United States District Court
Eastern District of Wisconsin

MAI NHIA THAO, individually and on behalf of a class of others similarly situated,

Plaintiff

Case No. 2:09-C-1158-LA

v.

MIDLAND NATIONAL LIFE INSURANCE COMPANY,

Defendant

DECLARATION OF ROBERT E. WILCOX IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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I. Introduction and Scope

1. My name is Robert E. Wilcox. I am a consulting actuary with R.E. Wilcox & Company, and have been a practicing actuary for more than forty-five years. I am the former Utah State Insurance Commissioner. While serving as insurance commissioner, I participated on many committees at the National Association of Insurance Commissioners ("NAIC")[1] and served as chair of several, including three years as Chair of the Financial Condition (EX4) Subcommittee which was responsible for measuring the financial condition of all insurance companies. I also chaired the workgroup that developed the Life Insurance Illustrations Model Regulation. I am the former President of the American Academy of Actuaries and a former Member of the Actuarial Standards Board. I have qualified as an expert in numerous matters. My complete resume is attached as Exhibit 1. A list of publications and a history of my recent testimony is attached as Exhibit 2. A list of documents relied upon in preparation of this declaration is attached as Exhibit 3. I am being compensated for this assignment at my standard hourly rate of $575 per hour.

2. A motion for class certification has been filed by Mai Nhia Thao ("Thao") individually and on behalf of others similarly situated against Midland National Life Insurance Company ("Midland"). I have been retained by Midland as an expert consultant and witness in this matter.

3. In formulating my opinions as set forth herein, I have drawn on my experience as a former insurance regulator, my knowledge and expertise concerning the insurance industry and insurance regulatory matters, and my experience as a consulting actuary.

[1] The NAIC, created in 1871, includes insurance regulators from the 50 states, the District of Columbia, and four U.S. territories. The mission of the NAIC is to assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient, and cost-effective manner, consistent with the wishes of its members: (1) protect the public interest, promote competitive markets, and facilitate the fair and equitable treatment of insurance consumers; (2) promote the reliability, solvency, and financial solidity of insurance institutions; and (3) support and improve state regulation of insurance.

II. Opinions Reached In This Matter

4. Based on my analyses of the issues raised in the Plaintiff's Motion for Class Certification as set forth in the following pages, I have reached the following opinions:

- In my opinion, because of the widely varying product designs and how those designs are implemented, Midland may use different tables of Cost of Insurance Rates for different UL products and the effect on the members of the putative class from applying the remedy proposed by the Plaintiff would be far from uniform and would likely impair the ability of some policyholders to meet their insurance objectives. (Paragraphs 46 to 49)
- It is my opinion as a former insurance regulator and based on my years of experience in the life insurance industry, that Midland has the ability to set the current Cost of Insurance Rates at any level they choose except as limited by the Table of Guaranteed Monthly Cost of Insurance rates and this policy interpretation is consistent with general industry practice and is recognized by insurance regulators. At any given duration, Cost of Insurance Rates may be higher or lower than the mortality rates used to test policy pricing and there is certainly no reason to expect them to be equal. (Paragraphs 54 to 56)
- In my opinion, an actuary presented with just the five elements found in paragraph 7.7 of Thao's policy (i.e. issue age, completed Policy Years, Sex, Specified Amount, and Premium Class), without additional information, would have no idea about the array to which the five elements should apply and would find it impossible to conclude that mortality rates used to test product pricing should be that array. (Paragraphs 57 to 58)
- In my opinion, based on my experience as an insurance regulator and my experience in the insurance industry for more than forty-five years, reading similar insurance provisions, the provision that "Cost of Insurance Rates are based on the Issue Age, completed Policy Years, Sex, Specified Amount, and Premium Class of the Insured," does not mean that there is only one way to calculate the Cost of Insurance Rate, nor does it mean that the Cost of Insurance Rate must be equal to Midland's pricing assumption. Paragraph 7.7 makes it clear that Midland may declare different Cost of Insurance Rates so long as they do not exceed the Guaranteed Monthly Cost of Insurance Rates. (Paragraphs 59 to 61)

