

Investors Opt Out of Transamerica Class Settlement

By [Donna Horowitz](#)

A federal judge has given final approval to a Transamerica Life Insurance Co. class-action settlement for \$110.7 million, slashing a proposed \$195 million payout after eight large life settlement investment groups withdrew from the agreement.

Judge Christina Snyder of the U.S. District Court for the Central District of California in Los Angeles certified the settlement Wednesday, Feb. 6.

The settlement resolved a dispute over a cost-of-insurance rate hike by the insurer as high as 100% that was imposed in 2015 and 2016.

Six of the eight large investors, including EFG Bank AG's Cayman Islands branch and Erste EAA-Beteiligungs GmbH, are represented by the Orrick, Herrington & Sutcliffe LLP law firm.

The names of all eight investment groups were not known.

"We fought for two years, did the discovery and then Orrick recruited the investors who dropped out," Harvey Rosenfield, founder and counsel for Consumer Watchdog, a nonprofit consumer-protection group in Santa Monica, Calif., and co-lead counsel in the case, said. "They were apparently told by Orrick they could get a better deal."

However, he'd said he'd be surprised if that turned out to be true.

Rosenfield said Orrick never gave a reason why their clients dropped out.

Neither Khai LeQuang, an Orrick attorney in Irvine, Calif., who represents EFG Bank and EAA, a German agency that's winding up WestLB assets, nor Stephen Foresta, an Orrick attorney in New York, who represents other large investors in the case, will say exactly why their clients opted out.

All LeQuang would say in an email is "they believed it was in their best interest to do so." As to the settlement itself, he said his clients don't want to comment about it.

LeQuang, however, had praised the settlement after preliminary approval was given by the court in October.

"It's clearly another significant development in the cost of insurance landscape," LeQuang said in a text message at the time. "It will be interesting to see how investors that have been monitoring these cases react."

LeQuang has a similar COI suit against Transamerica on behalf of EFG Bank and EAA that's pending in the same court.

A Jan. 14 court filing in the Transamerica case by the class counsel said "there has been an unexpectedly high level of exclusions by investor groups holding huge blocks of In-Force policies."

Andy Friedman, an attorney with the Bonnett Fairbourn Friedman & Balint PC law firm in Phoenix, who is part of the three-member class counsel lawyers' team, said he could not release the face value of the policies that were withdrawn by the investors' groups because it was confidential information that hasn't been made public.

Of a total of 69,908 policies in the settlement class, those owning 573 policies opted out, the filing said.

Some 544 of the 573 excluded policies are held by eight investor groups and 439 of those policies are represented by Orrick, the filing further said.

Since that filing, two additional policies were added to the opt-out list, bringing the total to 575 policies, Friedman said.

"Relatively small though the number of exclusions may be, however, those requesting exclusion from the Settlement Class have chosen to forgo substantial sums that would otherwise be paid to them under the Settlement Agreement," the filing said.

"Co-Lead Class Counsel believes that the reduction in the gross Settlement Common Fund due to the exclusion of a handful of well-heeled investors seeking to leverage potentially higher recoveries through separate demands or individual litigation does not undermine the reasonableness of the originally requested common fund fee award given the overall Settlement benefits achieved solely through the efforts of Plaintiffs' Counsel, particularly given the complete absence of any fee objection."

The attorneys' fees originally were calculated at \$33.75 million, but now have been reduced to \$27.7 million since the investors pulled out. An additional \$1 million will be paid for litigation costs.

The first \$10 million of the fees will be paid directly by Transamerica and will not come out of the pot of money to be distributed to class members.

Fees represent about 16% of the total settlement fund, which is below the 25% ceiling recommended by the U.S. District Court of Appeals for the 9th Circuit, Friedman said.

The opt-outs by institutional investors didn't come as a complete surprise.

The co-lead class counsel said it had noted in its initial fee brief and joint declaration that they believed institutional investors who acquired "high-dollar" policies would be more likely to opt out and thus they

created a formula that reduced the settlement's common fund based on such exclusions to preserve the same level of benefit for the settlement class to minimize Transamerica's incentive to terminate the agreement.

"I don't know what Orrick will be able to achieve because I'm not privy to their analysis," Friedman said. "They have a right to opt out. They have pre-existing litigation. It's common for this to happen in big anti-trust cases."

