

Plaintiffs Stephen Berry, Fader Higher, LLC, Mehmet C. Pekerol, M.D., Mehmet C. Pekerol, M.D., P.C., Jamie Hughes, Stanton Greene, Valley Vista Mortgage, Inc., Robert P. Young, M.D., Rocky Mountain Dermatology, Inc., Tyrone M. Seils, DP Search, Inc., Robert W. MacMillan, MacMillan Construction Company, Inc., Hodan Rabile, DDS, Rabile Family Dentistry, P.C., Charles R. Brown, DDS, and Poulsbo Children's Dentistry, individually and on behalf of all those similarly situated (collectively, "Plaintiffs" or "Class Representatives"), hereby file this Original Complaint against Defendants Indianapolis Life Insurance Company, Hartford Life and Annuity Insurance Company, Pacific Life Insurance Company, American General Life Insurance Company, Economic Concepts, Inc., ECI Pension Services, LLC, and Kenneth R. Hartstein (collectively, "Defendants"), and allege as follows:

I. NATURE OF ACTION

1. This is a putative nationwide class action in which Plaintiffs assert various state-law claims against four insurance companies and their consultants related to the design, marketing, and sale of specific life insurance policies used by Plaintiffs to fund defined benefit pension plans that purportedly complied with Section 412(i) of the Internal Revenue Code (the "Code"), but were later examined by the Internal Revenue Service (the "IRS") to determine whether such plans constitute "listed transactions" and/or abusive tax shelters.

II. JURISDICTION AND VENUE

2. The Court has subject matter jurisdiction over this action under 28 U.S.C. § 1332(d)(2) because this is a class action in which the citizenship of one or more members of the Classes (as defined below) differs from the citizenship of any Defendants, and the amount in controversy exceeds \$5,000,000, excluding interest and costs.

3. The Court also has personal jurisdiction, both general and specific, over Defendants. Defendants have purposefully availed themselves of the privileges and benefits of conducting business in Texas. Defendants, among other things, have (a) contracted by mail or otherwise with Texas residents, which contracts were to be performed in whole or in part in Texas; (b) committed certain torts, which are the subject of this action, in whole or in part in Texas; and (c) otherwise done business in Texas.

4. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(a)(1), 1391(a)(3), and/or 1391(c). Many of the events and omissions giving rise to the claims herein occurred in substantial part in this judicial district.

III. PARTIES

A. PLAINTIFFS

5. Plaintiff Stephen Berry ("Berry") is a citizen and resident of the State of Arizona.

6. Plaintiff Fader Higher, LLC ("Fader Higher") is a limited liability company organized under the laws of the State of Arizona, with its principal offices located at 9376 East Bahia, Suite D101, Scottsdale, Arizona 85260. Berry is a managing member of Fader Higher.

7. Plaintiff Mehmet C. Pekerol, M.D. ("Dr. Pekerol") is a citizen and resident of the State of California.

8. Plaintiff Mehmet C. Pekerol, M.D., P.C. ("Pekerol P.C.") is a professional corporation organized under the laws of the State of California, with its principal offices located at 9201 West Sunset Boulevard, Suite 616, West Hollywood, California 90069. Dr. Pekerol is an officer and shareholder of Pekerol P.C.

9. Plaintiff Jamie Hughes ("Hughes") is a citizen and resident of the State of California.

10. Plaintiff Stanton Greene (“Greene”) is a citizen and resident of the State of California.

11. Plaintiff Valley Vista Mortgage, Inc. (“Valley Vista”) is a corporation organized under the laws of the State of California, with its principal offices located at 4747 Viewridge Avenue, Suite 200, San Diego, California 92123. Hughes and Greene are officers and shareholders of Valley Vista.

12. Plaintiff Robert P. Young, M.D. (“Dr. Young”) is a citizen and resident of the State of Utah.

13. Plaintiff Rocky Mountain Dermatology, Inc. (“Rocky Mountain Inc.”) is a professional corporation organized under the laws of the State of Utah, with its principal offices located at 550 East 1400 N, Suite Q, Logan, Utah 84341. Dr. Young is an officer and shareholder of Rocky Mountain Inc.

14. Plaintiff Tyrone M. Seils (“Seils”) is a citizen and resident of the State of California.

15. Plaintiff DP Search, Inc. (“DP Search”) is a corporation organized under the laws of the State of California, with its principal offices located at 73350 El Paseo, Suite 205, Palm Desert, California 92260. Seils is an officer and shareholder of DP Search.