- In my opinion, Paragraph 7.8 makes it clear that Cost of Insurance Rates are not intended nor required to be the mortality rates used to test policy pricing. The Cost of Insurance Rates may be changed by Midland subsequent to policy pricing based on future expectations for a variety of elements. (Paragraphs 62 to 63)
- In my opinion, it is clearly illogical to conclude that a policy provision stating that, "Cost of Insurance Rates are based on Issue Age, completed Policy Years, Sex, Specified Amount, and Premium Class of the Insured," results in any unique table of rates, and the language of Thao's policy bears this out. (Paragraphs 64 to 66)
- In my opinion, utilization of the pricing mortality rates for the Cost of Insurance Rates is inappropriate, inconsistent with industry practice, and could, in fact, damage some members of the proposed class. (Paragraphs 67 to 71)
- In my opinion as a former insurance regulator, there is nothing in the Universal Life Insurance Model Regulation that would require Midland to interpret the policy consistent with the Plaintiff's claim. (Paragraphs 92 to 93)
- In my opinion, based on my experience as a former insurance regulator, regulators would not require illustrations to be prepared in accordance with the Plaintiff's interpretation of the Thao policy nor would they require Cost of Insurance Charges to exclude margins or be equal to the pricing mortality assumption. (Paragraphs 94 to 95)
- In my opinion, as a former insurance regulator, insurance regulators would be concerned about the potential disruption of policyholders' expectations with regard to their policies purchased by Midland. Further, insurance regulators would also be concerned about the broader impact on other companies that write UL and their policyholders. (Paragraphs 96 to 97)
- In my opinion, Thao has not demonstrated that she has suffered any loss related to the Cost of Insurance Charge and, based on her stated intent for the future, she will not suffer any loss in the future related to the Cost of Insurance Charge. (Paragraphs 98 to 101)

III. Life Insurance and Universal Life Insurance

5. This section is provided as a high-level overview of universal life insurance in the context of individual life insurance generally.

A. The Black Box of Life Insurance

6. Life insurance contracts are circular, interrelated series of cash flows into, out of, and within a policy. There are innumerable ways to establish these cash flows so that an insurance company can achieve a margin of profit, offer financial resources to a beneficiary in the event of the death of an insured, and provide a policyholder with a source of capital for current and long-term financial exigencies. But, the amount of cash that comes out of a policy, whether as death benefits or as other policy benefits, generally depends on the size of the premium the policyholder pays and the earnings generated by invested assets.

7. From an insurance company perspective, payments into a life insurance contract include premiums and investment earnings (e.g., interest earned on bonds and policy loans). Premiums typically include funds sourced in policy dividends that are applied to pay premiums or buy additional paid-up insurance. Payments out of life insurance policies include death proceeds, dividends, surrender amounts, and withdrawals. Amounts paid out also include expenses incurred in marketing, commissions, administration fees, reinsurance cost, taxes, and contributions to surplus and profits. Within an insurance contract there are expense and insurance benefit charges, interest credits, and charges for risk and contingencies.[2]

8. The payments into, out of, and within a contract must be kept in balance to accomplish policyholder objectives and to prevent the contract from either "imploding" (e.g., cancellation of the policy due to insufficient funds to pay policy benefits) or "exploding"

[2] Whenever an insurance company undertakes risk related to contingent events, there is the possibility that experience will be adverse. The company must provide for those contingent events by committing capital or surplus that then is not available for other purposes. Insurance companies assess risk charges within the policy to compensate for that use of capital and surplus.

(e.g., due to over-accumulation of cash values that would create the need to geometrically increase death benefits in order to comply with section 7702).

9. Not all insurance policies resemble black boxes. Some, such as universal life polices, provide a better view of the policy mechanics by making explicit certain credits and deductions, as well as guarantees.

B. Basic Structure and Operation of Life Insurance Contracts

1. Term Insurance

10. There are two basic types of life insurance products– term life insurance and whole life insurance. Under a typical term life insurance policy, the only guaranteed benefit contracted for is the payment of a specified face amount of insurance in the event of the death of the insured during a stipulated time period. There is no buildup of cash value (except possibly for longer term policies or policies issued at older ages). Also, nothing, except perhaps the accumulated value of dividends, is payable if the insured survives beyond the policy term. Premiums are determined based on assumptions regarding mortality rates,[3] expected dividends, costs involved in procuring and administering the policy, and anticipated profits. The mortality assumption is intended to reflect the probability that an insured will die during the period of coverage and hence, the likelihood that the insurance company will be required to pay a death claim under a contract. The premium also usually includes margins for adverse mortality experience, expenses, and profits.

