



**IN THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA
 EUFAULA DIVISION**

ERKINS MOSES,)	
Plaintiff,)	
)	
V.)	Case No.: CV-2015-900077.00
)	
USAA LIFE INSURANCE COMPANY,)	
Defendant.)	

**ORDER PRELIMINARILY APPROVING PROPOSED SETTLEMENT,
 CERTIFYING CONDITIONAL SETTLEMENT CLASS, APPOINTING
 SETTLEMENT CLASS COUNSEL AND CLASS REPRESENTATIVE, APPROVING
 AND DIRECTING NOTICE PLAN, APPOINTING SETTLEMENT
 ADMINISTRATOR AND SCHEDULING FINAL APPROVAL HEARING**

THIS CAUSE came before the Court on the Joint Motion for Certification of a Settlement Class and for Preliminary Approval of Settlement (“Motion for Preliminary Approval”). After carefully considering the Motion for Preliminary Approval and the accompanying materials, and the positions of the Parties, the Court finds as follows:

On November 2, 2015, Plaintiff initiated this class action lawsuit against USAA Life Insurance Company (“USAA Life” or “Defendant”). Plaintiff filed an Amended Complaint on December 9, 2016. Plaintiff asserts two causes of action for breach of contract and declaratory judgment and seeks damages based on allegedly improper practices by USAA Life with respect to its level term life insurance policies. In particular, Plaintiff alleges that Defendant increased premiums based upon factors not explicitly contained in the Policies, including for the purpose of eliminating accumulated cash values in the Policies. Defendant vigorously denies each and every one of Plaintiff’s allegations of wrongful conduct, injury and damages, and intends to vigorously defend against the merits of the lawsuit. Defendant has further denied that this case

could be tried as a class action under Rule 23 if it were to be litigated to conclusion.

During the course of the litigation, Plaintiff received detailed information regarding Defendant's practices and defenses, including thousands of documents specifically relating to the re-pricing of the Policies. Plaintiff's Counsel also had the opportunity to meet with Defendant's actuarial expert, Timothy C. Pfeifer, as well as consult with his own actuarial expert. Ultimately, the Parties agreed to mediate this class action lawsuit. As a result of the mediation process conducted by Robert J. Kaplan of Judicate West Alternative Dispute Resolution in San Diego, California, which covered two sessions and extended nearly a year until November, 2016, the Plaintiff and Defendant ultimately reached a settlement agreement ("Settlement Agreement") to settle this litigation on a class-wide basis, subject to the Court's approval.

The Parties' Settlement Agreement is attached to the Parties' Joint Motion for Preliminary Approval. The Court has considered the terms of the Settlement Agreement and the Motion for Preliminary Approval. In light of the issues presented by the pleadings, the complexity of the proceedings, the absence of any indication of collusion between adversaries, and the experience of Plaintiff's Counsel in this matter, the Court is preliminarily satisfied that the Settlement Agreement is fair, reasonable, and consistent with the requirements of applicable laws. The Court is also satisfied that the proposed Notice Plan and draft Notice and Claim Forms are adequate and sufficiently informative as to the terms and effect of the proposed settlement and the conditional certification of the class. Accordingly, the Court finds that the Motion for Preliminary Approval should be granted.

I. Conditional Certification of Settlement Class

This Court finds that the Settlement Class as proposed in the Settlement Agreement meets all the requirements for certification of a Settlement Class under Rule 23 of the Alabama Rules of Civil Procedure. Accordingly, it is Ordered as follows:

1. The Court conditionally certifies the following Settlement Class:

People who own or owned a USAA Life Level Term 2, Series 5.0, 5.1, 5.2, & 5.3; Level Term 2X, Series 6.0, 6.1, 6.2, & 6.3; and Level Term 3, Series 6.0, 6.1, 6.11, 6.2, 6.3, 6.4, 6.5, 6.6, & 6.7 term life insurance policy at any time between January 1, 2008 and December 15, 2016, as well as certain other persons identified by USAA Life who also owned the same Level Term 2, 2X or 3 Series policies, but the policies terminated before January 1, 2008.