16. Plaintiff Robert W. MacMillan (“MacMillan”) is a citizen and resident of the State of Arizona.

17. Plaintiff MacMillan Construction Company, Inc. (“MacMillan Construction”) is a corporation organized under the laws of the State of Arizona, with its principal offices located at 710 North Fifth Street, Prescott, Arizona 86301. MacMillan is the President of MacMillan Construction.

18. Plaintiff Hodan Rabile, DDS (“Dr. Rabile”) is a citizen and resident of the State of Texas.

19. Plaintiff Rabile Family Dentistry, P.C. (“Rabile P.C.”) is a corporation organized under the laws of the State of Texas, with its principal offices located at 5330 North MacArthur Boulevard, Suite 150, Irving, Texas 75038. Dr. Rabile is the President of Rabile P.C.

20. Plaintiff Charles R. Brown, DDS (“Dr. Brown”) is a citizen and resident of the State of Washington.

21. Plaintiff Poulsbo Children’s Dentistry (“Poulsbo Children’s Dentistry”) is a sole proprietorship operated by Dr. Brown, with its principal offices located at 19365 7th Avenue NE, Suite D-108, Poulsbo, Washington 98370.

B. DEFENDANTS

22. Defendant Indianapolis Life Insurance Company (“Indianapolis Life”) is a corporation organized under the laws of the State of Indiana, with its principal offices located at 9200 Keystone Crossing, Suite 800, Indianapolis, Indiana 46240.

23. Defendant Hartford Life and Annuity Insurance Company (“Hartford”) is a corporation organized under the laws of the State of Connecticut, with its principal offices located at 200 Hopmeadow Street, Simsbury, Connecticut 06070.

24. Defendant Pacific Life Insurance Company (“Pacific Life”) is a corporation organized under the laws of the State of Nebraska, with its principal offices located at 700 Newport Center Drive, Newport Beach, California 92660.

25. Defendant American General Life Insurance Company (“American General”) is a corporation organized under the laws of the State of Texas, with its principal offices located at 2727 Allen Parkway, Houston, Texas 77019.

26. Defendants Indianapolis Life, Hartford, Pacific Life, and American General are collectively referred to herein as the "Insurance Defendants."

27. Defendant Economic Concepts, Inc. ("ECI") is a corporation organized under the laws of the State of Arizona, with its principal offices located at 9316 Raintree Drive, Suite 100, Scottsdale, Arizona 85260. ECI is a product marketing and consulting firm that specializes in the area of qualified pension plans.

28. Defendant ECI Pension Services, LLC ("ECI Pension") is a limited liability company organized under the laws of the State of Arizona, with its principal offices located at 9316 Raintree Drive, Suite 100, Scottsdale, Arizona 85260. ECI Pension is a product marketing and consulting firm that specializes in the area of qualified pension plans.

29. Defendant Kenneth R. Hartstein ("Hartstein") is a citizen and resident of the State of Arizona, with a business address of 9316 Raintree Drive, Suite 100, Scottsdale, Arizona 85260. Hartstein is the President, Chief Executive Officer, and primary shareholder of ECI, as well as the managing member of ECI Pension.

30. Defendants ECI, ECI Pension, and Hartstein are collectively referred to herein as the "Consultant Defendants."

C. RELATED PARTIES

31. Bryan Cave LLP ("Bryan Cave") is a limited liability partnership organized under the laws of the State of Missouri, with its principal offices located at One Metropolitan Square, 211 North Broadway, Suite 3600, St. Louis, Missouri 63102. Bryan Cave is an international law firm with more than 900 lawyers and other consulting professionals located in twenty-one offices throughout the world.

32. Richard C. Smith ("Smith") is a citizen and resident of the State of Arizona, with a business address of One Renaissance Square, Two North Central Avenue, Suite 2200, Phoenix,

Arizona 85004. Smith is a licensed attorney and partner at Bryan Cave. His practice focuses on the employee benefits area, including the design, implementation, and other aspects of pension, profit sharing, and other qualified plans.