He said Orrick represents six of the eight investment groups. He said he doesn't know which firm or firms represent the remaining two investment firms, but it's not Steven Sklaver, an attorney with the Susman Godfrey LLP law firm in Los Angeles, who's well-known in the market for representing investors on cost-of-insurance cases, including class-action settlements.

As to whether the decision by the investment groups to withdraw from the settlement will dissuade law firms in similar class-action lawsuits from including investors, Friedman doesn't believe that that will happen.

"It won't change our view to do the right thing," he said.

As far as to whether this will allow Orrick or any other law firm representing investors who opted out to piggyback on the class counsel's work to get access to discovery they collected, Friedman said EFG Bank, which has a case pending, already gets access to the same discovery.

Friedman said he still was pleased with the settlement, although the investors decided not to participate in it.

"The people who were left bought insurance to protect their families," he said. "They didn't buy it for arbitrage."

Cost-of-insurance, or COI, increases reflecting mortality charges have plagued investors in the life settlement market for more than three years, reducing profits in their portfolios. Investors have fought back by suing carriers who have raised the rates, resulting in two other multimillion-dollar class settlements in recent years.

The class-action case settled litigation filed by Consumer Watchdog that was consolidated with four other similar cases brought by Adam Moskowitz of The Moskowitz Law Firm PLLC of Coral Gables, Fla., and Friedman.

Although the average payment has not been yet determined, the settlement fund equals about 62% of the past alleged overcharges, not including legal fees and expenses.

The money from the settlement will go to existing policyholders and those whose policies lapsed after the raises were imposed in four different "waves" in 2015 and 2016, the plaintiffs previously said.

The settlement also means that Transamerica won't impose any additional COI increases on class members for five years unless it's ordered to do so by regulatory authorities, something considered very unlikely.

Any future COI increases sought by Transamerica could not seek to recover past losses, according to a joint declaration filed with the court supporting the preliminary agreement.

The agreement also means that Transamerica won't deny future death benefits to class members based on alleged lack of insurable interest or misrepresentations on policy applications, a provision that would have seemed to benefit investors, who have faced numerous such legal challenges over the years.

Those who retained ownership of policies and those who lapsed their policies will be treated the same, Friedman previously said. The settlement payments will automatically increase account values of those who hung onto their policies while owners of terminated policies will receive cash payments.

"The settlement is the product of seven years of complex and hard-fought litigation by experienced class action law firms from across the country, the exchange and review of approximately one million pages of complicated insurance related documents and electronic data, months of arms-length negotiations, extensive expert analysis and a mediation overseen by a nationally-recognized and well-respected mediator, David Geronemus, of JAMS," the motion for preliminary approval of the settlement said.

In preparing for mediation, the class counsel acquired a license to use proprietary software allowing the consulting actuary to examine the COI increases using alternative actuarial assumptions, the motion said.

The plaintiffs had said that the agreement for a refund of 62% of overcharges compares favorably with similar settlements in COI cases.

In the Marty Fleisher settlement with Phoenix Life Insurance Co. in 2015, the cash payment of \$34.8 million to class members amounted to 68.5% of the overcharges, the plaintiffs said. The total value of the settlement was \$134.8 million.

The 37 Besen Parkway LLC settlement with John Hancock Life Insurance Co. of \$91.25 million in cash amounts to about 42% of the overages for about 80,000 policyholders.

In August 2017, the plaintiffs filed an amended class-action complaint alleging breach of contract, breach of the implied covenant of good faith and fair dealing, tortious breach of the covenant of good faith and fair dealing, violation of California's Unfair Competition Law, declaratory relief, preliminary and permanent injunctive relief and elder abuse under California law. All of the claims survived Transamerica's motion to dismiss.

The universal policies at issue were issued by Transamerica between 1983 and 2008.

The original suit was filed by Consumer Watchdog in February 2016 on behalf of Gordon and Mary Feller of San Rafael, Calif., and George and Margaret Zacharia of El Cerrito, Calif., who were notified that rates were going up 38%.

The Fellers bought their \$500,000 Trans Max policy in September 1989 from Transamerica Occidental Life Insurance Co. and the Zacharias acquired their policy with \$250,000 in in face value in December 1990. Transamerica Occidental was merged with Transamerica Life Insurance Co. in October 2008.

Transamerica announced it was raising rates by as much as 100% in June 2015. The plaintiffs alleged that the insurance company dramatically raised the rates to induce "shock lapses" to avoid paying death benefits. They also accused Transamerica of raising the rates to avoid its obligation to pay high interest rates it guaranteed in the policies and to recoup past losses.