11. Under a policy with a one-year term, the entire premium will typically cover only the mortality, expense, and profit charges. Thus, the contract will have no value at the end of the

[3] These rates generally are based on, but not identical to published tables (*e.g.*, 1980 Commissioners Standard Ordinary).

term. If the policy is a participating policy, i.e., one that offers dividends, the premium also may include a provision for dividends to those policyholders who renew their coverage. [4]

12. As an insured ages, the cost of providing coverage increases. If a term policy is renewable, the premiums will need to increase each renewal period in order to cover the growing cost of coverage. These increasing costs of insurance may be offset through the use of a level premium plan, or decreasing the face amount of the policy in later years. Under a level premium plan, the premiums charged in the earlier years will exceed the issuer's cost of providing insurance. The issuer will invest these "overcharges," and apply the overcharges and earnings toward insurance coverage in later years of the contract, when the cost of insurance exceeds the level premium amount. It is this level premium payment that may result in longer-term policies providing cash values.

2. Whole Life Insurance

13. In its most basic form, a whole life insurance policy provides both: (1) a source of capital upon the death of an insured individual (i.e., a death benefit); and (2) a funding vehicle for pre-death financial exigencies, as a result of accumulating premium amounts in excess of insurance costs in early policy years (i.e., a cash value).[5] In exchange for these benefits, a policyholder pays an actuarially determined premium. The premium reflects the amounts and interrelationships of various mortality, interest, and expense factors. In addition, the terms upon which funds may be borrowed or withdrawn, and under which dividends may be

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[4] Policies issued by mutual companies generally are participating policies. Dividends from these policies are, in essence, a return of excess premiums. Some stock life insurance companies also issue "participating" policies, but the number of such policies is relatively small compared to the amount issued by mutual companies. Also note that some mutual companies issue "participating" contracts that exist as such in name only (*i.e.*, they generally do not pay any dividends).

[5] In addition, the policyholder also is purchasing such rights as: (1) the right to participate in the favorable experience of the insurance company (with respect to participating policies); (2) the right to surrender; (3) the right to withdraw funds from the policy; and (4) the right to borrow funds at a contractually determined rate from the insurance company, with only the insurance policy serving as collateral. Moreover, state law typically requires other provisions to be included in life insurance contracts, such as nonforfeiture rights to paid-up whole life or extended term insurance.

applied, as well as margins added for the purpose of paying dividends and assumptions regarding future investment performance, are reflected in policy pricing and guaranteed cash values and death benefits. Thus, although the death benefit and the "savings" element are often described as separable components, a whole life insurance policy is a single, integrated product with interdependent moving pieces.

14. As a result of a level premium, a reserve amount is established in the form of a cash value. The cash value serves three functions: (1) it helps reduce the net amount at risk[6] for the insurance company over the lifetime of the insured; (2) it provides a source of funds for the policyholder who terminates the policy before death; and (3) it may serve as collateral for a loan from the insurance company. The assets underlying the reserve facilitate the continued availability of cost-efficient coverage.

15. The cash value helps to reduce the pure insurance risk to the insurance company, since at death the cash value is used to pay part of the death benefit. The cash value earns investment income and is designed to eventually equal the amount of the death benefit. Policies typically are designed such that the cash value will equal the death benefit (i.e., mature) somewhere between the ages of 95 and 100.

16. The cash value also protects the policyholder from losing the value of excess premiums invested in the policy in earlier years. In the event the policyholder fully or partially terminates the policy, all or part of the cash value (also referred to as the cash surrender value, because surrender charges that reduce the amount ultimately receivable may be applied) will be distributed to the policyholder.

3. Universal Life

17. Universal life insurance is a variation of whole life insurance. These policies, however, permit the insured to view the development of an accumulation account that is the basis for the cash value, permit the policyholder to see the effect of insurance benefit charges, other charges and interest earnings, and, in some cases, adjust or discontinue premium payments (within limits) and increase or decrease the death benefit.

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[6] The "net amount at risk" refers to the amount by which the death benefit exceeds the cash value of the policy at any given time.

18. Premium flexibility is usually but not always provided.[7] Policyholders have the power to skip premiums, increase their premiums, or decrease their premiums (i.e., virtually anything they want) without any obligation to provide notice to, or receive consent from, the insurance carrier. No payments are necessary under most contracts unless there is insufficient cash in the savings, or accumulation, account to pay ongoing costs and thereby avoid a policy lapse. Policyholders can pay in as much as they want under most contracts, provided they do not violate Tax Code qualification tests.

19. Insurance companies focus on two elements when designing their universal life policies: (1) the risk element (i.e., the death benefit); and (2) the accumulation or savings element (i.e., the accumulation account, which is credited with interest or investment income). The design may emphasize one of these two elements over the other. The death benefit was discussed above. With respect to the accumulation account, universal life does not afford its policyholders the same interest and cash value guarantees that are associated with basic whole life insurance. With traditional whole life policies, the insured knows what his or her cash value will be in the future except for the level of increased values from dividends used to purchase additional amounts of insurance. Universal life includes guarantees of minimum rates of investment return and maximum insurance benefit and expense charges. In these arrangements, the insurance company pushes more of the risk to the insured, thus lowering the cost of insurance to the policyholder. Generally, any interest received, minus any spread charged for the insurance company's effort, is passed on to the insured.

