

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)		
WILLIAM L. FAY, SR., KATHLEEN E. FAY and))	
FRANK J. SANTANGELO, TRUSTEE OF THE))	
FAY INSURANCE TRUST – 1994))	
)	Civil Action No. 01, CV 0846 (RGS)
Plaintiffs,))	
v.))	
)	
AETNA LIFE INSURANCE AND ANNUITY))	
COMPANY and GARY E. PFLUGFELDER))	
)	
Defendants.))	
_____)		

**DEFENDANT AETNA LIFE INSURANCE AND ANNUITY COMPANY’S
RESPONSE TO PLAINTIFFS’ SEPARATE STATEMENT OF ADDITIONAL
UNDISPUTED MATERIAL FACTS**

Pursuant to Local Rule 56.1, Defendant Aetna Life Insurance and Annuity Company (“Aetna”) hereby responds to the Separate Statement of Additional Material Facts (“Plaintiffs’ Separate Statement”) filed by Plaintiffs William and Kathleen Fay and Frank Santangelo, Trustee of the Fay Insurance Trust – 1994. Notwithstanding that Plaintiffs’ Separate Statement is filled with immaterial facts and non-factual conclusions, Aetna responds as follows:

1. Aetna does not dispute the quoted language from the integration clause of the policies at issue (the “1990 Policies” and the “1991 Policies,” collectively the “Policies”). Like every other policy term, the integration clause is binding. It provides the “Policy and the application are the whole contracts” and thus precludes Plaintiffs from looking beyond the Policies to define their terms.

2. Aetna disputes that Defendant Gary Pflugfelder was an officer of Aetna. Mr. Pflugfelder was not listed as an officer in Aetna’s corporate records, nor was he listed as having authority to sign or change policies in the Company’s name. (See Affidavit of Lorelee A. Renelt

in Support of Defendant Aetna Life Insurance and Annuity Company's Opposition to Plaintiffs' Cross-Motion for Summary Judgment on Count I –Breach of Contract, ¶5 (filed simultaneously herewith); see also Pflugfelder Ex. 24, Aff. Pflugfelder, ¶¶2-5) (Mr. Pflugfelder was never an executive officer of Aetna with authority to change the Policies)). The undisputed facts show that Mr. Pflugfelder was General Manager of Aetna's Syracuse/Albany office until August 1991, when he accepted an early retirement but agreed to assume a lesser, interim position for one year as a sales supervisor. (See Plaintiffs Ex. 30, Depo. Pflugfelder, pp. 18-19; Pflugfelder Ex. 24, Aff. Pflugfelder, ¶6.) The undisputed facts also show that Mr. Pflugfelder formally retired from Aetna in September 1992. (See Plaintiffs' Separate Statement, ¶48.)

3. Aetna disputes that the position of General Manager was equivalent to the positions of vice president or assistant vice president in Aetna's home office. Aetna's Rule 30(b)(6) designee testified that he did not know whether general manager would be equivalent to vice president or assistant vice president, and that it would be hard to draw that analogy anyway because they are different types of positions. (Plaintiffs Ex. 33, Depo. Dinius, pp. 37-38.) Aetna also disputes that job classification "80" was the same classification used by Aetna for assistant vice presidents. Aetna's designee testified merely that it *might* have been. (Plaintiffs Ex. 33, Depo. Dinius, pp. 46-47.) Aetna's designee did not testify, however, that Mr. Pflugfelder's job classification was that of an "officer."

6. Aetna does not dispute that it will honor alleged misrepresentations made by agents under certain circumstances, provided those alleged misrepresentations are specific and in writing. As Aetna's Rule 30(b)(6) designee testified, however, Mr. Pflugfelder's alleged misrepresentations did not rise to that level because he provided Plaintiffs with appropriate

disclosures and correctly informed them that the Policies were “interest sensitive.” (See Plaintiffs Ex. 34, Depo. Jeske, pp. 130, 135.)

8. Aetna disputes Plaintiffs’ contention that Mr. Pflugfelder represented that only ten annual premium payments on the Policies would ever be required. Mr. Fay admittedly understood that he might have to pay additional premiums if interest rates were to drop. (See Aetna Ex. H, Depo. Fay, pp. 224-25, 230.) Mr. Pflugfelder specifically informed Plaintiffs that the Policies are interest sensitive and that a drop in interest rates could result in the need to pay additional or higher premiums. (Pflugfelder Ex. 20, Aff. Pflugfelder, ¶¶5, 11.) The Policies clearly state that premiums are payable until the specified maturity dates, that the Policies may terminate prior to maturity if premiums paid and the interest credited thereto are insufficient to continue coverage, and that the period for which the Policies will continue depends on changes in interest rates. (See Aetna’s Statement of Undisputed Material Facts (the “Aetna Statement”), ¶¶27, 30.) The Policy Summaries clearly state that the “PREMIUM PAYMENT PERIOD” is “28 YEARS” for Mr. Fay’s 1991 Policy and “25 YEARS” for Mrs. Fay’s 1991 Policy. (See Aetna Statement, ¶32.) The Annual Reports clearly state that “additional premiums may be required” to keep the Policies in force. (See Aetna Statement, ¶37.)

9. Aetna does not dispute that Plaintiffs purchased the Policies, that the 1991 Policies were delivered to Plaintiffs at Mr. Santangelo’s office in Boston on February 27, 1992, and that the Fays hired attorneys, including Mr. Santangelo, to draft a new trust in 1991 to accommodate the Policies (see Aetna Statement, ¶12).

10. Aetna does not dispute the quoted language from Mr. Pflugfelder’s December 31, 1991 and January 13, 1992 letters, but disputes Plaintiffs’ interpretation of those letters.

11. Aetna disputes Plaintiffs' attempt to mischaracterize Mr. Pflugfelder's testimony and his January 13, 1992 letter. At his deposition, Mr. Pflugfelder was merely using a drop in interest rates to the guaranteed minimum as a specific example of what might happen under a "worst case scenario." (See Plaintiffs Ex. 31, Depo. Pflugfelder, p. 144.) In his letter, Mr. Pflugfelder made a more general reference to a drop in interest rates. (See Plaintiffs Ex. 6.)

12. Aetna does not dispute that Mr. Pflugfelder met with Plaintiffs at Mr. Santangelo's Boston office on February 27, 1992, and that Mr. Pflugfelder delivered and explained the 1991 Policies to Plaintiffs at that meeting. Aetna does dispute, however, that the Action memo, which lists ten years of premiums to be paid on the 1991 Policies, indicates in any manner that no more than ten years of premiums would be required. (See Plaintiffs Ex. 7.) Mr. Pflugfelder specifically explained to Plaintiffs that the Policies are interest sensitive and that a drop in interest rates could result in the need to pay additional or higher premiums. (Pflugfelder Ex. 20, Aff. Pflugfelder, ¶¶5, 11.) Moreover, the Policies and Policy Summaries admittedly received by Plaintiffs on that date clearly disclose that more than ten or eleven premiums might be required. (See Aetna Statement, ¶¶27, 30, 32-34.) Mr. Fay admittedly understood that he might have to pay additional premiums if interest rates were to drop. (See Aetna Ex. H, Depo. Fay, pp. 224-25, 230.)

13. Aetna disputes Plaintiffs' interpretation of Mr. Pflugfelder's letters that no more than ten or eleven premium payments would ever be required on the Policies. (See Plaintiffs Ex. 16.) Aetna also disputes that Mr. Pflugfelder informed Plaintiffs that no more than ten or eleven premium payments would ever be required. (Pflugfelder Ex. 20, Aff. Pflugfelder, ¶5) ("[Mr. Fay] was advised that Universal Life policies are interest sensitive so that should the credited interest rate drop then the annual premium would have to be increased to offset the loss of

interest or alternatively the premium payment period would have to be lengthened to require further payments [plural] beyond the tenth year.”) Mr. Pflugfelder also provided Plaintiffs with the Policies, Policy Summaries and Annual Reports, which clearly disclose that more than ten or eleven premiums might be required. (See Aetna Statement, ¶¶27, 30, 32-34, 37.) Mr. Fay admittedly understood that he might have to pay additional premiums if interest rates were to drop. (See Aetna Ex. H, Depo. Fay, pp. 224-25, 230.)

14. Aetna disputes that the Action memo indicates that no more than ten years of premiums would ever be required on the Policies. (See Plaintiffs Ex. 7.)

15. Aetna disputes that Mr. Pflugfelder stated that the Fays’ premium payment obligations would end on December 19, 1999. (Pflugfelder Ex. 20, Aff. Pflugfelder, ¶11) (“It was always made very clear to them that because of the interest sensitivity of the policies that more payments might have to be made.”)

16. Aetna disputes that Mr. Pflugfelder stated that making one additional premium payment of \$11,000 to \$12,000 in the eleventh year would be the only consequence of a decline in interest rates. (Pflugfelder Ex. 20, Aff. Pflugfelder, ¶5) (“[Mr. Fay] was advised that Universal Life policies are interest sensitive so that should the credited interest rate drop then the annual premium would have to be increased to offset the loss of interest or alternatively the premium payment period would have to be lengthened to require further payments [plural] beyond the tenth year.”) Mr. Fay admittedly understood that he might have to pay additional premiums if interest rates were to drop. (See Aetna Ex. H, Depo. Fay, pp. 224-25, 230.)