2. In particular, given the Settlement Agreement, the Court is able to make the following findings with respect to the elements of Rule 23 for settlement purposes:

- The conditional Settlement Class, estimated to include more than 340,000 members, satisfies the numerosity requirement of Rule 23(a)(1).
- The commonality requirement of Rule 23(a)(2) is met for settlement purposes because Plaintiff and Class Members allege that they entered into substantially similar written life insurance policies with Defendant. Given Plaintiff's allegations with respect to Defendant's pricing and re-pricing of the policies that resulted in an increase in premiums and the alleged failure to account for accumulated cash values, and the fact that the settlement affords agreed remedies that address the alleged breaches of those Policies, common questions of law or fact will apply to the disputes addressed in this case. The fact of the Settlement Agreement and the uniform compensation by category based upon on the status of the Class Members' Policies mitigates the need to address distinctions in any contracts, understandings or treatment and thus allows for class-wide resolution.
- The typicality requirement of Rule 23(a)(3) is met for settlement purposes because for this Settlement Class, Plaintiff's claims are typical of the claims of the members of the Class. Plaintiff alleges that Defendant engaged in a uniform course of conduct by improperly re-pricing the Policies and increasing premiums in order to eliminate cash values that had accumulated in the Policies. The alleged injury suffered by Plaintiff as a result of the alleged improper re-pricing of the Policies, as the class Representative, is typical to those alleged to be suffered by Class Members. Consequently, Plaintiff's claims satisfy the typicality requirement of Rule 23(a).

- The Class Representative and his Counsel are adequate representatives of the conditional Settlement Class under Rule 23(a)(4). In reaching this determination, the Court considered: (1) whether Class Counsel are qualified, experienced, and generally able to conduct the proposed litigation and (2) whether the Class Representative has interests antagonistic to those of the rest of the class. The Court finds that these requirements are also met. The Court finds that Class Counsel are qualified and the class representative has no interests antagonistic to those of other Settlement Class Members.
- Certification under Section Rule 23(b)(3) is appropriate for settlement purposes based upon Plaintiffs' allegations that Defendant breached the contracts of Plaintiff and Settlement Class Members by improperly increasing premiums based upon factors not specifically identified in the Policies, including for the purpose of eliminating accumulated cash values. Because this case is being settled, the Court does not "need to inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 620 (1997). For that and other reasons, this Court does not need to determine whether common issues would predominate over individual issues at trial.
- In the context of this settlement, the Parties have agreed to provide uniform, monetary compensation by category based upon the status of the Policies without the need for the Settlement Class Members to establish particular contract terms, their state of knowledge of the challenged practices, actual injury or breach. As a result of this uniform benefit to all members of the Settlement Class by category, the proposed Settlement Class is ascertainable from Defendant's business records.
- In the context of this settlement, given the likely costs and expenses associated with individual claims when weighed against the potential recoveries, and the potential waste of judicial resources, the superiority requirement of Rule 23(b)(3) is also satisfied.

3. This Order addresses only the conditional certification of a Settlement Class. As such, this Order shall not constitute nor be construed as a determination by this Court that in the absence of a settlement, a class action in this matter could be sustained under the Alabama Rules of Civil Procedure. Entry of this Order is without prejudice to the rights of Defendant to: (a) oppose certification in this Action, should the settlement not be approved or implemented for any reason; (b) oppose class certification in any other proposed or certified class action; (c) use the certification of a Class in this Action to oppose certification of any other proposed or existing class relating to or purporting to assert any Released Claims; or (d) terminate the

Settlement Agreement as provided therein. The provisions and findings of this Order are strictly limited to the specific facts and circumstances of this case.

II. Appointment of Class Counsel and Class Representative

4. Having certified this conditional Settlement Class under Rule 23, this Court is now required to appoint Class Counsel. Having considered the work Plaintiff's counsel have done in identifying and investigating potential claims in this action, the Court's extensive knowledge of counsel's experience in handling class actions, counsel's knowledge of the applicable law, and the resources counsel will continue to commit in representing the class, the following attorneys are designated Class Counsel: Robert G. Methvin, Jr., Esq., James M. Terrell, Esq., P. Michael Yancey, Esq. and Rodney E. Miller, Esq. of McCallum, Methvin & Terrell, P.C. The Plaintiff, Mr. Moses Erkins, is designated as Class Representative.