20. Once a consumer purchases a universal life insurance policy, the insurance company takes the gross premiums they receive from the consumer and subtracts expenses, insurance benefit charges, and other costs. The company then credits the balance into a savings or accumulation account. It is this account that receives any interest credited by the insurance company, which will generally be related to return on the insurance company's investments.

21. A UL policy's death benefit may also go up or down based on changes in the policy's cash value. Unlike whole life insurance, policyholders may have a choice of either a level death benefit, or the payment of a death benefit in addition to the cash value. With a level death

[7] The exception to this general rule is fixed premium universal life insurance.

benefit, the insurance company pays a death benefit that includes the cash value. For a higher premium, a death benefit is paid on top of the cash value. There is usually a guaranteed minimum schedule of cash values and death benefits.

22. Universal life policyholders can usually withdraw cash from their policies. This is not a loan. There is no interest component. Policyholders simply withdraw money out of their cash value. This is another facet of universal life insurance that differentiates it from basic whole life insurance, i.e., the expanded opportunities universal life insurance policyholders possess to gain access to the cash value of their policies during the life of the insured. As is the case with basic whole life insurance, universal life policyholders also can access cash by either surrendering their policies or borrowing from the insurance company, using their policy cash value as security or collateral for the loan.

23. With the introduction of universal life insurance products, policyholders could review annual statements that detailed such things as death benefit costs, expenses associated with the policies, and the amount of interest earned thereon.

C. Origins and Nature of Universal Life

24. In 1975, a paper entitled "The Universal Life Insurance Policy" was presented at the Seventh Pacific Insurance Conference by its author James C. H. Anderson, then president of the actuarial consulting firm of Tillinghast, Nelson and Warren, Inc.[8] This paper is often considered to be the most important step along the road to Universal Life ("UL"). Anderson described his concept as "a fully flexible alternative to conventional life insurance contracts designed to meet the needs and demands of the life insurance market in 1975 and beyond." He felt that it was "not realistic for the [insurance] industry to address the needs of the typical buyer with traditional permanent life insurance products requiring fixed regular premiums and providing fixed benefits, both expressed in constant nominal dollars."

25. Anderson's general description of UL was "[a] flexible-premium annuity with a monthly renewable term insurance rider." While this simplified approach to UL, an annuity with a term rider, could have worked well, few, if any, policies were sold that way. Instead, UL

[8] S. Pasini, Editor, *The Papers of James C. H. Anderson*, (The Actuarial Education and Research Fund, Schaumburg, IL, 1997) pp203-220.

policies are generally flexible-premium, adjustable death benefit, unbundled life contracts. But the annuity with term rider approach makes it easy to see that the cost of insurance charge is quite similar to the premium for the term insurance rider. Remember that, as discussed in Paragraph 10 above, the premium for the term insurance rider includes margins for adverse mortality experience, expenses, and profits.

26. The first successful implementation of UL was by E. F. Hutton Life (then Life of California) in 1979.[9] Over the next six years UL policy sales grew to a market share of over 38%. Much of this increase in UL sales was driven by the high interest environment that prevailed in the early 1980s. Since UL policies credited interest rates based on the yield on newly invested funds rather than portfolio investment yields, UL sales illustrations showed a competitive advantage over traditional life insurance policies.

D. Universal Life Product Design

27. As soon the first UL policy appeared, variations of the basic UL design began to be offered. Many of these designs simply took advantage of the inherent flexibility of UL by enabling the policyholder to select premium or death benefit patterns that would achieve certain objectives while other designs were fundamentally different such as first-to-die and second-to-die joint life policies, variable life policies which passed investment risk on to the policyowner, and indexed policies that tied investment results to a variety of market indexes while guaranteeing minimum results.

28. Following these initial developments, policies in recent years have offered a variety of modifications such as secondary guarantees that enable policyowners additional ways to use UL policies. Below are some of the common product design features:

1. Death Benefit Patterns

29. UL policies typically offer two death benefit patterns from which the policyowner selects one. The pattern may be changed at any time, but, in the absence of a change request, the selected pattern will be followed during the policy term. These two patterns are usually labeled Options A and B (or 1 and 2). Option A proves a level death benefit pattern, and

[9] See K. Black and H. Skipper, *Life Insurance*, 12th ed. (Prentice Hall 1994) (hereinafter referred to as Black & Skipper.) Ch. 6.