17. Aetna disputes that Plaintiffs were informed that there would be no need for them to pay any further sums after the tenth or eleventh year. (See Pflugfelder Ex. 20, Aff. Pflugfelder, ¶¶5, 11.) Mr. Pflugfelder specifically explained to Plaintiffs that the Policies are

interest sensitive and that a drop in interest rates could result in the need to pay additional or higher premiums. (Pflugfelder Ex. 20, Aff. Pflugfelder, ¶¶5, 11.) Mr. Pflugfelder also provided Plaintiffs with the Policies, Policy Summaries and Annual Reports, which clearly disclose that more than ten or eleven premiums might be required. (See Aetna Statement, ¶¶27, 30, 32-34, 37.) Mr. Fay admittedly understood that he might have to pay additional premiums if interest rates were to drop. (See Aetna Ex. H, Depo. Fay, pp. 224-25, 230.)

20. Aetna does not dispute that Mr. Pflugfelder described the Policies as “permanent insurance.” He did so correctly, as Plaintiffs concede.

21. Aetna does not dispute this paragraph, but adds that Plaintiffs never asked what the term “permanent insurance” means.

23. Aetna disputes that Plaintiffs were never informed that the death benefit would not be payable if the second death occurred after age 95. The Policies and Policy Summaries clearly specify the maturity dates and state that the Policies will not stay in effect after those dates. (See Aetna Statement, ¶¶29, 34.)

25. Aetna disputes that Plaintiffs were never informed that the death benefit under the Policies was not guaranteed. The Policies and Policy Summaries clearly specify the maturity dates, describe the proceeds payable on the specified maturity dates, and state that the Policies will not stay in effect after those dates. (See Aetna Statement, ¶¶28-29, 34.)

26. Aetna disputes Plaintiffs’ interpretation of the illustrations. (See Plaintiffs Ex. 1.)

30. Aetna disputes Plaintiffs’ characterization of Mr. Pflugfelder’s May 14, 1997 letter, in which Mr. Pflugfelder suggested that additional premiums (plural) might be required beyond the tenth year. (See Plaintiffs Ex. 16.)

32. Aetna disputes that Mr. Pflugfelder never informed Plaintiffs that additional premiums might be required beyond the eleventh year. Mr. Pflugfelder specifically explained to Plaintiffs that the Policies are interest sensitive and that a drop in interest rates could result in the need to pay additional or higher premiums. (Pflugfelder Ex. 20, Aff. Pflugfelder, ¶¶5, 11.) Mr. Pflugfelder also provided Plaintiffs with the Policies, Policy Summaries and Annual Reports, which clearly disclose that more than ten or eleven premiums might be required. (See Aetna Statement, ¶¶27, 30, 32-34, 37.) Mr. Fay admittedly understood that he might have to pay additional premiums if interest rates were to drop. (See Aetna Ex. H, Depo. Fay, pp. 224-25, 230.)

38. Aetna disputes that Plaintiffs were never informed prior to July 2000 that more than ten or eleven premiums might be required to keep the Policies in force. Mr. Pflugfelder explained to Plaintiffs that a drop in interest rates could result in the need to pay additional premiums. (Pflugfelder Ex. 20, Aff. Pflugfelder, ¶¶5, 11.) Mr. Pflugfelder also provided Plaintiffs with the Policies, Policy Summaries and Annual Reports, which clearly disclose that more than ten or eleven premiums might be required. (See Aetna Statement, ¶¶27, 30, 32-34, 37.) Moreover, Plaintiffs admit understanding that interest rates are variable (Aetna Ex. H, Depo. Fay, pp. 124, 176; Aetna Ex. I, Depo. Santangelo, pp. 197-98), and Mr. Fay admitted understanding as early as 1992 that a drop in interest rates would increase the premiums due (Aetna Ex. H, Depo. Fay, pp. 224-25, 230).

39. Aetna disputes that Mr. Pflugfelder made the alleged misrepresentations, see discussion supra, and therefore denies that there was anything to repudiate.

40. Aetna disputes Plaintiffs' suggestion that they were not put on notice of their alleged damages until they were asked to make an eleventh premium payment in December 2000.

46. Aetna disputes that the position of General Manager was equivalent to the positions of vice president or assistant vice president in Aetna's home office. Aetna's Rule 30(b)(6) designee testified that he did not know whether general manager would be equivalent to vice president or assistant vice president, and that it would be hard to draw that analogy anyway because they are different types of positions. (See Plaintiffs Ex. 33, Depo. Dinius, pp. 37-38.) Aetna also disputes that job classification "80" was the same classification used by Aetna for assistant vice presidents. Aetna's designee testified that it *might* have been. (See Plaintiffs Ex. 33, Depo. Dinius, pp. 46-47.) Aetna's designee did not testify, however, that Mr. Pflugfelder's job classification was that of an "officer."

47. Aetna disputes that Mr. Pflugfelder retained job classification "80" after he ceased being General Manager of Aetna's Syracuse/Albany office in August 1991 and assumed a lesser, interim position for one year as a sales supervisor. Mr. Pflugfelder's computer personnel record states that he acquired job classification "80" in 1984, but does indicate the date on which he no longer held that classification. For example, it does not indicate that he no longer held that classification even after he formally retired from Aetna in 1992. (See Plaintiffs Ex. 36, Bates no. AEO1087.)

50. Aetna disputes Plaintiffs' characterization of Mr. Pflugfelder's testimony that universal life insurance was intended to "replace" whole life insurance. (See Plaintiffs Ex. 30, Depo. Pflugfelder, pp. 99-100.)

58. Aetna disputes Plaintiffs' characterization of Mr. Pflugfelder's testimony concerning his understanding of trust mechanisms. (See Plaintiffs Ex. 30, Depo. Pflugfelder, pp. 130-31.)

59. Aetna disputes Plaintiffs' characterization that Aetna and Mr. Pflugfelder provided Plaintiffs with "extensive" guidance, advice and resources concerning tax and estate planning issues. (See Plaintiffs Ex. 31, Depo. Pflugfelder, pp. 189, 259-60, 270, 271.) Aetna also disputes that a new trust was created "on the advice" of John O'Connell. (See Plaintiffs Ex. 21-24.) The Fays had their own team of lawyers, including Mr. Santangelo and Robert Pomeroy from Goodwin Procter LLP, with whom they consulted. (See Aetna Statement, ¶¶12, 21.)

63. Aetna disputes Plaintiffs' characterization of Mr. Pflugfelder's testimony. Mr. Pflugfelder testified that Mr. Fay did not tell him that he trusted his opinion, but merely that "perhaps" a certain amount of trust could be inferred from the questions that Mr. Fay asked. (See Plaintiffs Ex. 31, Depo. Pflugfelder, p. 220.)

68. Aetna disputes that Mr. Fay did not handle contract negotiations for the Gilbert Freeman Fabric Corporation. Mr. Fay testified that he would "get them [the contracts] all set" and that his partner then "looked them over." (Aetna Ex. H, Depo. Fay, pp. 92-94.) Mr. Fay's handling of contracts shows his sophistication.

69. Aetna disputes that Faytex was a family-owned business. Mr. Fay testified that he started Faytex "myself." (Aetna Ex. H, Depo. Fay, pp. 94-95.)

70. Aetna does not dispute that Mr. Fay testified that he has relied on "handshake deals" with major corporations, and that he interacts with consultants and attorneys on contract and patent issues. His dealings with major corporations and his frequent interaction with

consultants and attorneys establish him as a sophisticated businessman. See McCord v. Minn. Mut. Life Ins. Co., 138 F. Supp. 2d 1180, 1186 n.6 (D. Minn. 2001).

72. Aetna does not dispute that Mr. Fay owned a number of life insurance policies that he purchased previously to purchasing the Policies and that were being held in an insurance trust, but Aetna disputes the characterization of them as “only a handful of smaller policies.” They had combined face amounts of at least \$700,000. (Aetna Statement, ¶10.) Mr. Fay’s ownership of these other policies establishes him as a sophisticated consumer of life insurance. See McCord, 138 F. Supp. 2d at 1186 n.6.

73. Aetna does not dispute that Mr. Fay’s son-in-law, David Stangl, is a licensed insurance agent. Aetna disputes that Mr. Fay did not consult with Mr. Stangl about the Policies. Mr. Stangl received commissions for the sale of the Policies, was the agent on the other policies purchased by Mr. Fay, and was consulted by Mr. Fay generally on insurance matters. (Aetna Statement, ¶20.)

