misrepresentation)

59. Plaintiffs hereby adopt and incorporate by reference paragraphs 1-41, as if fully stated herein.

60. Pacific Life made numerous representations of material facts regarding the Policies that were erroneous and false:

- a. That the Policies issued by Pacific Life were appropriate for use in funding the Zarrella Construction defined benefit 412(i) plan;
- b. That the Policies would qualify the Zarrella Construction defined benefits plan as a 412(i) Plan;
- c. That the Policies provided a permissible death benefit under the Zarrella Construction 412(i) Plan;
- d. That the premiums to be paid on the Policies by Zarrella Construction were tax deductible contributions;
- e. That the Zarrella Construction 412(i) Plan could be funded entirely by the Policies under applicable law, including Section 412(i) of the IRS Code;
- f. That Plaintiff Zarrella could lawfully recover most of the already tax-deductible premiums paid towards the Policies by taking tax-free loans against the increasing cash value of the policy after purchasing it from Zarrella Construction; and
- g. That Plaintiff Zarrella could eventually purchase the Policy from the 412(i) plan for its net cash value and report the policy's net cash value as the taxable income.

61. Pacific Life knew or should have known that these representations were erroneous and false based on the IRS' previous treatment and proscription of policies possessing the same characteristics. The IRS issued numerous notices and rulings indicating that such "springing" cash value policies violated federal tax regulations, and Pacific Life knew or should have known this at the time the misrepresentations were made to Plaintiffs.

62. Plaintiffs purchased the Policies in justifiable reliance upon the above misrepresentations set forth in paragraph 60.

63. Pacific Life failed to exercise reasonable care in communicating the representations made herein and then in failing to communicate the omissions made herein.

64. As a result of these misrepresentations, Plaintiffs suffered damages.

WHEREFORE, Plaintiffs, on behalf of themselves and the Class as defined herein, respectfully demand a trial by jury and pray for judgment as follows:

- A. Certifying that this civil action may be maintained as a Class Action by the named Plaintiffs as representative of the Class;
- B. Awarding damages to the Class as a result of Defendant's negligent misrepresentations;
- D. Awarding costs, pre-judgment and post-judgment interest to the Class, as allowed by law; and
- E. Granting such other and further relief as is just and proper.

COUNT V
(Common Law Fraud)

65. Plaintiffs hereby adopt and incorporate by reference paragraphs 1-41 as if fully stated herein.

66. Pacific Life knowingly made the following misrepresentations of material fact to Plaintiffs when marketing, promoting, and selling the Policies:

- a. That the Policies issued by Pacific Life were appropriate for use in funding the Zarrella Construction defined benefit 412(i) plan;
- b. That the Policies would qualify the Zarrella Construction defined benefits plan as a 412(i) Plan;
- c. That the Policies provided a permissible death benefit under the Zarrella Construction 412(i) Plan;
- d. That the premiums to be paid on the Policies by Zarrella Construction were tax deductible contributions;
- e. That the Zarrella Construction 412(i) Plan could be funded entirely by the Policies under applicable law, including Section 412(i) of the IRS Code;

- f. That Plaintiff Zarrella could lawfully recover most of the already tax-deductible premiums paid towards the Policies by taking tax-free loans against the increasing cash value of the policy after purchasing it from Zarrella Construction; and
- g. That Plaintiff Zarrella could eventually purchase the Policy from the 412(i) plan for its net cash value, and report the policy's net cash value as the taxable income.

67. Pacific Life knew that these misrepresentations would induce Plaintiffs to purchase the Policies for the purpose of funding 412(i) Plans.

68. Further, while Pacific Life promoted the tax advantages of the Policies for use in a 412(i) Plan, it failed to disclose the known risk that the Policies could be deemed to violate § 412(i) and thereby fail to provide the insurance benefits and tax advantages promoted.

Specifically:

- (a) That the plans and policies would fail in their essential purpose to provide the projected tax benefits;
- (b) That the 412(i) Plan funded by the Policies would be declared invalid by Internal Revenue Service and declared a "listed transaction" and abusive tax shelter by the IRS;
- (c) That the premiums for such plans were in excess of the amount required to provide the permissible death benefit and would therefore be disallowed as a tax deduction;
- (d) That there were significant tax risks associated with funding a 412(i) plan with the Policies; and
- (e) That the IRS issued numerous announcements and notices over the years indicating that "springing" cash value policies, such the Policies, had been proscribed and were contrary to federal tax laws and regulations.

69. Plaintiffs relied on these misrepresentations in purchasing the Zarrella Construction Policies and have been damaged as a result thereof.

WHEREFORE, Plaintiffs, on behalf of themselves and the Class as defined herein,

respectfully demand a trial by jury and pray for judgment as follows:

- A. Certifying that this civil action may be maintained as a Class Action by the named Plaintiffs as representative of the Class;
- B. Awarding damages to the Class as a result of Defendant's fraudulent misrepresentations and omissions;
- D. Awarding costs, pre-judgment and post-judgment interest to the Class, as allowed by law;
- E. Awarding punitive damages to the Class; and
- G. Granting such other and further relief as is just and proper.