Option B provides a level net amount at risk. Option A is most like a traditional whole life policy while Option B can provide an increasing death benefit based on the growth of the account value.

30. Since the policyowner has the ability to control the account value by adjusting the amount of premium, there is a risk under Option A that the account value will become too large (as defined by U.S. tax law) relative to the net amount at risk. It is necessary to maintain a minimum corridor of net amount at risk to avoid having the UL policy become an endowment and not qualify for the favorable tax treatment accorded life insurance. This means that the death benefit must exceed the account value by a specified percentage based on insured's attained age.

31. The policyowner has the ability to increase or decrease the death benefit at any time. Increases to the death benefit, other than provided by Option B or by other policy provisions would normally require evidence of insurability. Many companies permit policyowners to attach cost-of-living benefits or other future purchase options to their UL policies that may enable death benefit increases without evidence of insurability.

2. Premium Payments

32. UL policyowners pay premiums of whatever amount and whenever they desire, subject to company rules regarding minimums and maximums. Most companies require only that the first premium be sufficient to cover the first month's deductions, but most purchasers pay a much larger amount.

33. One of the potential disadvantages of UL is that policyowners might too easily allow their policies to lapse because there are no required premiums. To overcome this concern, at least in part, companies send notices of planned or target premium payments selected by the policyowner or the policyowner may agree to preauthorized bank drafts.

34. Because of policyowners' potential concerns about the uncertainty of future policy performance, many companies have introduced a no-lapse guarantee, which guarantees that the policy will not lapse if at least a stipulated minimum premium is paid. If this minimum continuation premium is paid, the contract will remain in force even with no (or even negative) account value.

3. Margins

35. When setting the various parameters such as premium loads, expense charges, insurance benefit charges, and interest crediting rates that are used in developing the account value, insurers make assumptions about expected future experience with regard to such elements as investment earnings, mortality, persistency, and expenses. With regard to each such element, actual experience is virtually certain to be different from the assumptions. The combination of the parameters used in developing the account value must not only provide for the insurer's best estimates of future experience but sufficient margins to assure that adverse actual experience will be covered as well. In addition, margins must be added to provide an adequate return on invested capital, often called profit margins. It is the margins on all the various parameters that must be sufficient to cover adverse future experience and profits. Thus, margins added to one parameter may be increased to cover an inadequate margin for some other parameter.

4. Policy Loads and Expense Charges

36. UL policy expenses are often recovered as "front-end" loads as a percent of premium that may vary by duration, "back-end" loads such as surrender charges that usually decrease by duration, or in a variety of other ways such as an amount per policy month or an amount per thousand dollars of face amount. Some policies have both front-end and back-end loads and some have neither.

37. The expense charges of a UL policy rarely match a company's actual expense pattern. It is common that the amount charged is insufficient to cover initial expenses, especially on policies with low or no identifiable front-end loads. It is hoped that excess first-year expenses will be recovered through renewal expense charges, surrender charges, interest margins, insurance charge margins, or through a combination of these. It is unreasonable to conclude that a policy with no identifiable expense load has no charge for expenses. Expenses must always be recovered in some way.

5. Insurance and Other Benefit Charges

38. Insurance benefit charges (often referred to as cost of insurance charges or rider charges when policy riders are added) are deducted each month and they are calculated by applying

the applicable rate to the net amount at risk. Most, but not all, UL policies have indeterminate insurance charges that are subject to maximum rates that are stated in the contract. So long as the policy maximums are not exceeded, the insurer has flexibility to include margins and select any scale of insurance benefit charges that will not discriminate inappropriately. Both the maximum cost of insurance charges and the actual insurance benefit charges are each expressed as a matrix of rates that vary by several characteristics such as issue age, policy duration, gender, policy size and premium class. Those characteristics, the five mentioned and perhaps others, define which matrix cell to select. The maximum insurance charges are conservative and the actual insurance charges are often less.

39. Table 1 lists current insurance charges levied by six companies for similar products for three different ages. The range of the insurance charges indicate that there is a significant differences in the margins that each of the companies includes. One could not conclude from these figures alone which of the various companies' policies might be a good buy. Interest credits and loadings also must be factored into the analysis. For example, Company F, with the highest insurance charges, has relatively low front-end loads and no surrender charges. Obviously, its insurance charges include greater margins as a provision for expense recovery.