74. Aetna disputes that Mr. Santangelo has never been asked by any client to provide advice on insurance matters. Mr. Santangelo testified that all his dealings with Mr. Fay were as his attorney, including those dealings relating to the Policies (See Depo. Santangelo, pp. 92-93, 107-08), and that he charged and continues to charge Mr. Fay \$275/hour for this legal work (Depo. Santangelo, pp. 61-62).¹

75. Aetna does not dispute that Mr. Santangelo testified that he had no prior experience serving as trustee of an insurance trust. Mr. Santangelo did testify, however, that he had served as trustee of approximately 10 or 15 testamentary trusts, trusts under wills, and inter vivos trusts. (Depo. Santangelo, pp. 153, 158) (attached hereto as Exhibit “A”). Moreover, with

¹ True and accurate copies of the cited pages from Mr. Santangelo’s deposition transcripts are attached hereto as Exhibit “A.”

respect to the various Fay insurance trusts, it is undisputed that Mr. Santangelo has acted as trustee of the William L. Fay Insurance Trust, the Fay Irrevocable Trust, and the Fay Insurance Trust – 1994, the latter two of which he was involved or consulted in drafting. (Aetna Statement, ¶¶12-13, 21.) That the Policies were held in these successive trusts shows Plaintiffs’ sophistication as it specifically relates to insurance matters.

76. Aetna does not dispute that Mr. Santangelo’s duties as trustee of the Fay Irrevocable Trust, and the Fay Insurance Trust – 1994, included arranging for premiums to be paid on the Policies, which was done through a series of complex schemes including Crummey notices, tax exempt gifts, the creation of an “excess deposit premium,” and direct distributions to the Fay children from Faytex Corp. (Aetna Statement, ¶¶2, 19, 23-24.) The complexity of these premium payment schemes shows Plaintiffs’ sophistication as it specifically relates to insurance matters.

77-78. Aetna disputes that Mr. Santangelo was not responsible for reviewing the Policies. Mr. Fay testified that he was “completely” relying on Mr. Santangelo to take care of things and review everything he received as trustee. (Aetna Ex. H., Depo. Fay, pp. 209, 215, 233.) Mr. Santangelo testified that he was acting as Mr. Fay’s attorney at all times with respect to their communications relating to the Policies. (Depo. Santangelo, pp. 92-93, 107-08.)

79. Aetna disputes that Mr. Pflugfelder persuaded Mr. Fay to purchase the Policies. Mr. Fay approached Mr. Pflugfelder about acquiring insurance. (Pflugfelder Ex. 20, Aff. Pflugfelder, ¶5.)

81. Aetna disputes Plaintiffs’ characterization of Mr. Pflugfelder’s testimony. Mr. Pflugfelder testified that Mr. Fay did not tell him that he trusted his opinion, but merely that

“perhaps” a certain amount of trust could be inferred from the questions that Mr. Fay asked. (See Plaintiffs Ex. 31, Depo. Pflugfelder, p. 220.)

88. Aetna disputes Plaintiffs’ mischaracterization of Mr. Pflugfelder’s testimony that universal life policies involve a “sophisticated concept.” Mr. Pflugfelder merely testified that in his experience is it difficult to explain a sophisticated concept without an exhibit to specifically refer to. (See Plaintiffs Ex. 31, Depo. Pflugfelder, p. 194.) Mr. Pflugfelder provided Plaintiffs with the Policies, Policy Summaries and Annual Reports (see Aetna Statement, ¶¶27, 30, 32-34, 37), as well as numerous illustrations (Pflugfelder Ex. 24, Aff. Pflugfelder, ¶7).

92-94. Aetna disputes the unsupported assumptions and conclusions by Plaintiffs’ expert, Theodore Affleck, which are not statements of material fact that require a response under Local Rule 56.1. Aetna has filed a motion to exclude the expert testimony of Mr. Affleck because his opinions are inadmissible. Moreover, Aetna disputes that Mr. Pflugfelder did not present Plaintiffs with numerous, complete illustrations (See Pflugfelder Ex. 24, Aff. Pflugfelder, ¶7), and denies that Mr. Pflugfelder was guilty of a “serious professional lapse.”

95. The purported experience of Plaintiffs’ expert, William Hager, and any findings of the NAIC task force survey on sales practices, are not material facts that require a response under Local Rule 56.1. Mr. Hager testified that he does not know whether the NAIC was concerned with Aetna’s sales practices or illustrations. (Depo. Hager, pp. 29-31.)² Aetna has filed a motion to exclude the expert testimony of Mr. Hager because his opinions are inadmissible.

96-97. Aetna disputes Plaintiffs’ interpretation of the illustrations, and that the illustrations attached to Mr. Pflugfelder’s April 30, 1990 letter contained an “unrealistic

² True and accurate copies of the cited pages from Mr. Hager’s deposition transcript are attached hereto as Exhibit “B.”

assumption” or that they “illustrated something not shown in the Policies.” (See Plaintiffs Ex. 1; Aetna Ex. B.)

98. Aetna disputes that Mr. Pflugfelder did not present Plaintiffs with any illustrations other than those attached to his April 30, 1990 letter. Mr. Pflugfelder presented Plaintiffs with numerous illustrations. (Pflugfelder Ex. 20, Aff. Pflugfelder, ¶6; Pflugfelder Ex. 24, Aff. Pflugfelder, ¶7.)

101. Aetna disputes the legal conclusion that Mr. Pflugfelder utilized a “bait-and-switch” tactic to the sell the Policies. The conclusions that Mr. Pflugfelder acted deceptively and used a bait-and-switch tactic are not statements of material facts that require a response under Local Rule 56.1. Aetna denies that Mr. Pflugfelder acted deceptively in any manner.

103. Aetna disputes that the illustrations were inconsistent with the Policies (see Aetna Ex. B), and that Mr. Pflugfelder did not present Plaintiffs with numerous, complete illustrations (See Pflugfelder Ex. 24, Aff. Pflugfelder, ¶7).

104-06. Aetna disputes Mr. Hager’s legal conclusions, which, along with his purported qualifications, are not statements of material fact that require a response under Local Rule 56.1. Aetna denies that Mr. Pflugfelder misrepresented the Policies or violated applicable laws and industry standards.

107. Aetna disputes Plaintiffs’ mischaracterization of the testimony by Aetna’s expert, Donna Claire. (See Plaintiffs Ex. 38, p. 61.) Aetna does not deny, however, that it is important for the Court or the jury, with instruction from the Court, to consider everything disclosed to Plaintiffs. Therefore, Plaintiffs were not reasonable in relying on Mr. Pflugfelder’s alleged misrepresentations at the exclusion of the Policies, Policy Summaries and Annual Reports, each of which should have put Plaintiffs on notice of their claims as early as 1992.

108. Aetna denies Mr. Hager's legal conclusions, which are not statements of material fact that require a response under Local Rule 56.1.

109-13. Aetna disputes Mr. Affleck's unsupported assumptions and conclusions, which, along with his purported qualifications, are not statements of material fact that require a response under Local Rule 56.1.

114-15. Aetna disputes that Plaintiffs were informed that there would be no need for them to pay any further sums after the tenth or eleventh year. Mr. Pflugfelder specifically explained to Plaintiffs that the Policies are interest sensitive and that a drop in interest rates could result in the need to pay additional or higher premiums. (Pflugfelder Ex. 20, Aff. Pflugfelder, ¶¶5, 11.) Mr. Pflugfelder also provided Plaintiffs with the Policies, Policy Summaries and Annual Reports, which clearly disclose that more than ten or eleven premiums might be required. (See Aetna Statement, ¶¶27, 30, 32-34, 37.) Mr. Fay admittedly understood as early as 1992 that he might have to pay additional premiums if interest rates were to drop. (See Aetna Ex. H, Depo. Fay, pp. 224-25, 230.)

116. Plaintiffs' interpretation of Szymanski v. Boston Mutual Life Ins. Co., 56 Mass. App. Ct. 367 (2002), is not a material fact that requires a response under Local Rule 56.1.

117. Aetna disputes Plaintiffs' characterization of Mr. Pflugfelder's testimony that the Policies are not true "second to die" policies. Mr. Pflugfelder testified that the Policies, which have a Surviving Spouse Option rider, are variations of a classic second to die policy, but that they are nonetheless second to die policies. (Plaintiffs Ex. 31, Depo. Pflugfelder, pp. 202-05.)

118. Aetna disputes Mr. Affleck's characterization that the ability of the Policies to pay the Fays' estate taxes is "heavily dependent" on the timing of the first death, which is not a statement of material fact that requires a response under Local Rule 56.1.

119. Aetna does not dispute that the Policies could lapse for lack of cash value before reaching maturity – the Policies, Policies Summaries and Annual Reports make that clear (see Aetna Statement, ¶¶27, 30, 34, 37) – but does dispute Mr. Affleck’s characterization that the beginning interest rate of 8.5% was “historically inflated.” Plaintiffs have not alleged, nor have they offered any evidence, that Aetna “inflated” its credited interest rates.