III. Preliminary Approval of Proposed Settlement

5. Approval of a class-action settlement is a two-step process. Rule 23 of the Alabama Rules of Civil Procedure is based on Federal Rule of Civil Procedure 23 and Alabama courts may look to federal cases as persuasive authority. *Adams v. Robertson*, 676 So. 2d 1265, 1268 (Ala. 1995). In the first step, the Court determines whether the proposed settlement should be preliminarily approved. *See* David F. Herr, *Annotated Manual for Complex Litigation* 21.632 (4th ed. 2004). At the preliminary-approval stage in the process, the Court is required to "make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." *Id.* 21.632. A proposed settlement should be preliminarily approved if it "is 'within range of possible approval' or, in other words, [if] there is 'probable cause' to notify the class of the proposed settlement." *Horton v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D. N.C. 1994) (quoting *Armstrong v. Board of School Directors*, 616 F.2d 305, 312 (7th Cir. 1980)).

6. In the second stage, following appropriate notice to the class and after hearing

from any potential objectors, the Court makes a final decision whether to approve the proposed settlement. *See* Annotated Manual for Complex Litigation 21.633-35. Although the Court will not make a final decision regarding approval of the Settlement Agreement until later at the Final Approval Hearing, the Court is well aware that its preliminary approval of the proposed settlement here will result in notice of the settlement being provided to the Settlement Class members at substantial cost to the Defendant.

7. Turning to the specific terms of the Settlement Agreement, Defendant has agreed to provide specific relief in the form of a Two-Year Term Certificate or cash payment, depending on the particular category the Class Member falls under. The specific categories and relief are as follows:

CATEGORY	Policy Characteristics	Settlement Relief
A	In-Force Policy in Level Benefit Period as of October 31, 2016	A two-year Term Certificate with a death benefit payment equal to ten percent of the Policy's Face Amount as of October 31, 2016. The Term Certificate shall be subject to the terms and conditions set forth therein. For in-force Level Term 2, 2X or 3 riders, a two-year Term Certificate with a death benefit payment equal to ten percent of the term rider's Face Amount as of October 31, 2016. If a Policy has multiple Owners, only one Term Certificate will be issued in the name of all Owners for that Policy
B	Policy Terminated after December 31, 2007 and Owner paid Additional Premium	A single payment representing an amount of forty percent of the Increased Premium Amount paid by the Eligible Settlement Class Member.
C	In-Force Policy beyond Level Benefit Period as of the Cutoff Date and Owner has paid Additional Premium	An Eligible Settlement Class Member in Category C shall select the settlement relief provided for Category "A" or "B." Should an Eligible Class Member in Category C pass away between the Execution Date and Final Settlement

		Date, Defendant shall pay the settlement relief provided for in Category B to the Eligible Class Member's Estate.
D	Policy Terminated after December 31, 2007 while still in the Level Benefit Period	A single payment of \$100.
E	Policies Designated by Defendant as "Settlement Category E" Policies that terminated prior to January 1, 2008	A single payment of \$100.

Defendant has also agreed to nonmonetary relief: (a) the removal of any language from Policy illustrations and annual owner statements providing that the Policy's premium will not increase after the Level Benefit Expiration Date; (b) one-time written notice to In-Force Policy Owners that their premium shall increase after the Level Benefit Expiration Date; and (c) that it will not conduct any additional re-pricing of the Policies for five years commencing on the Execution Date.¹

8. In addition, Defendant has agreed to bear all the costs of the administration of the Settlement Agreement, including the costs of direct mail notice to all Class Members, costs of administration in the tracking of opt-outs, objectors and in the distribution of settlement benefits.

9. In evaluating the proposed settlement and considering whether it should be preliminarily approved as fair, reasonable, and adequate, the Court has considered the following factors: (a) the absence of any collusion among the parties; (b) the significant risks of continued litigation; (c) the complexity, expense, and duration of the litigation; (d) the substantial, uniform relief by category that will be provided to all Class Members under the proposed settlement; (e) the stage of the litigation; and (f) the judgment of experienced counsel for the parties. *See Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984).