Table 1[10]

Selected Companies' Current Insurance Charges

	Age 25	Age 40	Age 55
Company A	$ 6.67	$14.43	$35.33
Company B	9.17	12.08	25.83
Company C	10.00	16.00	37.00
Company D	14.00	21.00	46.00
Company E	15.00	21.00	51.00
Company F	16.00	31.00	73.00

6. Credited Interest

40. UL policies guarantee a minimum rate to be credited to the account value. Companies typically credit interest rates greater than the guaranteed rates but that may not always be the case, often depending on the market for which the policy is designed. The crediting rates are typically determined by reducing the company's investment earnings rate by a spread that

[10] Black & Skipper, p.122.

would generally cover investment expenses plus appropriate margins. It is not uncommon to cover some noninvestment expenses in the spread as well as a profit element.

7. Cash Values

41. The account value (or policy or accumulation value) is simply the residual of each period's flow of funds. The cash surrender value is the account value minus the surrender charge. Surrender charges may be considered analogous to a penalty for early withdrawal of funds from a certificate of deposit.

E. Universal Life Nonguaranteed Elements

42. Essential to the effective design of a UL policy are the nonguaranteed charges and benefits and the relationships between those nonguaranteed elements. A nonguaranteed element is any element within a policy, other than dividends, which affects policyholder costs or value, and which may be changed at the discretion of the insurer after issue.[11] Examples of nonguaranteed charges or benefits include excess interest, insurance charges and various expense charges that are lower than those guaranteed in the policy.

43. Setting or determining the nonguaranteed elements by actuaries utilizes numerous factors including:

- Policy Class—A group of policies considered together for purposes of determining a nonguaranteed charge or benefit.

- Determination Policy—The insurer's criteria or objectives for determining nonguaranteed charges or benefits for a particular policy class.

- Anticipated Experience Factors—Assumptions that reflect anticipated experience and may be used to determine nonguaranteed charges or benefits. A particular anticipated experience factor reflects future experience of a specific type such as investment income, mortality, policy termination, and expense rates.

- Policy Factors—Premium, value, charge, or benefit limits that restrict a nonguaranteed charge or benefit. Policy factors are based on the guarantees defined

[11] *Actuarial Standard of Practice No. 1*, Actuarial Standards Board, March 2004.

in the policy such as minimum cash values, minimum interest rates, maximum mortality charges, maximum gross premiums, and maximum policy loan interest rates.

- Applicable Law—Federal, state, and local statutes, regulations, case law, and other legal authority that may restrict the determination of nonguaranteed elements.

44. These nonguaranteed elements work in concert to achieve the company's profit objectives and to facilitate the policyholder's objectives that are anticipated by the insurer. The effect of each nonguaranteed element is fungible relative to the other nonguaranteed elements. It is the combination of all of the nonguaranteed elements that determines the policy profitability and whether the policy will meet reasonable policyholder expectations.

45. While one of the original intentions of issuers of universal life may have been to make clear the exact costs of life insurance by showing and charging exactly the interest, mortality and expenses incurred, with appropriate margins for profits, few, if any, insurers separate costs in a UL policy in that manner. Not only are high early expenses now covered by a surrender charge, but also insurance charges, in addition to margins for items such as profits and adverse experience, frequently include expense or income tax, and interest rates credited may be reduced by expense costs other than investment expense.[12]

[12] Actuarial Aspects of Individual Life Insurance and Annuity Contracts, Albert E. Easton and Timothy F. Harris, Actex Publications, Winsted, CT, 1999, (Hereinafter Referred to as "Easton & Harris"), Chap. 1.

IV. Universal Life Policies in Putative Class

46. The class of policyholders as defined in the Plaintiff's Motion for Class Certification consists of the owners of twelve base policy forms issued in 33 states. Since Midland uses the same policy form in different ways, there are 21 different UL products written on the twelve base policy forms identified by the Plaintiff.[13]

