

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

**ROBERT HARPER,
On Behalf of Himself And All Others
Similarly Situated**

Plaintiff,

v.

**WESTERN-SOUTHERN LIFE
ASSURANCE COMPANY
400 Broadway
Cincinnati, Ohio 45202**

**THE WESTERN AND SOUTHERN LIFE
INSURANCE COMPANY
400 Broadway
Cincinnati, Ohio 45202**

Defendants

**: Case No. 1:11-cv-00836
:
: JUDGE: _____**

**: CLASS ACTION COMPLAINT
: AND JURY DEMAND**

Plaintiff, Robert Harper, on behalf of himself and all others similarly situated, for his Class Action Complaint against Defendants allege, upon information and belief, as follows:

NATURE OF THE CASE

1. This class action arises out of Defendants Western-Southern Life Assurance Company and The Western and Southern Life Insurance Company's breach of contract for failure to adhere to the terms of Single Premium Immediate Annuity ("SPIA") contracts sold by Defendants Plaintiff to Class Members nationwide.

2. This action is brought on behalf of the named Plaintiff, Robert Harper, and all other similarly situated persons nationwide who purchased a Single Premium

Immediate Annuity from Defendants and failed to receive annuity payments for the remainder of his/her life.

PARTIES

3. Plaintiff Robert Harper is now and was at all times relevant hereto a citizen and resident of Cincinnati, Ohio, Clermont County. Mr. Harper was a resident of Cincinnati, Ohio on June 3, 1991, when he purchased a SPIA from Western-Southern Life Assurance Company, contract number W 10484371 (attached hereto as Exhibit 1).

4. Defendant Western-Southern Life Assurance Company is a corporation organized and existing under the laws of the State of Ohio. Western-Southern Life Assurance Company's principal place of business is in Cincinnati, Ohio. Western-Southern Life Assurance Company is a citizen and resident of the State of Ohio. Western-Southern Life Assurance Company is a wholly owned subsidiary of The Western and Southern Life Insurance Company.

5. Defendant The Western and Southern Life Insurance Company is a corporation organized and existing under the laws of the State of Ohio. The Western and Southern Life Insurance Company's principal place of business is in Cincinnati, Ohio. The Western and Southern Life Insurance Company is a citizen and resident of the State of Ohio.

6. Upon information and belief, Plaintiff asserts that numerous Class members exist nationwide such that there are Class members from states other than Ohio. Although Plaintiff does not know the names of such Class members, their identities can be readily ascertained from records maintained by Defendants.

JURISDICTION AND VENUE

7. This Court has jurisdiction over Plaintiff's claims under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2), because there is minimal diversity of citizenship between the parties, the amount in controversy exceeds \$5,000,000, exclusive of interests and costs, and the proposed plaintiff class meets or exceeds 100 claimants.

8. This Court has personal jurisdiction over Defendants consistent with the United States Constitution, because Defendants are citizens of Ohio residing within this Judicial District. Defendants also conduct business in Ohio and within this Judicial District.

9. Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391, because Defendants reside in the State of Ohio and within this Judicial District, and the actions which give rise to this action occurred in this District.

FACTUAL ALLEGATIONS

10. Established in 1888, The Western and Southern Life Insurance Company is a member of Western & Southern Financial Group.

11. The Western and Southern Life Insurance Company is currently licensed to operate in 43 states and the District of Columbia and serves individuals, families and businesses in the middle-income market through 181 field offices and nationwide Internet and contact center coverage.

12. Established in 1981, Defendant Western-Southern Life Assurance Company is a wholly owned subsidiary of The Western and Southern Life Insurance Company and a member of Western & Southern Financial Group.

13. Currently licensed to operate in 44 states, the District of Columbia and Guam, Defendant Western-Southern serves individuals, families and businesses in the middle-income market through 181 field offices and nationwide Internet and contact center coverage.

14. Defendants offer annuity products, including the SPIA, through its licensed insurance agents, enterprise companies and banking partners throughout the United States.

15. Defendants' SPIA contract allows an individual to exchange a single lump-sum premium payment for an immediate steady income stream that does not vary with the market, but rather is a fixed rate.

16. According to Western & Southern Financial Group's 2010 Annual Report, the SPIA is Western & Southern Financial Group's "flagship" annuity, generating \$237 million in sales in 2010, placing Western & Southern Financial Group in the top ten providers of immediate annuities.

17. On May 31, 1991, at the age of 62, Plaintiff Harper purchased a SPIA from Defendants, through its licensed agent Phillip Meyer. The formal contract date of the annuity is June 3, 1991. (See ex. 1.)

18. The first page of Plaintiff Harper's SPIA contract states, "Western-Southern Life Assurance Company will pay The Annuity Amount to the Annuitant beginning one month after the Contract Date and periodically thereafter **as long as the Annuitant lives.**" (See ex. 1, emphasis added).