COUNT VI

(Violation of Florida's Deceptive and Unfair Trade Practices Act §508.201 *et seq.*)

70. Plaintiffs hereby adopt and incorporate by reference paragraphs 1-41 as if fully stated herein.

71. Plaintiffs bring this claim pursuant to Florida's Deceptive and Unfair Trade Practices Act, Florida Statutes §501.201, *et seq.*

72. Pacific Life marketed, advertised, promoted, and sold products and/ or services through the Policies and, thereby, was engaged in trade or commerce, as defined under Fla. Stat. §501.203.

73. Plaintiffs and the members of the Class were consumers, as defined by Fla. Stat. §501.203.

74. Pacific Life's marketing, promotion, and sale of the Policies was a deceptive, misleading, and unfair trade practice, as it induced Plaintiffs to purchase the Policies based upon

knowingly erroneous representations that the Policies could properly fund a 412(i)Plan. Pacific Life did not disclose the risks associated with purchasing the Policies.

75. The Plaintiffs sustained damages due to Pacific Life's unfair and deceptive practices regarding the marketing and sale of the Policies.

76. Plaintiffs retained the services of the undersigned attorneys who are entitled to a reasonable fee upon prevailing pursuant to Fla. Stat. §501.2105.

WHEREFORE, Plaintiffs, on behalf of themselves and the Class as defined herein, respectfully demand a trial by jury and pray for judgment as follows:

- A. Certifying that this civil action may be maintained as a Class Action by the named Plaintiffs as representative of the Class;
- B. Awarding damages as provided by Fla. Stat. §501.211(2);
- C. Awarding compensatory and other legal damages to the Class;
- D. Awarding costs, pre-judgment and post-judgment interest to the Class, as allowed by law;
- E. Awarding attorneys' fees and costs to counsel for the Class; and
- G. Granting such other and further relief as is just and proper.

COUNT VII
(Unjust Enrichment, in the alternative)

77. Plaintiffs hereby adopt and incorporate by reference paragraphs 1-41 as if fully stated herein.

78. Plaintiffs and the Class conferred a benefit upon Pacific Life by purchasing and paying exceedingly high premiums for the Policies.

79. Pacific Life voluntarily accepted and retained the benefits of the Policies it sold to

Plaintiffs and the Class, despite the fact that these Policies could not and cannot be used for their sole intended purpose – to fund 412(i) plans. Plaintiffs and the Class have failed to obtain any of the alleged benefits from the Policies that were expressly guaranteed by Pacific Life.

80. Pacific Life continues to earn interest on active Policies, while they have been declared “listed transactions” by the IRS, and Plaintiffs and the members of the Class are subject to substantial tax liability and associated expenses and fees stemming from their purchase of the Policies.

WHEREFORE, Plaintiffs, on behalf of themselves and the Class as defined herein, respectfully demand a trial by jury and pray for judgment as follows:

- A. Certifying that this civil action may be maintained as a Class Action by the named Plaintiffs as representative of the Class;
- B. Awarding damages to the Class in amounts to be determined at trial;
- C. Awarding costs, pre-judgment and post-judgment interest to the Class, as allowed by law; and
- D. Granting such other and further relief as is just and proper.

COUNT VIII
(Negligence)

81. Plaintiffs hereby adopt and incorporate by reference paragraphs 1-41 as if fully stated herein.

82. Pacific Life designed, marketed, and sold the Policies to Plaintiffs with the express purpose of funding the Zarrella Construction 412(i) Plan. Pacific Life promoted the Policies as § 412(i) funding vehicles that would provide substantial tax benefits to the Plaintiffs. However, the Policies were designed in such a manner that did not meet with the requirements of

412(i) of the IRS Code, and accordingly, the IRS deemed the Policies abusive tax shelters.

83. Pacific Life owed Plaintiffs and members of the Class a duty to structure and design the Policies as suitable funding mechanisms for 412(i) Plans with substantial tax benefits stemming therefrom, as they were purchased by Plaintiffs and the Class under these express representations.

84. Pacific Life was negligent in that it knew or should have know that the Policies would fail to qualify as funding instruments for 412(i) Plans and fail to provide the tax benefits provided in the projections and illustrations found within the Policies. Pacific Life's failure to structure and design the Policies in such a manner as to qualify for 412(i) Plans demonstrates a lack of due care.

85. Pacific Life's negligence in designing and selling the Policies was the proximate cause of Plaintiffs' damages and injuries.

WHEREFORE, Plaintiffs, on behalf of themselves and the Class as defined herein, respectfully demand a trial by jury and pray for judgment as follows:

- A. Certifying that this civil action may be maintained as a Class Action by the named Plaintiffs as representative of the Class;
- B. Awarding damages to the Class as a result of Defendant's negligence;
- C. Awarding costs, pre-judgment and post-judgment interest to the Class, as allowed by law; and
- D. Granting such other and further relief as is just and proper.

COUNT IX
(Negligence – Per Se)

86. Plaintiffs hereby adopt and incorporate by reference paragraphs 1-41 as if fully

stated herein.