120. Aetna disputes that Plaintiffs were never informed that the Policies could lapse before maturity due to insufficient cash value. For example, Mr. Fay’s 1991 Policy Summary clearly states:

THIS POLICY WILL STAY IN EFFECT AS LONG AS PREMIUMS PAID AND INTEREST CREDITED ARE MORE THAN CHARGES FOR MORTALITY AND SURRENDER, BUT NOT AFTER DECEMBER 19, 2016. IF PLANNED PREMIUMS ARE PAID THE POLICY WILL TERMINATE FOR INSUFFICIENT VALUE ON MAY 19, 1996 ASSUMING INTEREST AND DEDUCTIONS AT THE GUARANTEED RATES.

(Aetna Statement, ¶34.)

121-22. Mr. Affleck’s speculation that “it was a near certainty that interest rates would decline” and conclusion that lapse was more likely if interest rates were to decline are not statements of material fact that require a response under Local Rule 56.1. Aetna does not dispute that the Policies could lapse in a declining interest rate environment. The Policies and Policy Summaries clearly state that they may terminate prior to maturity if premiums paid and the interest credited thereto are insufficient to continue coverage, and that the period for which the Policies will continue depends on changes in interest rates. (See Aetna Statement, ¶¶30, 33-34.) Moreover, the Annual Reports clearly state that “additional premiums may be required” to keep the Policies in force, and state when the Policies would lapse assuming current and guaranteed minimum interest rates. (See Aetna Statement, ¶37.)

123. Aetna disputes that Mr. Pflugfelder never disclosed to Plaintiffs that the Policies have an increased risk of lapsing in a declining interest rate environment. Plaintiffs were provided with the Policies, Policy Summaries and Annual Reports to Plaintiffs, all which clearly show that the Policies could lapse if interest rates were to decline. (See Aetna Statement, ¶¶30, 33-34, 37.)

124. Aetna disputes that the only consequence of lower interest rates ever identified by Mr. Pflugfelder was that the Fays would have to pay one additional premium of a modest amount in Year 11. (See Pflugfelder Ex. 20, Aff. Pflugfelder, ¶5) (“[Mr. Fay] was advised that Universal Life policies are interest sensitive so that should the credited interest rate drop then the annual premium would have to be increased to offset the loss of interest or alternatively the premium payment period would have to be lengthened to require further payments [plural] beyond the tenth year.”) Mr. Fay admittedly understood that he might have to pay additional premiums if interest rates were to drop. (See Aetna Ex. H, Depo. Fay, pp. 224-25, 230.)

126. Aetna disputes that the Policies needed to achieve \$6 million of cash value on the maturity date in order to provide \$6 million of estate liquidity. It is undisputed that, assuming exercise of the Surviving Spouse Option rider, the death benefit payable under the Policies is \$6 million. (See Aetna Statement, ¶1.)

127. Aetna disputes Mr. Hager’s conclusion. It is undisputed that, assuming exercise of the Surviving Spouse Option rider, the death benefit payable under the Policies is \$6 million. (See Aetna Statement, ¶1.)

128. Aetna disputes that Plaintiffs wanted to achieve \$6 million in cash value at maturity, which would have required substantially higher premiums. Because Mr. Fay did not want to pay more than \$100,000 annually in premiums, the maximum amount he and his wife

could pay on behalf of their children without incurring a gift tax, the Policies were not purchased with the idea of accumulating cash value at age 95. (Pflugfelder Ex. 20, Aff. Pflugfelder, ¶5; Depo. Fay, pp. 8-9.)³

129. Aetna disputes Plaintiffs' characterization of Mr. Fay's deposition testimony. Mr. Fay admitted understanding that a drop in interest rates could affect the "size of number of premiums [plural] that would have to be made" and that "[I]t would increase the premiums [plural]." (Aetna Ex. H, Depo. Fay, pp. 224-25, 230.)

130. Aetna disputes that Mr. Fay was never informed that no death benefits would be paid after age 95. The Policies and Policy Summaries clearly specify the maturity dates, describe the proceeds payable on the specified maturity dates, and state that the Policies will not stay in effect after those dates. (See Aetna Statement, ¶¶28-29, 34.)

131. Aetna disputes Plaintiffs' characterization of Mr. Pflugfelder's testimony. He did not testify that if the Policies matured with no cash value they would be of no "real value." Rather, he testified that if the Policies matured with no cash value then the Fays would receive no benefit at that time. (See Plaintiffs Ex. 31, Depo. Pflugfelder, pp. 256-57.) The Policies specifically state that the proceeds payable at maturity equal the net cash value on the maturity date. (See Aetna Statement, ¶28.) The Fays nonetheless would have received the benefit of the insurance itself up to that time, which has value. (See Plaintiffs Ex. 46, Depo. Affleck, pp. 394-95.)⁴

³ True and accurate copies of the cited pages from Mr. Fay's deposition transcripts are attached hereto as Exhibit "C."

⁴ True and accurate copies of the cited pages from Mr. Affleck's deposition transcripts are attached hereto as Exhibit "D."

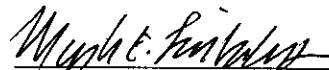
132. Aetna does not dispute that the Policies necessarily consisted of approved forms, but those forms contained information specific to the Fays, including issue dates, maturity dates, the planned premiums, the premium payment period, the specified amounts, and the Surviving Spouse Option rider, among other things. (See Aetna Ex. B.)

133. Aetna disputes that the terms of the Policies were not subject to negotiation. The Fays chose the amount of coverage they wanted, chose the amount of premiums they wanted to pay, and chose to include the Surviving Spouse Option rider. (See Pflugfelder Ex. 20, Aff. Pflugfelder, ¶¶5-6.) Aetna denies Plaintiffs' legal conclusion that the Policies constituted contracts of adhesion, which is not a statement of material fact that requires a response under Local Rule 56.1.

134. Aetna disputes that the Fays could not select the amount of the premiums they would be required to pay. Mr. Fay did not want to pay more than \$100,000 in annual premiums, the maximum amount that would be subject to the gift tax exclusion. (Pflugfelder Ex. 20, Aff. Pflugfelder, ¶5; Depo. Fay, pp. 8-9 (attached hereto as Exhibit "C").) Obviously, the amount of coverage he wanted to purchase has a direct relationship to the premiums he would have to pay, and vice versa.

Respectfully submitted,

AETNA LIFE INSURANCE AND ANNUITY
COMPANY
By its attorneys,



Mark E. Swirbalus (BBO #631650)
DAY, BERRY & HOWARD LLP
260 Franklin Street
Boston, MA 02110
(617) 345-4600

Allan B. Taylor (admitted *pro hac vice*)

DAY, BERRY & HOWARD LLP
CityPlace I
Hartford, CT 06103-3499
(860) 275-0100

Dated: June 2, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the above document was served upon the attorney of record for each party by mail by hand.

Walter E. Finkler

In The Matter Of:

*Fay v.
Aetna Life Insurance & Annuity Co.*

*Frank J. Santangelo
November 14, 2002*

*Vol. 1
pp. 1-121*

*Jones, Fritz & Sheehan
A LegaLink Company
210 South Street
11th Floor
Boston, MA 02111
(617) 542-0039 or (800) 822-3376*

*Original File FNLSANT.V1, 121 Pages
Min-U-Script® File ID: 2119451790*

Word Index included with this Min-U-Script®

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[1] **A:** My answer is, yes, I remember specifically
 [2] having a meeting at the airport in Albany, New York,
 [3] on the date that we signed the application which was
 [4] December 19, 1991, according to the application
 [5] date.
 [6] And in that conversation he told me that
 [7] the premiums would be payable for a period of ten
 [8] years.
 [9] **Q:** Is that the only meeting that you had with
 [10] Mr. Pflugfelder in which that subject was discussed?
 [11] **A:** No. Prior to January 15, 1992, there may
 [12] have been one other. But I'm not sure about that.
 [13] **Q:** That's the only one that you can remember?
 [14] **A:** That's the only one I can remember.
 [15] **MR. GILBERT:** The only one prior to
 [16] January 15, 1992?
 [17] **THE WITNESS:** That's the date.
 [18] **Q:** You don't remember any other meetings in
 [19] Albany, New York?
 [20] **MR. GILBERT:** Prior to January 15, 1992?
 [21] **Q:** Prior to January 15, 1992.
 [22] **A:** Yes.
 [23] **Q:** Okay. Look at Exhibit 11.
 [24] **A:** I have Exhibit 11.