10. First, given the multiple mediations conducted by a nationally-recognized class action mediator, Robert J. Kaplan of Judicate West Alternative Dispute Resolution in San Diego, California, and months of ensuing negotiations, there is no evidence of collusion in this

proposed settlement, which favors preliminary approval. The parties vigorously and professionally represented the interests of their respective clients throughout.

11. Second, both Parties face significant risks from continued litigation, which also favors preliminary approval of the settlement. Plaintiff has not yet established any breach of contract, and Defendant has denied any such breach. Further, the class certification issue has not yet been litigated and the Parties have opposing positions with respect to potential certification of a class for litigation purposes. For example, Plaintiff contends that certification of a class would be appropriate, in part, because the re-pricing of the Policies was done uniformly and breached all of the Policies in the same manner. On the other hand, and without limiting Defendant's objections under Rule 23, Defendant has at all times maintained that its practices with respect to re-pricing the Policies were proper and in accordance with its contract terms and any regulatory requirements. In addition, Defendant steadfastly contends this case is wholly unsuitable for class treatment and could never be tried as a class action. In particular, Defendant argues: (a) numerous courts have held that a class cannot be certified due to the legal variation among the states on the standards for interpreting insurance contracts; (b) the differing facts and differing evidence that could come into play for each putative class member could have a significant impact on certification; (c) the differing evidence applicable to each putative class member's damages claim; and (d) the existence of individualized evidence necessary to determine the outcome of Defendant's statute of limitations defense. Obviously, there is a risk that if the issues were to be litigated, the Court could find that the Plaintiff's proposed class could or could not be certified for trial purposes, or that only a class smaller than the Settlement Class could be certified. Defendant also faces the costs and risks of continued litigation if the Class were to be certified for trial purposes.

12. The Court also finds the complexity, expense, and duration of this litigation favor preliminary approval of the proposed Settlement Agreement. Were this matter to continue, numerous, complex issues of law would have to be resolved at the cost of considerable time and

expense to the parties and the Court.

13. The substantial benefits to be provided under the proposed settlement on a categorical basis also favors preliminary approval.

14. The stage of the litigation and the judgment of experienced counsel for the Parties is a factor in favor of preliminary approval. The Parties have engaged in substantial investigation, exchange of information and legal positions, and debated the strengths and weaknesses of their merits and class certification claims and defenses, including with the help of nationally-recognized actuarial consultants and a mediator with significant experience in class action litigation. Therefore, the Parties are well placed to assess the strength of this case and the comparative benefits of the proposed settlement. Moreover, this proposed settlement is supported by experienced counsel for the Parties. Plaintiff is represented by highly respected attorneys with significant experience in other class actions, including actions against others in Defendant's industry. Defendant is also represented by leading attorneys from respected law firms experienced in class action litigation. The unanimous support of counsel for this settlement weighs in favor of its approval.

15. The Court has also considered that the Settlement Agreement and conditional class certification make adequate provision for the interests of Class Members to opt out or to object to its terms.

16. Based on the foregoing conclusions, the proposed settlement is hereby preliminarily approved as fair, reasonable, and adequate, subject to further consideration at the final approval hearing described below. Plaintiff and Defendant are authorized to take all actions that may be required prior to the Final Approval Hearing.

IV. Approval Of The Proposed Notice Plan

17. Once preliminary approval of a settlement is granted, Rule 23(c)(2) requires the Court to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

18. The Parties have proposed to use Rust Consulting (“Rust”) as the Settlement Administrator. The Court has reviewed materials about the Settlement Administrator and has concluded that it has extensive and specialized experience and expertise in class-action settlements and notice programs.

19. The Court hereby appoints Rust to assist and provide professional guidance in the implementation of the Notice Plan and other aspects of the settlement administration.