19. The first page of Plaintiff Harper's SPIA contract further states that the "benefits and rights set out on this and the pages which follow are a part of the policy." (See ex. 1).

20. Plaintiff Harper's SPIA contract provides an Annuity Amount of \$226.76, to be paid by Defendants to Plaintiff Harper on a monthly basis as long as the annuitant lives. If the annuitant dies before the guarantee date set forth in the contract, the remaining benefits are to be paid to the designated beneficiaries. If the annuitant lives beyond the guarantee date, however, payments continue to the annuitant for life.

21. As consideration for the SPIA contract, Plaintiff Harper paid Defendants a single one time premium of \$30,591.41.

22. Plaintiff Harper selected a guaranteed term of 20 years.

23. In July 1991, in accordance with the terms of the contract, Defendants began making monthly payments of \$226.76 to Plaintiff Harper. Plaintiff Harper continued to receive his monthly payments from Defendants through July 2011, the twenty year minimum guarantee date.

24. On July 3, 2011, Defendants sent Plaintiff Harper his monthly \$226.76 check, along with a note stating: "THE ABOVE CHECK REPRESENTS THE FINAL PAYMENT DUE ON THE ABOVE CONTRACT." (See ex. 2).

25. Defendants therefore treated the minimum policy term as the maximum policy term by posturing that the policy did not guarantee payment for life.

26. Plaintiff disputed Defendants' failure to continue his annuity payments, but Defendants refused to honor their obligation to continue payments under the contract.

27. Since July 3, 2011, Plaintiff Harper has not received any further payments from Defendants pursuant to his SPIA contract, despite the contract requirement of lifetime payments.

28. Defendants breached the SPIA contract by failing to provide continued monthly annuity payments to Plaintiff Harper pursuant to the terms of his SPIA contract.

CLASS ACTION ALLEGATIONS

29. Plaintiff brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of himself and two classes of similarly situated persons (the "Class" or "Class Members") defined as follows:

- a. **Rule 23(b)(2) Class:** All persons who, during the time period of January 1, 1981 to the present, purchased a Single Premium Insurance Annuity from Defendant Western-Southern Life Assurance Company and/or Defendant The Western and Southern Life Insurance Company providing life time benefits and a guaranteed minimum term who remain living or lived beyond the guarantee date.
 - b. **Rule 23(b)(3) Class:** All persons who, during the time period of January 1, 1981 to the present, purchased a Single Premium Insurance Annuity from Defendant Western-Southern Life Assurance Company and/or Defendant The Western and Southern Life Insurance Company providing life time benefits and a guaranteed minimum term who failed to receive annuity payments beyond the guarantee date and for the remainder of his/her life.
30. Plaintiff is a member of the Class he seeks to represent.

31. The members of the Class are so numerous that joinder is impracticable. Based on Defendants' sale of SPIA contracts nationwide, Plaintiff believes there are potentially hundreds, if not thousands, of persons in the Class. Although Plaintiff does not presently know the names of all other Class members, their identities can be readily ascertained from records maintained by Defendants.

32. Plaintiff's claims raise issues of law and fact common to all members of the Class. These common questions include, but are not limited to:

- a. Whether the SPIA contracts in question guarantees and promises to pay annuity benefits to annuitants for the remainder of their lives;
- b. Whether Defendants' failure to pay annuity payments throughout the lifetime of the annuitants to those who have lived beyond the guaranteed term constitutes a breach of contract;
- c. Whether Defendants breached their SPIA contracts with Plaintiff and Class members by failing to continue annuity payments throughout the lifetime of the annuitant for those who have lived beyond the guaranteed term;
- d. Whether Defendants fraudulently misrepresented to Plaintiff and Class members, upon the expiration of the guaranteed minimum term, that they were not entitled to annuity payments beyond the guaranteed date;
- e. Whether Defendants negligently, recklessly or intentionally failed to inform Plaintiff and Class members that, pursuant to the terms of the contract, they were entitled to annuity payments for the remainder of their lives;

f. Whether Plaintiff and Class members have sustained damages and the proper measure of damages.

33. Plaintiff's claims are typical of the claims of the Class and Plaintiff has no interests adverse to the interests of the other members of the Class.

34. Plaintiff will fairly and adequately protect the interests of the Class and has retained counsel experienced and competent in the prosecution of class action and complex litigation.

35. Plaintiff seeks certification of a Class pursuant to Rule 23(b)(2) & (b)(3) of the Federal Rules of Civil Procedure.

36. Certification of this action as a class action pursuant to Rule 23(b)(2) is appropriate because Defendants have acted or refused to act on grounds generally applicable to the entire Class, thereby making appropriate declaratory relief with respect to the Class as a whole.

37. Defendants, in breach of the contract, have refused to pay annuity payments to Plaintiff and Class Members beyond the guarantee date and for the remainder of the annuitants' life. Plaintiff and Class members seek a declaration of the rights, duties and obligations arising from the SPIA contracts issued by Defendants.