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[1] **Q:** Right.
 [2] **A:** It says, "28 years," and then a little
 [3] further down it says, "28 years."
 [4] **Q:** Now, do you understand what that means,
 [5] Premium Payment Period?
 [6] **A:** No.
 [7] **Q:** And do you see where it says, "Important
 [8] Notice" right here?
 [9] **A:** I see "Important Notice," yes.
 [10] **Q:** Do you want to just read that.
 [11] **A:** You want me to read it out loud?
 [12] **Q:** Yes, please.
 [13] **A:** "Important Notice: The projected results of
 [14] your insurance program may change with
 [15] variations in the interest rates credited by
 [16] Aetna, the cost of insurance rates, expense
 [17] factors and the frequency, timing and amount
 [18] of your premium payment and withdrawals.
 [19] You should read and study your policy
 [20] and policy summary very carefully. The
 [21] values shown on this statement are based on
 [22] the assumptions that the planned premium is
 [23] paid at the frequency specified in the
 [24] policy, that no withdrawals are made, and

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[1] **Q:** Okay.
 [2] **A:** I haven't read. Do you want me to read it?
 [3] **Q:** Just take a look at it for a minute.
 [4] **A:** I looked at it, you know, very briefly.
 [5] It's a four-page document with a lot of numbers.
 [6] **Q:** And this document is a statement of policy
 [7] costs and benefit information. Do you see that?
 [8] **A:** Yes. It's entitled, "Statement of Policy
 [9] Costs and Benefit Information in Participating Life
 [10] Insurance." And it looks like the date that's on
 [11] the front is January 13, 1992.
 [12] **Q:** Right. Do you remember receiving this when
 [13] the policies were delivered to you?
 [14] **A:** I did not receive it.
 [15] **Q:** Did you say you did not receive it?
 [16] **A:** I'm telling you, I did not receive it.
 [17] **Q:** And do you notice, about in the center of
 [18] the page, where it says, Premium Payment Period, do
 [19] you see that?
 [20] **A:** No. Okay. The answer is, yes, I can see
 [21] where it says Premium Payment.
 [22] **Q:** What does it state as to the Premium Payment
 [23] Period? What does it say underneath premium?
 [24] **A:** Just reading down under that column?

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[1] that Aetna will refund any premium that
 [2] exceeds the amount that Federal Income Tax
 [3] permits."
 [4] **Q:** Okay. Thank you. Now, you stated that you
 [5] never read this document before.
 [6] **MR. GILBERT:** Objection.
 [7] **A:** I said I'd never received it. So I never
 [8] read it, yes.
 [9] **Q:** Have you ever read it prior to today?
 [10] **A:** I'm sure I have.
 [11] **Q:** If you had received this and had seen that
 [12] there were 28 years of payments involved, would you
 [13] have contacted Aetna or Gary Pflugfelder?
 [14] **MR. GILBERT:** Objection.
 [15] **A:** First of all, it was not my function to be
 [16] reviewing the substance of these insurance policies
 [17] to make a determination as to, you know, what the
 [18] policies provided in terms of whether it was a good
 [19] policy to buy or a bad policy to buy.
 [20] So I wasn't reading these documents with
 [21] an eye toward advising anybody on anything,
 [22] including Mr. Fay.
 [23] **Q:** You were not acting as Mr. Fay's attorney in
 [24] this process?

[1] **MR. GILBERT:** Objection.

[2] **A:** That's a different question. Was I acting

[3] as Mr. Fay's attorney in this process? Yes, sir, I

[4] was.

[5] **Q:** Okay.

[6] **MR. WILLIAMS:** I think that's all I have

[7] for right now.

[8] **MR. GILBERT:** Can we take a two-minute

[9] break?

[10] (Break taken.)

[11] (Exhibit No. 32 marked for

[12] identification.)

[13] **A:** Do you want me to look at this?

[14] **Q:** Yes, would you, please.

[15] **MR. GILBERT:** You know what? I'm going

[16] to ask that all copies be returned. This was turned

[17] over inadvertently. This was not intentionally

[18] produced.

[19] **MR. WILLIAMS:** Say again?

[20] **MR. GILBERT:** This is the first I've

[21] noted that we've produced that. And it was not

[22] meant to be produced. So I'm asking now that it be

[23] returned. I'm also asking that people stop reading

[24] it at this point.

[1] **MR. SWIRBALUS:** We've already read it

[2] and we've already studied it.

[3] **MR. GILBERT:** Of course you have. And

[4] I'm stating now, on the record, that this is the

[5] first time I've noted that you've got it. And we're

[6] stating that it was an inadvertent production.

[7] **MR. WILLIAMS:** Well, I'll stop asking

[8] any questions about it.

[9] **MR. SWIRBALUS:** But I don't agree,

[10] necessarily, that you're entitled to get this back.

[11] Because it's a question of whether he was acting in

[12] his capacity as attorney, then that may raise an

[13] issue. But it may not raise an issue. If he was

[14] acting in his capacity as trustee, which I think he

[15] was, then this isn't privileged.

[16] And there is also the issue of whether

[17] Mr. Pomeroy was acting as the Fays' attorney for the

[18] purposes of this litigation, which is what this

[19] letter concerns, or with respect to the issuance of

[20] the insurance policies.

[21] I believe the testimony was that

[22] Mr. Pomeroy was not involved with those policies.

[23] If you're saying he was involved with those

[24] policies, then that's another story.

[1] **MR. GILBERT:** I can represent to you

[2] that the firm of Goodwin, Proctor & Hoar was

[3] consulted by Mr. Santangelo for purposes of

[4] initiating litigation against Aetna and the matter

[5] was subsequently referred to me. I can also

[6] represent that this letter was in connection with

[7] that.

[8] This was inadvertent disclosure. And I,

[9] again, I ask for it back. I won't engage in

[10] self-help. But I believe that the law is clear and

[11] the face of the letter is clear.

[12] **THE WITNESS:** The letter states in the

[13] third paragraph that—

[14] **MR. WILLIAMS:** I don't think he wants

[15] you to be testifying, Frank.

[16] **THE WITNESS:** Well, it states,

[17] "litigation," that's what he's asking.

[18] **MR. GILBERT:** Yeah. It explicitly talks

[19] about litigation being contemplated.

[20] **MR. WILLIAMS:** I'll have to think that

[21] through. I think for the time being, I'm going

[22] to — I won't ask any questions on it.

[23] **MR. GILBERT:** I would appreciate that.

[24] It sounds like we'll be getting back together again.

[1] You could study the matter and you could review the

[2] law of inadvertent disclosure.

[3] **MR. WILLIAMS:** Well, we've got a lot of

[4] other issues along the same thing.

[5] **MR. SWIRBALUS:** And there are a lot of

[6] privilege issues.

[7] **MR. WILLIAMS:** Yeah, privilege issues

[8] and I don't know where we're headed for on that.

[9] But in any event, I won't ask anymore questions.

[10] **MR. SWIRBALUS:** Actually, while we're

[11] talking about the privilege issues, for the moment,

[12] depending on how those privilege issues come out,

[13] it's possible that we may have a few more questions

[14] for Mr. Fay.

[15] **MR. GILBERT:** That's fine. We can bring

[16] him back if we'll be getting together more than

[17] once.

[18] **MR. SWIRBALUS:** Right.

[19] **MR. GILBERT:** I'm asking for it back.

[20] I'm not going to physically grab these things.

[21] **MR. SWIRBALUS:** Because we have many

[22] copies, anyway.

[23] **MR. GILBERT:** You do. Why don't we

[24] leave this as an exhibit and ask that it not be

[1] correct?
 [2] **A:** I did.
 [3] **Q:** When you were paying these premiums, were
 [4] you doing so as trustee or as attorney?
 [5] **A:** As trustee.
 [6] **Q:** But not as attorney?
 [7] **A:** That's correct.
 [8] **Q:** When you received the policies, did you
 [9] receive them as trustee or as attorney?
 [10] **A:** I would say I received them as trustee.
 [11] **Q:** When you would forward any correspondence or
 [12] the policies to Mr. Fay, did you do so as trustee or
 [13] as attorney?
 [14] **A:** It would depend upon what the correspondence
 [15] was.
 [16] **Q:** Explain, please, if you could.
 [17] **A:** Okay. If I sent him a letter saying,
 [18] Enclosed, please find a copy of Gary Pflugfelder's
 [19] letter to me, that may have — depending upon what
 [20] Gary Pflugfelder's letter said — that may or may
 [21] not have functioned as both an attorney and a
 [22] trustee.
 [23] **Q:** So, are you saying that it was part of your
 [24] scope of responsibility as Mr. Fay's trustee to

[1] substance of it. So you might want to ask the
 [2] question again.
 [3] **MR. SWIRBALUS:** Well, I'm asking
 [4] Mr. Santangelo.
 [5] **Q:** The question to you is, whether that
 [6] statement that I made in that question is correct
 [7] substantively, not whether that's what you recall
 [8] testifying to, but whether that is true that you
 [9] were not acting as attorney with respect to the
 [10] policy.
 [11] **MR. GILBERT:** Objection. With respect
 [12] to what part of the policy? That's a vague
 [13] question.
 [14] **A:** I want the question read back because that's
 [15] not the way you just asked it. You asked it
 [16] differently earlier, sir.
 [17] **MR. SWIRBALUS:** If you could read it
 [18] back again.
 [19] (Record read.)
 [20] **A:** That's correct.
 [21] **Q:** I know. But what's does that mean? If you
 [22] could explain to me where your role as trustee ended
 [23] and where your role as attorney began, I think that
 [24] would be helpful.