47. Plaintiff claims that each of the base policy forms, the owners of which comprise the putative class, contain substantively identical provisions for the Cost of Insurance charge and further argues that since each of three other policy provisions, provisions that they selected, contained in each of the base policy forms is substantively identical, all of the base policy forms are materially identical; and that therefore imposition of Plaintiff's interpretation of the Policy would have the same effect on all members of the putative class. This argument ignores not only differences in the purposes for which the base policy forms were designed, but also, differences in how different insurance products using the same base policy form were designed, and how the guaranteed and nonguaranteed elements support those purposes. Those different design objectives are accomplished through a variety of methods such as 1) balancing the use of guaranteed vs. nonguaranteed elements, 2) shifting the investment element of the policy by providing indexed investments or a variable UL, 3) including certain policy benefits such as interest bonuses or Extended No Lapse Guarantees, 4) offering certain policy riders such as a Waiver of Surrender Charge Option, or the Premium Guarantee Rider, 5) changing the underwriting criteria used in selecting insurance risks, or 6) raising or lowering one nonguaranteed element and shifting the effect to a different nonguaranteed element. As a result, if the exact same individual were to apply for coverage under two or more insurance products included in the putative class, he or she would likely find that the Cost of Insurance Rates, as well as other Rates and Charges, used to calculate Policy Values would not be the same. The differences created by these design objectives mean that all policyholders would not be affected in the same way should Thao prevail on her claim. Some might find Thao's interpretation beneficial but others might find that the purposes for which they purchased their policy had become more difficult, if not impossible, to achieve.

[13] Declaration of Jeremy Bill, Exhibit A.

48. Twelve of the 21 insurance products are designed to focus on providing low-cost death benefit protection; seven products focus on providing long-term cash value accumulation, and two focus on providing short-term cash value accumulation. Five products are indexed UL and four are variable UL. Eight products provide extended no lapse guarantee protection through an optional Premium Guarantee Rider (PGR) and three products have extended no lapse guarantee protection included as a policy provision.[14]

49. In my opinion, because of the widely varying product designs and how those designs are implemented, Midland may use different tables of Cost of Insurance Rates for different UL products and the effect on the members of the putative class from applying the remedy proposed by the Plaintiff would be far from uniform and would likely impair the ability of some policyholders to meet their insurance objectives.

[14] Ibid., Exhibit A.

V. Thao Universal Life Policy

50. Policy Number 1502818925 was issued to Thao with a Policy Date of September 23, 2008.[15] The Schedule of Policy Benefits identifies Thao as a 26 year old female and the Specified Amount is $100,000. The Premium Class is Preferred Plus. Both the Planned Periodic Premium and the Initial No Lapse Guarantee Premium are $28.83 per month. Reserves and Minimum Cash Surrender Values are based on the 2001 CSO, Select & Ultimate Mortality Table for Female, Super Preferred lives, age nearest birthday.

51. This policy form with the Extended No Lapse Guarantee is designed specifically for individuals who wish to purchase death benefit protection with a premium rate that will not increase as they get older. If the Planned Periodic Premiums are paid when they are due for 74 years and there are no Policy Loans or Withdrawals or other changes to the policy, coverage will not expire until the Insured's Policy Age 121. Payment of the Planned Periodic Premium over the life of the contract is unlikely to develop any significant cash value and hence the calculation of the account value or Policy Fund is of little consequence.

52. A key provision of this policy is the Extended No Lapse Guarantee. The Extended No Lapse Guarantee provides a UL secondary guarantee using a dual shadow account design. The Extended No Lapse Guarantee provided by the shadow account is included on Thao's policy and allows a guaranteed death benefit to any age up to maturity (age 121). While the maturity age is 121, the product is designed so that all Policy Fund charges are guaranteed to terminate at age 100.

53. Thao's policy deemphasizes cash-value accumulation and is distinguished in the industry as a "protection-oriented" product as opposed to an "accumulation-oriented" product. Application of this provision requires the company to track two Premium Guarantee Accounts in order to determine whether the Extended No Lapse Guarantee is in effect. Calculation of the Premium Guarantee Accounts utilizes Account Premium Loads, Account

[15] Plaintiff's Motion for Class Certification, Exhibit 1.

Interest Rates, Required Premium Rates, and Account Expenses, which are specified in the Extended No Lapse Guarantee Schedule of Premium Guarantee Amounts.

A. Analysis of Questioned Policy Provisions

1. Use of Pricing Mortality Assumption

54. Plaintiff has claimed that Midland breached its contract with Thao by imposing charges that are not permitted under the express terms of her policy. Specifically, Plaintiff claims that Paragraph 7.7 of the contract was breached in that the mortality assumption used in pricing the policy was not also used as the current applicable Cost of Insurance Rates.

55. Previously I have explained that industry practice recognizes that these nonguaranteed charges and benefits are fungible and except as limited by the Table of Guaranteed Monthly Cost of Insurance Rates, Midland may include in the Cost of Insurance Rates not only margins for adverse mortality experience but also margins for expenses, adverse investment experience, and profits. Later in Section VI, I will explain that insurance regulators also recognize that Midland has that flexibility in setting Cost of Insurance Rates.