20. The Court has evaluated the proposed Notice Plan to determine if it is reasonable and in accord with the requirements of Alabama law. The Notice Plan that the Parties have agreed upon in the Settlement Agreement is direct and appropriate. It employs a Notice and Claim Form delivered by first class mail to all Class Members -- most of which are Defendant’s existing policyholders -- which is the best practicable notice and routinely acknowledged by courts to be the most appropriate form of notice when Class Members can be identified. The Notice Plan also provides for the creation of a class settlement website, which will contain important settlement documents, including the Settlement Agreement and this Order. The website will also include a description of the settlement relief, answers to questions class members may have, and updates on the status of the settlement approval process. There will also be a toll-free telephone number, which provides Settlement Class members with access to live responders and recorded information that includes answers to frequently-asked questions and directs them to the website.

21. This Court has also reviewed both the Notice and Claim Forms attached as an Exhibit to the Settlement Agreement. After careful review of the documents, the Court has concluded that they clearly state in plain, easily understood language, the nature of the action; the definition of the classes certified; the ability of a class member to opt out or otherwise object and appear in this matter; and the binding effect of a class judgment on class members. The notice is designed to reach a significant number of class members and is otherwise proper under Rule 23(c)(2) and 23(e). Non-material modifications to these Notices may be made by

agreement between the Parties without further need for Court approval.

22. Based on the foregoing, the Court hereby approves the Notice Plan and directs that it be implemented according to the Settlement Agreement. The Court finds that the Notice Plan constitutes reasonable notice under Rule 23(c)(2) and 23(e) and satisfies due process.

23. The cost of the Notice Plan shall be paid by the Defendant according to the terms of the Settlement Agreement. The Notice and Claim Form shall be mailed in accordance with the Notice Plan commencing within 7 days of this Order.

V. Procedure for Objection

24. Any member of the Settlement Class who wishes to object to the proposed settlement may do so by filing a notice of objection, including any supporting papers with the Circuit Court of Barbour County, Alabama (Eufaula Division), on or prior to **March 3, 2017**. Copies of the Notice of Objection must also be delivered to counsel for the parties at that time. Attendance at the settlement hearing is not necessary. The objection shall contain a caption or title that identifies it as “Objection to Class Settlement in *Erkins v. USAA Life Insurance Company*” and must include all of the following:

- the objecting party’s name, Policy number, address, and telephone number, and the original signature of the Settlement Class Member or his or her Authorized Representative;
- a copy of the Settlement Class Member’s Policy;
- a certification that the objecting party is a member of the Settlement Class;
- a statement of each objection asserted and a description of the facts underlying each objection;
- a description of the legal authorities, if any, supporting each objection and any exhibits or affidavits the objecting party may offer in support of any objection;
- a list of other cases in which the Settlement Class Member has appeared as a settlement objector (and, if the Settlement Class Member is represented by any attorneys in connection with the objection, a list of other cases in which the attorneys have appeared as counsel for objectors) in the preceding ten

years; and

- if the objecting party is represented by an attorney or attorneys in connection with the objection, the signature of each of the objecting party's attorneys below a statement that "No other attorney has a financial interest, either directly or indirectly, in the representation of this objecting party."

25. Any person who wishes to appear and speak at the final approval hearing, either in person or through counsel, in addition to providing the above information must provide the following in their objection filed in writing with the Court and delivered to counsel for the Parties by **March 3, 2017**:

- a notice of intention to appear, either in person or through an attorney, with the name, address, and telephone number of the attorney, if any, who will appear;
- the points the objecting party or its lawyers wish to address at the hearing;
- copies of any documents, if any, the objecting party may offer or rely upon during the hearing;
- a list of all witnesses, if any, the objecting party may call to testify at the hearing, along with a summary of each witness's anticipated testimony; and
- a statement of the amount of time the objecting party or its lawyer request for speaking at the hearing.

26. Any lawyer who intends to appear or speak at the final approval hearing must enter a written notice of appearance of counsel with the Clerk of Court no later than **March 3, 2017**. All preliminarily submitted objections shall be considered by the Court.

27. Any objector who does not properly and timely object in the manner set forth above will not be allowed to appear at the final approval hearing and will not be allowed to object to or appeal the final approval of the proposed settlement, the dismissal of the case, any award of attorney's fees and expenses to Class Counsel, or any incentive awards to the Named Plaintiff.