87. Fla. Stat. §626.9541, Unfair Methods of Competition and Unfair or Deceptive Acts, prohibits insurance entities from “knowingly making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, or comparison” that misrepresents the “benefits, advantages, conditions, or terms of any insurance policy.” It also proscribes insurance entities from “knowingly making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public” any “advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the business of insurance, which is untrue, deceptive, or misleading.”

88. In its marketing, promotion, and sale of the Policies, Pacific Life knowingly made numerous misrepresentations pertaining to the adequacy of the Policies as proper funding instruments for 412(i) Plans and the alleged tax benefits offered by the Policies. Pacific Life knowingly elected not to disclose to the Plaintiffs and the Class that the Policies presented substantial tax risks.

89. The numerous misrepresentations made by Pacific Life as to the benefits, advantages, and conditions of the Policies violates Fla. Stat. § 626.9541.

90. Plaintiffs sustained damages and injuries as a result of Pacific Life’s violation of this statutory duty.

WHEREFORE, Plaintiffs, on behalf of themselves and the Class as defined herein, respectfully demand a trial by jury and pray for judgment as follows:

- A. Certifying that this civil action may be maintained as a Class Action by the named Plaintiffs as representative of the Class;
- B. Awarding damages to the Class as a result of Defendant's negligence;
- C. Awarding costs, pre-judgment and post-judgment interest to the Class, as allowed by law; and
- D. Granting such other and further relief as is just and proper

COUNT X

(Unlawful Business Acts and Practices In Violation of California Business and Professions Code Section 17200, et seq.)

91. Plaintiffs hereby adopt and incorporate by reference paragraphs 1-41 as if fully stated herein.

92. Plaintiffs have standing to assert the claims against Pacific Life by virtue of the fact that Pacific Life is a California corporation with its principal place of business in California.

93. California Business and Professions Code § 17200, *et seq.*, prohibits acts of unfair competition, which means and includes any "unlawful...business act or practice."

94. The policies, acts and practices alleged herein violate numerous provisions of law as set forth below.

95. Pacific Life's dissemination of uniformly deceptive advertisements and statements, including the failure to disclose material facts regarding the nature of their insurance policies, violates California Business and Professions Code § 17500, *et. seq.*

96. Pacific Life's acts and practices alleged herein violate the California Consumer Legal Remedies Act ("CLRA") (Civil Code § 1770, et. seq.). Specifically:

A. Pacific Life's acts and practices alleged herein were intended to, and did, result in the purchase of the Policies from Pacific Life by Plaintiffs;

B. Pacific Life's conduct alleged herein violated the CLRA by representing that the Policies have characteristics, uses, or benefits they do not have (Section 1770(a)(5)) and by marketing the Policies with the intent not sell them as advertised (Section 1770(a)(9)).

97. These acts constitute unlawful business practices based on the violations of law alleged above.

98. Plaintiffs are entitled to all relief available under the Business and Professions Code § 17200, *et. seq.*

WHEREFORE, Plaintiffs, on behalf of themselves and the Class as defined herein, respectfully demand a trial by jury and pray for judgment as follows:

A. Certifying that this civil action may be maintained as a Class Action by the named Plaintiffs as representative of the Class;

B. Awarding damages to the Class as a result of Defendant's violation of California Business and Professions Code § 17200, *et seq.*;

C. Awarding costs, pre-judgment and post-judgment interest to the Class, as allowed by law; and

D. Granting such other and further relief as is just and proper

COUNT XI

(Fraudulent Business Acts and Practices In Violation of California Business and Professions Code 17200, et. seq.)

99. Plaintiffs hereby adopt and incorporate by reference paragraphs 1-41 as if fully

stated herein.

100. Plaintiffs have standing to assert these claims against Pacific Life by virtue of the fact that Pacific Life is a California corporation with its principal place of business in California.

101. California Business and Professions Code § 17200, *et. seq.*, prohibits acts of unfair competition, which means and includes any “fraudulent business act or practice.” Conduct which is “likely to deceive” is “fraudulent” within the meaning of Section 17200.

102. As more fully described above, Pacific Life’s acts and practices are likely to deceive, constituting a fraudulent business act or practice.

103. Plaintiffs are entitled to the relief available under Business and Professions Code § 17200, *et. seq.*

WHEREFORE, Plaintiffs, on behalf of themselves and the Class as defined herein, respectfully demand a trial by jury and pray for judgment as follows:

- A. Certifying that this civil action may be maintained as a Class Action by the named Plaintiffs as representative of the Class;
- B. Awarding damages to the Class as a result of Defendant’s violation of California Business and Professions Code § 17200, *et seq.*;
- C. Awarding costs, pre-judgment and post-judgment interest to the Class, as allowed by law; and
- D. Granting such other and further relief as is just and proper.

JURY DEMAND

104. Plaintiffs hereby demand a trial by jury in this action.

DATED May 10, 2010.

/s Ronald P. Weil

Ronald P. Weil

Fla. Bar No: 169966

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