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Locke Lord QuickStudy: Eleventh Circuit Affirms Dismissal of ?Cost-of-Insurance Rate Class Action ?Against Wilco Life ?Insurance Company

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On November 15, 2021, the U.S. Court of Appeals for the Eleventh Circuit ?affirmed dismissal of a ?putative cost-of-insurance ("COI") rate class action in ?*Anderson v. Wilco Life Insurance Company* [1] — a victory for life insurers in litigation that has harried the industry for the last ?decade.?

The lawsuit alleged that Wilco Life — a successor to Conseco Life Insurance ?Company — breached ?the terms of certain universal life policies by determining COI ?rates using factors not described in the ?policy. The district court granted Wilco Life's ?motion to dismiss the case on the pleadings, holding ?that the policy unambiguously ?gave Wilco Life discretion to determine current COI rates, as long as ?they were below ?the maximum guaranteed rates stated in the policy. The Eleventh Circuit affirmed.?

Anderson staked her claims on a sentence accompanying the Table of ?Guaranteed Monthly COI ?Rates in her policy. That sentence, which followed the ?table and explanation of the annual ?guaranteed COI rates, stated that ?"[a]ctual ?monthly cost of insurance rates will be determined by the ?company *?based on the ?policy cost factors described in your policy*"? (emphasis added). The policy's ?later ?provision entitled "Cost of Insurance Rates" explained that the guaranteed monthly ?COI rates ?were "based on the insured's sex, attained age, and premium class on the ?date of issue" but that ?current monthly COI rates "will be determined by the ?Company" ?and would not exceed the ?guaranteed rates.? Anderson argued that, ?because sex, attained age, and premium class were the ?only "policy cost factors" ?described in the policy, the policy restricted Wilco Life to consider only those ?factors ?in adjusting current COI rates.?

?The Eleventh Circuit rejected Anderson's argument. ?

First, it rejected Anderson's invitation to apply *contra proferentem* — an oft-?cited (and misapplied) ?contract construction principle interpreting ambiguous policy ?exclusions against the drafter. The ?court stated that, even if Anderson had provided ?a reasonable alternative reading of the policy, a ?policy "susceptible to two reasonable ?meanings is not ambiguous if the trial court can resolve the ?conflicting ?interpretations by applying the rules of contract construction."?

The court determined that the policy was not ambiguous because Wilco Life's ?proffered ?interpretation, not

Anderson's, was the only reasonable way to read the ?policy. It held that the policy ?plainly set forth two different COI rates (guaranteed ?and current), and that engrafting the factors ?governing the determination of guaranteed ?rates onto the current rates would destroy the policy's ?distinction between the two ?types of rates. It further concluded that the provision stating that current ?monthly ?COI rates "will be determined by the Company" was a "straightforward" provision that ?gave Wilco ?Life discretion to set Anderson's current monthly rate, citing to cases in ?other contexts where the ?phrase "determined by the Company" has been interpreted ?to give discretion.?

The Court declined to weigh in on the debate over whether policy provisions ?stating that COI rates ?will be "based on" certain factors requires insurance ?companies to consider only those factors in ?determining COI rates. It distinguished ?cases like *Vogt v. State Farm Life Ins.* Co., 963 F.3d 753, 761 ??(8th Cir. 2020), and ?*Fleisher v. Phoenix Life Insurance Co.*, 18 F. Supp. 3d 456, 470 (S.D.N.Y. 2014). ??Nevertheless, a separate 11th Circuit panel recently held in an unreported decision ?that the phrase ??"based on" is not exclusive. *Slam Dunk I, LLC v. Conn. Gen. Life Ins.* ?Co., No. 20-13706, 2021 WL ??1575162 (11th Cir. Apr. 22, 2021). The *Slam Dunk* court ?relied on Seventh Circuit authority in ?determining that"[n]othing about the plain ?and ordinary meaning of the phrase 'based on' connotes ?exclusivity, and nothing ?about it implies the list that follows is exhaustive." *Id.* (citing *Norem v. ?Lincoln ?Benefit Life Co.*, 737 F.3d 1145, 1150 (7th Cir. 2013)).?

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[1]— F.4th —, 2021 WL 5293558 (11th Cir. Nov. 15, 2021).?

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