[1] oversee the handling of these policies?
 [2] **A:** No.
 [3] **Q:** So then your dealings with Mr. Pflugfelder
 [4] and Mr. Fay concerning these policies were in your
 [5] capacity as trustee of the trust; is that right?
 [6] **A:** And as attorney, depending on what year
 [7] we're dealing with. There is a twelve-year period.
 [8] **Q:** But I thought you just testified that you
 [9] weren't responsible as an attorney overseeing the
 [10] handling of these policies.
 [11] **MR. GILBERT:** Objection.
 [12] **A:** That's correct.
 [13] **MR. GILBERT:** I object to the question
 [14] as vague.
 [15] **A:** Ask me one more time.
 [16] **MR. SWIRBALUS:** Could you read it back,
 [17] please.
 [18] (Record read.)
 [19] **A:** That's correct.
 [20] **Q:** Is that correct substantively?
 [21] **A:** I stand by the answer. That is correct.
 [22] **MR. GILBERT:** And I stand by the
 [23] objection. I'm not sure if you're asking what his
 [24] prior testimony was or if you're asking about the

[1] **MR. GILBERT:** Object to question.
 [2] **A:** I'll do the best I can. As trustee, my
 [3] responsibility was to collect the funds from
 [4] Mr. Fay, deposit them to a trust account and see to
 [5] the payment of the annual premiums. That was my
 [6] function as trustee.
 [7] **Q:** Those three things. That's it?
 [8] **A:** Yes.
 [9] **Q:** All right. And now what was your role as
 [10] attorney with respect to these policies?
 [11] **A:** I think anything other than those areas.
 [12] And that's the best answer because we're talking
 [13] about twelve years. And I did a lot of different
 [14] things.
 [15] **Q:** Do you recall Mr. Fay testifying that he
 [16] relied on you completely to take care of the
 [17] policies?
 [18] **A:** I don't recall that exact statement, no.
 [19] **Q:** Do you recall something to that effect?
 [20] **A:** I recall his saying he relied upon me
 [21] completely. I'm not sure in what regard he was
 [22] relying on me.
 [23] **Q:** Do you know whether Mr. Fay was relying upon
 [24] you to read the policies?

In The Matter Of:

*Fay v.
Aetna Life Insurance & Annuity Co.*

*Frank J. Santangelo, Esq.
February 27, 2003*

*Vol. 1
pp. 1-68*

*Jones, Fritz & Sheehan
A LegaLink Company
210 South Street
11th Floor
Boston, MA 02111
(617) 542-0039 or (800) 822-3376*

*Original File 0227SANT.TXT, 68 Pages
Min-U-Script® File ID: 2891106254*

Word Index included with this Min-U-Script®

[1] Q: Back on the record. Mr. Santangelo, what
[2] is the hourly rate you have charged Mr. Fay for
[3] your legal services prior to the commencement of
[4] this litigation?

[5] A: Well, the rates vary. I don't know. I
[6] couldn't tell you.

[7] Q: What's the rate you're charging him now?

[8] A: Well, I charge \$300 an hour to clients
[9] generally. I charge him 275 because he's been a
[10] client for a long time and he gives me a volume of
[11] work.

[12] Q: What is the volume of work he gives you?

[13] A: You mean dollars per year?

[14] Q: Right.

[15] A: Well, first of all, let's keep in mind that
[16] I've represented him for about 20 — 20 or 22
[17] years, so it's hard for me to give you a definitive
[18] answer.

[19] Q: I understand.

[20] A: But it would range from maybe 10,000 to 30
[21] or 40,000.

[22] Q: Do you have any clients that you bill more
[23] than 30 or \$40,000 a year?

[24] A: Yes.

[1] Q: How many? Do you know?

[2] A: Well, again, that depends, too. It could
[3] be three or four, five.

[4] Q: Do you have any clients that you've had a
[5] relationship for a longer period than Mr. Fay?

[6] A: Yes.

[7] Q: You say that for your legal services you
[8] bill Mr. Fay \$275 an hour. Is that the same rate
[9] that you charge him for your trustee services?

[10] A: Yes.

[11] Q: And so to testify in this matter, for
[12] example, during today's deposition, what is the
[13] rate that you're charging him?

[14] A: 275.

[15] Q: To testify at trial, what is the rate that
[16] you'll be charging him?

[17] A: Well, I assume it will be the same thing,
[18] unless the trial takes place five years from now.

[19] Q: Do you know how much in fees you have
[20] charged to Mr. Fay pertaining to these policies?

[21] A: No.

[22] Q: Do you know what your trustee fees have
[23] been to Mr. Fay?

[24] MR. GILBERT: Objection.

[1] A: No.

[2] MR. SWIRBALUS: That's all I have.

[3] MR. GILBERT: I just wanted to ask a
[4] few follow-up questions.

CROSS-EXAMINATION

BY MR. GILBERT:

[7] Q: I believe when you were providing testimony
[8] with respect to the January 15th, 1992 letter that
[9] referred to the February — the upcoming meeting in
[10] February 1992 with Mr. Pflugfelder and Mr. Fay —

[11] A: Yes.

[12] Q: — that you were asked some questions about
[13] what ultimately was discussed at that February 1992
[14] meeting. Do you recall that testimony?

[15] A: Yes.

[16] Q: And I just want to clarify —

[17] A: Let me just interrupt a second. As I
[18] remember the question, it wasn't what was
[19] discussed. The question was did you discuss a
[20] specific item, and did you discuss this specific
[21] item.

[22] Q: Did you have any discussions at that
[23] meeting regarding the number of years that premiums
[24] would be payable?

[1] A: Yes.

[2] Q: What was said by Mr. Pflugfelder, if
[3] anything?

[4] A: Mr. Pflugfelder said that the premiums will
[5] be payable for ten years, and that the first year
[6] premium that was already paid at that time for the
[7] December 1990 premium on the original policy would
[8] be year number one of the ten-year period, so that
[9] the total premiums would be finished in 1999, with
[10] the exception of a small amount that might be due
[11] in the eleventh year, which he described, as I
[12] remember, about 10 or \$12,000.

[13] Q: Now, what would cause something — did he
[14] say what would cause the premium in the eleventh
[15] year to be payable?

[16] A: Yes, I believe it had to do with interest
[17] rates.

[18] Q: Do you recall anything more specifically
[19] about what it had to do with interest rates?

[20] A: Yeah, depending on the interest rate, there
[21] might be 10 or \$12,000 due in the eleventh year.
[22] Maybe there would be none.

[23] Q: If interest rates went down?

[24] A: You know, I don't really remember

Page 1

1 UNITED STATES DISTRICT COURT
 2 DISTRICT OF MASSACHUSETTS
 3 IN AND FOR PALM BEACH COUNTY, FLORIDA
 4 CASE NO.: 01cv10846RGS

5 _____
 6 WILLIAM L. FAY, SR., et al.,
 7 Plaintiffs,
 8
 9 -vs-
 10 AETNA LIFE INSURANCE AND ANNUITY
 11 COMPANY and GARY E. PFLUGFELDER,
 12
 13 Defendants.

14 _____
 15 DEPOSITION OF WILLIAM D. HAGER
 16 VOLUME I
 17
 18 Thursday, March 6, 2003
 19 10:15 a.m. - 12:10 p.m.
 20 2499 Glades Road, Suite 205
 21 Boca Raton, Florida

22 Reported By:
 23 Denise T. Medina, RPR-CM
 24 Notary Public, State of Florida
 25 Esquire Deposition Services
 Boca Raton Office
 Phone - 800.357.6952
 561.338.0955

Page 2

1 APPEARANCES:
 2
 3 On Behalf of the Plaintiffs:
 4 ROBERT J. GILBERT, ESQUIRE
 5 GILBERT & RENTON LLC
 6 23 Main Street
 7 Andover, MA 01810

8
 9 On Behalf of the Defendant Aetna Life Insurance
 10 and Annuity Company:
 11 MARK E. SWIRBALUS, ESQUIRE
 12 DAY, BERRY & HOWARD LLP
 13 260 Franklin Street
 14 Boston, MA 02110

15
 16 On Behalf of the Defendant Gary E. Pflugfelder:
 17 HARRISON V. WILLIAMS, JR., ESQUIRE
 18 GREEN & SEIFTER
 19 One Lincoln Center
 20 Syracuse, NY 13202
 21
 22 - - -
 23
 24
 25

Page 3

1 - - -
 2 I N D E X
 3 - - -
 4 WITNESS: DIRECT CROSS REDIRECT RECROSS
 5 William D. Hager
 6 BY MR. SWIRBALUS 5
 7 - - -
 8 E X H I B I T S
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 10 DEFT'S. NUMBER PAGE
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Page 4