33. Bryan Cave and Smith are collectively referred to herein as the "Bryan Cave Parties."

IV. CLASS ALLEGATIONS

34. Plaintiffs bring this action on their own behalf and, pursuant to Federal Rules of Civil Procedure 23(b)(1)(A), (b)(2), and/or (b)(3), as a class action on behalf of themselves and the following four nationwide classes of similarly situated persons (the "Classes" or "Class Members"):

- a. All persons who, between January 1, 1999 and the present, paid insurance premiums to Indianapolis Life on a PenPro policy, Executive VIP policy, or a substantially similar policy that was used to fund a defined benefit plan under Section 412(i) of the Code.
- b. All persons who, between January 1, 1999 and the present, paid insurance premiums to Hartford on a Stag Whole Life policy or a substantially similar policy that was used to fund a defined benefit plan under Section 412(i) of the Code.
- c. All persons who, between January 1, 1999 and the present, paid insurance premiums to Pacific Life on a Flex XII policy or a substantially similar policy that was used to fund a defined benefit plan under Section 412(i) of the Code.
- d. All persons who, between January 1, 1999 and the present, paid insurance premiums to American General on policies that were used to fund a defined benefit plan under Section 412(i) of the Code.

35. The claims of the Class Members are so numerous that joinder of all members would be impracticable. On information and belief, there are hundreds, if not thousands, of Class Members.

36. The claims of the Class Representatives are typical of the claims of the Class Members in that they all arise by virtue of their purchase of specific life insurance policies issued by the Insurance Defendants and designed and/or marketed by the Consultant Defendants, which policies were used to fund defined benefit plans that purported to comply with Section 412(i) of the Code, but were later examined by the IRS to determine whether such plans constitute “listed transactions” and/or abusive tax shelters (the “Insurance Policies”).

37. The Class Representatives will fairly and adequately protect the interests of the Class Members, and the claims of the Class Representatives are consistent with and not antagonistic to those of the Class Members.

38. The Class Representatives have engaged the undersigned counsel who have substantial experience in complex commercial litigation and class action litigation, and counsel will fairly, adequately, and vigorously represent the interests of the Class Representatives and Class Members.

39. There are questions of law and fact that are common to the Class Members, which common questions predominate over any individual questions. Upon information and belief, each of the Insurance Defendants conspired with each other and the Consultant Defendants to design, market, and sell the Insurance Policies for use in funding abusive 412(i) plans. The Bryan Cave Parties blessed these Insurance Policies by providing legal opinions regarding their compliance with the requirements necessary to satisfy Section 412(i). In marketing these specially designed policies, the Defendants created uniform marketing materials, which they distributed to licensed insurance agents working for the Insurance Defendants throughout the country. These uniform marketing materials provided a scripted presentation for setting up a 412(i) plan and funding that plan with the Insurance Policies designed by the Defendants.

Agents for the Insurance Defendants then relayed the scripted presentation to the Class Members. Because the uniform marketing materials mentioned nothing about the substantial tax risks and problems with these 412(i) arrangements, the agents failed to disclose such risks and problems to the Class Members. These common questions include, but are not limited to, the following:

- a. Whether Defendants designed the Insurance Policies to be used to fund 412(i) plans;
- b. Whether Defendants knew or should have known that the Insurance Policies would be used by the Class Members to fund 412(i) plans;
- c. Whether Defendants knew or should have known that the Insurance Policies contained provisions that, when used to fund 412(i) plans, could subject the plans to being deemed abusive 412(i) plans and/or non-qualified plans by the IRS;
- d. Whether the Insurance Policies issued to the Class Members by an Insurance Defendant were substantially similar to each other;
- e. Whether the Insurance Defendants were negligent, reckless, and/or engaged in intentional misconduct in selling the Insurance Policies to the Class Members;
- f. Whether the Consultant Defendants provided actuarial, consulting, and/or marketing services to each of the Insurance Defendants in connection with the Insurance Policies;
- g. Whether the Consultant Defendants were negligent, reckless, and/or engaged in intentional misconduct in assisting with the design and marketing of the Insurance Policies;
- h. Whether the Defendants failed to disclose material information in marketing and selling the Insurance Policies to the Class Members;
- i. Whether the Insurance Policies were sold or marketed to the Class Members pursuant to standard scripts, marketing materials, or sales pitches provided by the Insurance Defendants and/or Consultant Defendants;

- j. Whether the misrepresentations made to the Class Members were materially uniform such that reliance could be established by generalized proof;
- k. Whether the Bryan Cave Parties provided legal opinions to the Consultant Defendants and/or the Insurance Defendants in which the Bryan Cave Parties rendered opinions regarding whether the Insurance Policies would comply with all requirements necessary to satisfy Section 412(i);
- l. Whether the legal opinions provided by the Bryan Cave Parties to the Consultant Defendants and/or the Insurance Defendants were substantially similar to each other;
- m. Whether the Bryan Cave Parties were negligent, reckless, and/or engaged in intentional misconduct in rendering the legal opinions;
- n. Whether the fees or commissions charged or earned by the Insurance Defendants, the Consultant Defendants, and/or the Bryan Cave Parties were excessive and unreasonable; and
- o. Whether Defendants conspired and/or aided and abetted each other in furtherance of the unlawful acts alleged herein.