38. Certification of this action pursuant to Rule 23(b)(3) is appropriate because common questions of fact and law set forth above predominate over any questions affecting only individual Class members. Moreover, certification of this action as a class action is appropriate and superior to other available methods of adjudication for the following reasons:

- a. Given the size of each Class member's claim and the expense of litigating those claims, few, if any, Class members could afford to or would seek legal redress individually for the wrongs Defendants committed against them;
- b. Plaintiff is aware of no similar class action or individual action pending against Defendants and absent Class members have no substantial interest in individually controlling the prosecution of individual actions;
- c. This action will promote an orderly and expeditious administration and adjudication of the Class members' claims, maximize economies of time and effort, and ensure uniformity of decisions;
- d. Without a Class action, the Class members will continue to suffer damages, and Defendants' violations of law will proceed without remedy while Defendants continue to retain monies rightfully owed to Class members;
- e. When the Defendants' liability has been adjudicated, claims of all members of the Class can be determined by this Court; and
- f. This action presents no difficulty that would impede its management by the Court, as a class action is the best available means by which Plaintiff and other members of the Class can seek redress for the harm caused to them by Defendants, and damages under the contract are readily calculated.

39. Plaintiff knows of no difficulty which would be encountered in the management of this litigation that would preclude its maintenance as a class action.

FIRST CAUSE OF ACTION

Declaratory Judgment

40. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein and further alleges as follows:

41. Plaintiff and members of the Rule 23(b)(2) declaratory judgment Class defined herein are persons entitled to seek a declaration of their rights as a result of their contractual relationship with Defendants.

42. Declaratory judgment is entirely appropriate in this case as it involves the interpretation of a contractual document.

43. Plaintiff, on behalf of himself and all members of the Class, seeks declaratory relief from this Court that the contract language in the SPIA which states that “Western-Southern Life Assurance Company Will Pay The Annuity Amount to the Annuitant beginning one month after the Contract Date and periodically thereafter as long as the Annuitant lives” is a part of the contract and requires Defendants to pay the annuity amount to the annuitant as long as the annuitant lives.

44. As a direct and proximate result of Defendants’ actions in failing to pay annuity benefits for the lifetime of the annuitant, Plaintiff and members of the Class have suffered harm and are entitled to declaratory relief.

SECOND CAUSE OF ACTION

Breach of Contract

45. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein and further allege as follows:

46. Defendants entered into written SPIA contracts with Plaintiff and other members of the Rule 23(b)(3) Class pursuant to which Defendants agreed to pay regular annuity amounts to Plaintiff and Class members as long as the annuitant lives.

47. As consideration for Defendants' promise to pay regular annuity payments for the rest of the annuitants' lives, Plaintiff and other Class members paid Defendants a single lump-sum premium.

48. Defendants breached its contracts with Plaintiff and members of the Rule 23(b)(3) Class when it failed to continue to pay to annuitants the annuity amounts beyond the guaranteed minimum date and throughout the lifetime of the annuitant.

49. As a direct and proximate result of Defendants' conduct as alleged herein, Plaintiff and Class members have sustained monetary damages, in the aggregate, in excess of \$5,000,000.

THIRD CAUSE OF ACTION

Fraudulent Misrepresentation and/or Negligent Misrepresentation

50. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein and further alleges as follows:

51. Plaintiff, and members of the Rule 23(b)(3) Class who failed to receive annuity payments beyond the guarantee date and for the remainder of their lives, were falsely told by Defendants that their annuity payments ended at the guaranteed minimum payment date. Defendants failed to inform Plaintiff and members of the Rule 23(b)(3) Class that, pursuant to the terms of their contracts, they were entitled to annuity payments for the remainder of their lives.

52. Defendants' representations to Plaintiff and Class members that they were not entitled to annuity payments for the remainder of their lives were false, material, and made by Defendants with knowledge of the falsity and/or with negligent disregard and/or recklessness as to the truth of such matters.

53. Defendants' representations to Plaintiffs and Class members that they were not entitled to annuity payments for the remainder of their lives were made by Defendants with negligent disregard for the truth and/or recklessness or with the intent of misleading Plaintiff and members of the Class into relying upon such statements so as to not to take further actions against Defendants for the remainder of the funds owed to them under the SPIA contracts.

54. Plaintiffs and members of the Class justifiably relied upon the representations made to them by Defendants.

55. As a direct and proximate result of Defendants' conduct as alleged herein, Plaintiff and Class members have sustained monetary damages, in the aggregate, in excess of \$5,000,000.

56. Defendants' action and omissions as alleged in this Complaint demonstrate that such actions were done with actual malice, fraud and/or oppression so as to warrant the imposition of punitive damages.

WHEREFORE, Plaintiff prays for judgment:

- a. Certifying this case as a class action pursuant to Rule 23(a), (b)(2) & (b)(3) of the Federal Rules of Civil Procedure;