1 P R O C E E D I N G S
 2 - - -
 3 Deposition taken before Denise T.
 4 Medina, Registered Professional Reporter and
 5 Notary Public in and for the State of Florida at
 6 Large, in the above cause.
 7 - - -
 8 MR. SWIRBALUS: Bob, before we get
 9 started, you agree to the normal
 10 stipulations, which we are reserving all
 11 objections, except as to form, until the
 12 time of trial?
 13 MR. GILBERT: Correct.
 14 MR. SWIRBALUS: And does he want to
 15 sign the transcript?
 16 MR. GILBERT: Yes. Sign but notary
 17 waived.
 18 MR. SWIRBALUS: Okay.
 19 THE WITNESS: Hold on here. I'm not
 20 willing to have it waived. I'm not
 21 willing to have the reading waived on it.
 22 MR. GILBERT: You will have an
 23 opportunity of 30 days to read.
 24 THE WITNESS: Okay. Great.
 25 MR. GILBERT: The only thing that we

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1 individual states in which they elected to
 2 market those products. So we would not
 3 consider an individual insurer's proposed life
 4 insurance products as such, nor would we pass
 5 on them or approve them or disapprove them.
 6 Q. What did the committee do, then?
 7 A. The committee dealt with national
 8 insurance issues. Specific to this case, the
 9 committee dealt with issues relating to
 10 illustrations. Misrepresentations in
 11 illustrations during this period of time was a
 12 significant issue. We dealt with solvency
 13 matters relating to life insurance companies.
 14 We dealt with all of the regulatory apparatus
 15 that comes to bear on life insurance companies,
 16 illustrations, for example, being a component
 17 part of the range of issues that would be dealt
 18 with.
 19 Q. In dealing with illustrations, did
 20 you or that committee have occasion to find
 21 that Aetna's illustrations were somehow
 22 improper?
 23 A. Well, again, the work of the NAIC and
 24 specifically, counselor, in answer to your
 25 question, our work would not generally make

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1 findings against, about, for an insurance
 2 company. We would make determinations as to
 3 difficulties in the marketplace in general or
 4 problems or issues in the marketplace in
 5 general, and we would consider proposals to
 6 address those problems.
 7 Q. When you were making determinations
 8 as to I think you said problems in the
 9 marketplace --
 10 A. Yes.
 11 Q. -- were any of those perceived
 12 problems caused by Aetna?
 13 MR. GILBERT: Objection.
 14 THE WITNESS: It's, it's, my answer
 15 is as follows: The problems that we dealt
 16 with were problems that emerged in the
 17 marketplace in general. We did not make
 18 an effort to articulate any particular
 19 insurer that was the driving force of a
 20 problem. Alternatively, our job was to
 21 articulate in fact what was believed to be
 22 a marketplace problem, set forth the
 23 marketplace problem and if in fact there
 24 were regulatory or statutory solutions to,
 25 to produce statutory or regulatory

Page 31

1 solutions to the problem.
 2 BY MR. SWIRBALUS:
 3 Q. And --
 4 A. I'm finished with my answer.
 5 Q. You are?
 6 A. Yes, I am.
 7 Q. In that effort in order to determine
 8 or articulate what problems in general there
 9 might be, would the committee review the
 10 insurance practices of specific companies?
 11 A. They might, though that would be,
 12 that would not occur with much frequency. The
 13 tools to identify issues ranged from surveys of
 14 regulators, surveys of agents, for example, and
 15 for that matter, surveys of insurance
 16 companies. In addition, it was not uncommon
 17 for insurance companies themselves, life
 18 insurance companies or the trade associations
 19 such as the American Council on Life Insurance
 20 to bring forward matters that they had, the
 21 industry itself had perceived in the
 22 marketplace and bring those issues forward for
 23 regulatory consideration.
 24 Q. Do you recall whether Aetna brought
 25 forward any such issues?

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1 A. I'm certain they did. But I don't
 2 recall any particular issues that they did.
 3 Q. You had mentioned surveys. What
 4 would be the purpose of these surveys?
 5 A. Surveys would be to determine --
 6 let's take a regulatory survey. Through a
 7 regulatory survey, we could efficiently
 8 determine and get a read through the regulators
 9 in all 50 states as to whether a particular
 10 matter, particular issue was in fact a
 11 nationwide issue that merited national
 12 attention or in fact whether it was a localized
 13 issue.
 14 Q. So when you say an issue, could an
 15 example of an issue be the types of disclosures
 16 that are being made in illustrations?
 17 A. Yes.
 18 Q. Was that in fact one of the issues
 19 that was reviewed?
 20 A. Yes. In fact, while I was insurance
 21 commissioner, I oversaw a survey to that
 22 effect.
 23 Q. As chair of the life insurance
 24 product development task force, you led the
 25 development of model disclosure statements for

In The Matter Of:

*Fay v.
Aetna Life Insurance & Annuity Co.*

*William L. Fay
February 27, 2003*

*Vol. 1
pp. 1-46*

*Jones, Fritz & Sheehan
A LegaLink Company
210 South Street
11th Floor
Boston, MA 02111
(617) 542-0039 or (800) 822-3376*

*Original File 0227FAYTXT, 46 Pages
Min-U-Script® File ID: 2698506392*

Word Index included with this Min-U-Script®

(1) **A:** Twenty-seven?
 (2) **Q:** The second page in.
 (3) **A:** Oh, okay. Yeah.
 (4) **Q:** Do you recall receiving this letter?
 (5) **A:** Yes.
 (6) **Q:** In this letter, it lists five different
 (7) insurance policies towards the bottom. Do you see
 (8) that?
 (9) **A:** Yes.
 (10) **Q:** Were all five of those policies life
 (11) insurance policies?
 (12) **A:** I believe so.
 (13) **Q:** Do you know what kind of policies they
 (14) were?
 (15) **A:** I have no idea.
 (16) **Q:** Did you have any life insurance policies
 (17) other than these five at this time, which was March
 (18) 31, 1988?
 (19) **A:** 1988? I don't recall any more.
 (20) **Q:** Are you on any medication today, Mr. Fay?
 (21) **A:** Yes.
 (22) **Q:** Is it the same medication that you were on
 (23)
 (24) **A:** As before, yes.

(1) letter, yes.
 (2) **MR. GILBERT:** If I can just clarify,
 (3) Bill, these questions are asking if you have a
 (4) memory today of receiving this letter.
 (5) **A:** Okay.
 (6) **BY MR. SWIRBALUS:**
 (7) **Q:** In the second paragraph it references the
 (8) amount of \$100,000. Do you see that?
 (9) **A:** Yes.
 (10) **Q:** Was there a reason in your opinion why the
 (11) amount of the checks to Mr. Pflugfelder or the
 (12) amount of this check to Mr. Pflugfelder was in the
 (13) amount of \$100,000?
 (14) **MR. GILBERT:** Objection. Go ahead.
 (15) You can answer.
 (16) **A:** That he suggested that — that with the
 (17) amount of money that I was looking for, that
 (18) \$100,000 would probably be doing, he said, if I
 (19) recall.
 (20) **Q:** Did you have any discussions with
 (21) Mr. Pflugfelder about the amount of the annual
 (22) premiums that you were willing to pay?
 (23) **A:** Yes and no. Yes.
 (24) **Q:** What were those discussions?

(1) **Q:** Does it inhibit your ability to understand
 (2) and answer these questions truthfully?
 (3) **A:** Does it inhibit me? No. No.
 (4) **Q:** If you could turn to the fourth page in,
 (5) which is a December 23, 1991 letter from
 (6) Mr. Santangelo to you, do you see that?
 (7) **A:** Yes.
 (8) **MR. GILBERT:** What Bates number?
 (9) **MR. SWIRBALUS:** It is Bates Number
 (10) FAY01377.
 (11) **BY MR. SWIRBALUS:**
 (12) **Q:** Do you recall receiving this letter,
 (13) Mr. Fay?
 (14) **A:** Uh —
 (15) **MR. GILBERT:** You're not — are you
 (16) asking if he remembers it or —
 (17) **A:** Yeah.
 (18) **MR. GILBERT:** Or if he doesn't deny
 (19) getting it? Are you asking if he has specific
 (20) recollection or —
 (21) **BY MR. SWIRBALUS:**
 (22) **Q:** Yeah, we'll start there.
 (23) **A:** Well, Frank Santangelo sent it to me,
 (24) regardless of the signature, and I'm sure I had the

(1) **MR. GILBERT:** Objection. Time frame?
 (2) **BY MR. SWIRBALUS:**
 (3) **Q:** 1990, 1991.
 (4) **A:** 1991?
 (5) **Q:** In that time frame, prior to the issuance
 (6) of the policies.
 (7) **MR. GILBERT:** Which policies?
 (8) **BY MR. SWIRBALUS:**
 (9) **Q:** The 1990 policies.
 (10) **A:** Let's see. The one New York policy, I
 (11) believe, the 19— the first policy?
 (12) **Q:** Right. What did you discuss with
 (13) Mr. Pflugfelder — with Mr. Pflugfelder about the
 (14) amount of premiums that you were willing to pay on
 (15) an annual basis?
 (16) **A:** I asked him what I would get for \$100,000,
 (17) what would I get from the monies.
 (18) **Q:** Did you want to cap your annual premiums at
 (19) \$100,000 for any reason?
 (20) **A:** If I could afford it. It was a difference
 (21) of whether I can afford it for higher or lower
 (22) amounts.
 (23) **Q:** Was the \$100,000 amount based on the gifts
 (24) that you were permitted to make to your children?