40. The prosecution of separate actions by individual Class Members would create a risk of inconsistent or varying adjudications with respect to individual Class Members that would establish inconsistent standards of conduct for Defendants, such that this class should be certified pursuant to Rule 23(b)(1)A). Moreover, Defendants have acted or refused to act on grounds generally applicable to the Class as a whole, making appropriate final injunctive or declaratory relief under Rule 23(b)(2). In addition, common questions of fact and law predominate over individual questions and the benefits and efficiencies of a class action make this superior to other available methods for the fair and efficient adjudication of the controversy. Thus, certification is appropriate under Rule 23(b)(3).

V. FACTUAL BACKGROUND

A. THE SCHEME TO SELL ABUSIVE TAX SHELTERS

41. In the late 1990s, Defendants, with substantial assistance from the Bryan Cave Parties, devised a scheme to sell abusive and illegal tax shelters under the auspices of Section 412(i) of the Code. Specifically, upon information and belief, the Insurance Defendants conspired with each other, the Consultant Defendants, and the Bryan Cave Parties to design special life insurance policies, with excessively high premiums, which were to be used in funding defined benefit pension plans under Section 412(i). Defendants knew or should have known that this arrangement would likely be deemed an abusive tax shelter by the IRS, but Defendants were financially incentivized by the prospect of reaping enormous premiums and commissions from the sale of these Insurance Policies.

42. A 412(i) plan is a defined benefit pension plan created under Section 412(i) of the Code. Like any defined benefit pension plan, a 412(i) plan provides specified retirement benefits to its participants once they reach retirement and must contain assets sufficient to pay those retirement benefits. A 412(i) plan differs from other defined benefit pension plans, however, in that it must be “funded exclusively by the purchase of individual insurance contracts,” such as life insurance policies or annuities. To create a 412(i) plan, an employer first establishes a trust to hold the plan’s assets. The employer then funds the 412(i) plan by making regular cash contributions to that trust, and the Code allows the employer to take a tax deduction in the amount of these contributions. The trust uses the contributed funds to purchase some combination of life insurance policies and annuities for the 412(i) plan. As the plan participants retire, the trust will usually sell the policies for their present cash value and purchase annuities with the proceeds. The revenue stream from the annuities pays the specified retirement benefit to plan participants.

43. Defendants used the traditional 412(i) plan's structure to devise a scheme for selling life insurance policies with excessively high premiums. This led to "abusive" 412(i) plans. In an abusive 412(i) plan, the employer makes cash contributions to the trust that are substantially larger than the cash contributions made in a traditional 412(i) plan. The trust then uses those large cash contributions to pay the high insurance premiums, and the employer takes a tax deduction for the sum of those large contributions.

44. The trust for a traditional 412(i) plan also uses the funds contributed by the employer to purchase assets for the plan but, in an abusive 412(i) plan, these assets consist entirely of life insurance policies. As part of their scheme, insurance companies, like the Insurance Defendants, designed insurance policies to carry extremely high "loads" that provide exorbitant fees and/or commissions to the insurance companies and their selling agents. These high loads ensure considerable profits for the insurance companies and agents selling these policies. Because of the very large cash contributions an employer makes when funding an abusive 412(i) plan, the purchased life insurance policies necessarily have high present cash values after only a few years. But insurance companies, like the Insurance Defendants, employ a high "surrender charge" to suppress the true cash value of the policies. Surrender charge clauses provide that the bulk of a policy's cash value will be surrendered to the insurance company if the trust cashes out of the policy early.

45. Usually after five years, a participant in an abusive 412(i) plan purchases the insurance policy that the trust holds for the participant's benefit. To do so, the participant pays the trust the amount of the policy's surrender value (the present cash value of the policy reduced by the surrender charge). In exchange for that payment, the participant takes possession of the insurance policy. In an abusive 412(i) plan, this transaction is ostensibly tax-free for the