VI. Procedure for Opting Out

28. Settlement Class Members who wish to exclude themselves from the Settlement

Class must submit timely, written requests for exclusion. To be effective, such a request must include the Settlement Class Member's name and address, a clear and unequivocal statement that the Settlement Class Member wishes to be excluded from the Settlement Class, and the signature of the Settlement Class Member or the Authorized Representative of the Settlement Class Member. The request must be mailed to the Settlement Administrator at the address provided in the Notice and must be postmarked no later than **March 3, 2017**. Requests for exclusion must be exercised individually by the Settlement Class Member or his or her Authorized Representative, not as or on behalf of a group, class, or subclass.

29. Each Class Member who does not submit an opt-out request substantially in compliance with this section on or prior to **March 3, 2017** shall be included in the Settlement Class and deemed to participate in the settlement and release provided in the Settlement Agreement. For purposes of determining timeliness, an opt-out request shall be deemed to have been submitted when postmarked. The original opt-out request(s) shall be sent to and maintained by the Settlement Administrator. The Settlement Administrator shall provide copies to Plaintiffs' Counsel and the Defendant's Counsel.

VII. Final Approval Hearing

30. A Final Approval Hearing shall be held on **April 3, 2017 at 1:00 p.m.** for the purpose of determining whether the proposed settlement set forth in the Settlement Agreement shall be approved finally by the Court and whether final judgment dismissing the litigation with respect to Defendant is appropriate. The Court will also consider Class Counsel's request for attorneys' fees, and expenses, and Plaintiff's request for an incentive award. The hearing will be held at the Circuit Court of Barbour County, Alabama (Eufaula Division).

31. The Court hereby sets the following dates and deadlines:

"Notice Date" (date by which dissemination of Notice must have begun)	=	Seven Days from the Date of this Order
"Opt-Out Deadline" (deadline for post-marking)	=	March 3, 2017

and serving Request for Exclusion)		
“Objection Date” (deadline for post-marking, filing and serving written objections)	=	March 3, 2017
“Final Approval Hearing”	=	April 3, 2017 at 1:00 p.m.
“Deadline for Disbursement”	=	TBD in accordance with Settlement Agreement

32. The findings and rulings in this Order are made solely for the purposes of Settlement and may not be cited or otherwise used to support the certification of any contested class or subclass in this Action or any other action.

33. If logistical problems arise from implementation of this Order, then the parties shall bring them to the attention of this Court for resolution by subsequent order of this Court.

34. The Parties are directed to send the Notice and Claim Form (contained as exhibits to the Motion for Preliminary Approval) approved by this Order, with such modifications as may be authorized by this Order.

35. This Court shall retain exclusive jurisdiction for all matters related to this Order. All Settlement Class Members and persons in privity with them, including all persons represented by them, are barred and enjoined from commencing or continuing any suit, action, proceeding, case, controversy, or dispute relating to: (1) the claims alleged herein and as discussed in the Settlement Agreement; (2) the Settlement Agreement; and (3) performance or breach of same. Such Persons are further barred and enjoined from seeking to raise any objections or challenges to the Settlement, in any state or federal court or other body other than the Circuit Court of Barbour County, Alabama (Eufaula Division).

36. If the settlement is not finally approved by the Court or is not consummated for any reason whatsoever, the settlement and all related proceedings shall be null and void and

without prejudice to the status quo ante and rights of Defendant and the Plaintiff as they existed prior to the date of execution of the Settlement Agreement, except as otherwise provided in the Settlement Agreement.

37. Counsel are directed to file any remaining briefs in support of the proposed settlement no later than **March 24, 2017**. Class Counsel are directed to file any material in support of their fee motion no later than **March 24, 2017**. The Final Approval Hearing will be held at 1:00 p.m. on **April 3, 2017**.

38. The Court may (i) approve the Settlement Agreement, with such modifications as may be agreed to by the parties, without further notice; (ii) adjourn the final approval hearing from time to time by oral announcement at the hearing without further notice. The Court retains exclusive jurisdiction over the Action to consider all further matters arising out of or in connection with the proposed settlement.

Accordingly, the Motion for Preliminary Approval of Proposed Settlement is **GRANTED**, consistent with this Order.

DONE this 21st day of December, 2016.

/s/ HON. BURT SMITHART
CIRCUIT JUDGE