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[1] A: Yes.
[2] Q: Were you willing, prior to the issuance of
[3] the 1990 policies, to pay anything more than
[4] \$100,000 annually for premiums?
[5] A: If I could afford it.
[6] Q: Could you have afforded it?
[7] A: Depending on the amount of money. He'd
[8] have to tell me if it was \$100,000 or if it was
[9] 90,000 or whatever was on the premiums. He
[10] suggested this \$100,000.
[11] Q: Would you have been willing to pay \$150,000
[12] a year in premiums?
[13] A: No.
[14] Q: Would you have been willing to pay \$140,000
[15] a year in premiums?
[16] A: No. I — I think eventually it started —
[17] it started with this and then what it was close to.
[18] Q: So that was pretty much the limit of what
[19] you were willing to pay per year?
[20] A: Yes.
[21] Q: And did you discuss that with
[22] Mr. Pflugfelder?
[23] A: Completely.
[24] Q: If you could turn to the next page,

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[1] Mr. Fay, which is Bates — on the bottom, Bates
[2] Number FAY01374. It's a December 27, 1991 letter
[3] from Mr. Santangelo to you.
[4] A: Yes.
[5] Q: Do you see that?
[6] A: Yes.
[7] Q: Did you have any discussions with
[8] Mr. Reardon about the 1990 or 1991 policies?
[9] A: No. He just suggested that Pflugfelder had
[10] talked to him and talked to me, and he said — he
[11] didn't discuss it with me, no. I didn't — Reardon
[12] didn't get involved with it.
[13] Q: Did you discuss the 1990 or 1991 policies
[14] with Mr. Weiner?
[15] A: No.
[16] Q: What was Mr. Weiner's involvement with the
[17] policies; do you know?
[18] A: Nothing.
[19] Q: Do you recall or do you have any reason to
[20] believe that you didn't receive this letter from
[21] Mr. Santangelo on or about December 27, 1991?
[22] A: I don't recall. No. I don't recall.
[23] Q: You don't recall? Do you have any reason
[24] to believe that you did not receive it?

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[1] A: Me or — I thought you said Mr. Weiner.
[2] Q: No, you.
[3] A: Yes. Yeah, again, if it was sent over, I'm
[4] sure that I've seen it. Yes.
[5] Q: If you could turn to the next page, please,
[6] which is a copy of a January third, 1992 letter
[7] from Mr. Santangelo to you?
[8] A: Yes.
[9] Q: Do you have any reason to believe you did
[10] not receive this letter?
[11] A: No, I got this letter.
[12] Q: Do you have any reason to believe that you
[13] did not receive the enclosures to this letter,
[14] which would be a letter dated December 30, 1991
[15] from Mr. Pflugfelder?
[16] A: If Mr. Santangelo sent this, I would have
[17] gotten it, yes.
[18] Q: If you could turn a couple of pages to a
[19] letter dated January 15, 1992?
[20] A: Yes.
[21] Q: And this is Bates Number FAY01355. Do you
[22] have reason to believe you did not receive this
[23] letter?
[24] A: No.

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[1] MR. GILBERT: Mark, if it will shorten
[2] your questioning, we are not going to make any
[3] contention in this case that letters or enclosures
[4] identified in letters from Mr. Santangelo to
[5] Mr. Fay were not included, were not sent to
[6] Mr. Fay.
[7] MR. SWIRBALUS: And will you also
[8] stipulate that Mr. Fay did in fact receive all of
[9] the correspondence in Exhibit 42?
[10] MR. GILBERT: Yes. Well, all the
[11] correspondence that indicates him as a recipient,
[12] together with the enclosures.
[13] MR. SWIRBALUS: I think that will save
[14] some time.
[15] MR. GILBERT: I think so, too.
[16] BY MR. SWIRBALUS:
[17] Q: In this letter dated January 15, 1992, it
[18] speaks of a meeting with Gary Pflugfelder. Do you
[19] see that?
[20] A: Yes.
[21] Q: Do you recall that meeting with
[22] Mr. Pflugfelder?
[23] A: Yes.
[24] Q: Do you recall how long that meeting lasted?

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF MASSACHUSETTS

3 - - - - - x

4 WILLIAM L. FAY, SR., KATHLEEN :

5 E. FAY, and FRANK J. SANTANGELO, :

6 Trustee of the Fay Insurance :

7 Trust,

8 Plaintiffs, : Civil Action No.

9 vs. : 01-CV-10846

10 AETNA LIFE INSURANCE AND : (RGS)

11 ANNUITY COMPANY and GARY : Volume 2

12 PFLUGFELDER, :

13 Defendants. :

14 - - - - - x

15

16 Continued deposition of THEODORE E.

17 AFFLECK, taken pursuant to the Federal Rules of

18 Civil Procedure at the law offices of Day,

19 Berry & Howard, CityPlace, Hartford,

20 Connecticut, before Elizabeth A. Zawacki, LSR

21 #00087, a Registered Merit Reporter and Notary

22 Public in and for the State of Connecticut, on

23 Thursday, March 13, 2003, at 10:15 a.m.

24

25

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1 opportunity to earn interest on it."

2 Do you disagree with her premise in that
3 sentence?

4 A. I do, because I don't think it's relevant
5 to the issue. The issue is what the Fays thought
6 they bought and where they thought they were going
7 to be as of 2002, now 2003. Are they there or
8 aren't they there? They did everything that Aetna
9 and Mr. Pflugfelder recommended that they do, yet
10 they are clearly not in the position that they
11 thought they were going to be in based upon their
12 understanding at the time they bought the policy.

13 So whether they kept premiums or didn't
14 pay premiums, or this or that, I think is
15 irrelevant. I think the only issue is where they
16 thought they were going to be as of this point in
17 time, and how to put them into the situation where
18 they thought they were going to be. That, in my
19 view, is defined by the criteria I set when I set
20 these damages to begin with, was a six million
21 dollar policy or a policy that was going to pay a
22 six million dollar death benefit on the second of
23 their two deaths, regardless of when that happened,
24 with no further premium outlay on their part.

25 Q. Have you done any research -- strike that.

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1 Q. I'm sorry. Is this responsive to the
2 question?

3 A. It is.

4 So there were situations similar to this,
5 or at least litigation situations at Connecticut
6 Mutual where I was asked to be involved in the
7 outcome of the thing. I was never asked to
8 calculate damages. I was asked to evaluate
9 settlements and settlement offers on the part of the
10 company.

11 In one case, there was a damage
12 calculation that was made by an actuary, and I was
13 asked to render an opinion as to what I thought
14 about it. So I invoked some experience just based
15 upon -- or I invoked those experiences when I was
16 doing this calculation. That's my answer.

17 Q. If the policies mature with zero cash
18 value or relatively little cash value, do you
19 believe that the money that was spent on those
20 policies was worthless?

21 A. If the policies end up maturing for little
22 or no value, I would regard that as a failure of the
23 fundamental objective, yes.

24 Q. Does the insurance itself have any value,
25 in your opinion?

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1 Did you do any research in this case to
2 determine what the appropriate measure of damages
3 might be?

4 MR. GILBERT: Objection.

5 A. No, I can't say that I did any research as
6 to what the appropriate damage would be. I
7 certainly invoked some of my experience at
8 Connecticut Mutual. We occasionally would be
9 involved in litigation and offers of settlement and
10 whatnot. Quite often I would be asked to consult on
11 situations where there was litigation, and
12 Connecticut Mutual had its share of those things.
13 Quite often my involvement there would be trying to
14 ascertain whether the illustrations that were
15 alleged to have been presented by the agent were
16 possible under the software at the time. I was
17 quite often asked whether there were important
18 understanding, footnotes, additional pages that
19 hadn't been provided by the agent based upon the
20 information that was part of the record, their
21 document record. Quite often I was asked whether,
22 based upon the testimony and the allegations, I
23 thought the agent had misrepresented, misstated,
24 overstated the benefits of the policy, or the
25 expected costs of the policy.

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1 A. The fact that the policy would pay a
2 benefit in the event the death had occurred is a
3 value, there's no question about that, and I
4 acknowledge that if either of the Fays were to die
5 today and the other one of them were to die tomorrow
6 or next year or the year after that, that the policy
7 would fulfill that objective. I said that in many
8 instances, and would say it to anybody that wanted
9 to listen.

10 Q. It would fulfill the Fays' objective?

11 A. It would fulfill the Fays' fundamental
12 objective, and that has a value, and I don't
13 discount that at all.

14 The point of the litigation, I think a
15 large part of the point of the lawsuit, is they
16 thought they bought something, that they thought
17 they were going to be in a position right now, and
18 they are not. What they ended up buying was not
19 what they thought they bought, and they are not
20 anywhere close to the position they thought they
21 would be in, and right now they are confronting
22 scenarios down the road that present enormous
23 potential costs to achieve that fundamental
24 objective, and those costs and the risks that are
25 exposed by those costs were not disclosed to them at

43 (Pages 392 to 395)