56. It is my opinion as a former insurance regulator and based on my years of experience in the life insurance industry, that Midland has the ability to set the current Cost of Insurance Rates at any level they choose except as limited by the Table of Guaranteed Monthly Cost of Insurance rates and this policy interpretation is consistent with general industry practice and is recognized by insurance regulators. At any given duration, Cost of Insurance Rates may be higher or lower than the mortality rates used to test policy pricing and there is certainly no reason to expect them to be equal.

2. Use of Five Elements

57. Plaintiff further claims that the five elements set forth in the last sentence of paragraph 7.7 of her policy are industry-standard factors that require the Cost of Insurance Rates to be precisely the mortality rates assumed when testing product pricing. There are, in fact, no such industry-standard factors and the use of these five elements does not imply the use of one set of mortality rates over another or any mortality rates at all. The Cost of Insurance Rates used by Midland are found in a five dimensional array (i.e. matrix) and those five elements provide the means of selecting the correct cell in that array.

58. In my opinion, an actuary presented with just the five elements found in paragraph 7.7 of Thao's policy (i.e. issue age, completed Policy Years, Sex, Specified Amount, and Premium Class), without additional information, would have no idea about the array to which the five elements should apply and would find it impossible to conclude that mortality rates used to test product pricing should be that array.

3. Cost of Insurance Rates are "based on". . .

59. Plaintiff interprets the sentence, "Cost of Insurance Rates are based on the Issue Age, completed Policy Years, Sex, Specified Amount, and Premium Class of the Insured," as meaning that there is only one way to calculate the Cost of Insurance Rate and it must be the company's assumption for mortality used for pricing.

60. Certainly "based on" does not mean that there is a unique calculation required. For example, K, 2xK, 3xK, K+1, K-3, 2xK+2, and K/2 are all "based on" K but result in seven different results. The five factors are used by Midland to identify the appropriate cell in a five-dimension matrix of the current Cost of Insurance Rates. Paragraph 7.7 also refers to the Table of Guaranteed Monthly Cost of Insurance Rates, which is a similar matrix to the current Cost of Insurance Rates, and four of those same five factors are used to identify the appropriate cell. Except for the fact that the Table of Guaranteed Monthly Cost of Insurance Rates does not vary by Specified Amount, this means that we have two different sets of rates that are based on the factors that Plaintiff claims produce a unique outcome.

61. In my opinion, based on my experience as an insurance regulator and my experience in the insurance industry for more than forty-five years, reading similar insurance provisions, the provision that "Cost of Insurance Rates are based on the Issue Age, completed Policy Years, Sex, Specified Amount, and Premium Class of the Insured," does not mean that there is only one way to calculate the Cost of Insurance Rate, nor does it mean that the Cost of Insurance Rate must be equal to Midland's pricing assumption. Paragraph 7.7 makes it clear that Midland may declare different Cost of Insurance Rates so long as they do not exceed the Guaranteed Monthly Cost of Insurance Rates.

4. Paragraph 7.8 Declared Rates and Charges

62. Paragraph 7.8 of Thao's policy specifies that "Changes in the Cost of Insurance Rates . . .will be based upon (emphasis added) changes in future expectations for such elements as investment earnings, mortality, persistency, and experience." It should be noted that future expectations of elements other than the four that are identified are not precluded.

63. In my opinion, Paragraph 7.8 makes it clear that Cost of Insurance Rates are not intended nor required to be the mortality rates used to test policy pricing. The Cost of Insurance Rates may be changed by Midland subsequent to policy pricing based on future expectations for a variety of elements.

5. Comparison of Cost of Insurance Rates and Account Premium Rates

64. Paragraph 7.7 specifies that Cost of Insurance Rates are "based on" the five characteristics identified above. Paragraph 5.6 specifies that Account Premium Rates are based on the same five characteristics and there are two sets of these rates found in Table A and Table B. If the Plaintiff's position that Paragraph 7.7 requires a unique result were valid, the same language would seem to require the same of Table A and Table B, but that is not so. This internal inconsistency demonstrates one of the fallacies in Plaintiff's position.

65. We are now up to four sets of rates that are "based on" the characteristics that Plaintiff claims produce a unique outcome, 1) Cost of Insurance Rates, 2) Guaranteed Monthly Cost of Insurance Rates, 3) Account Premium Rates Table A, and 4) Account Premium Rates Table B, and each of those four sets have different rates. Those characteristics do not produce a unique outcome, as plaintiffs contend.

66. In my opinion, it is clearly illogical to conclude that a policy provision stating that, "Cost of Insurance Rates are based on Issue Age, completed Policy Years, Sex, Specified Amount, and Premium Class of the Insured," results in any unique table of rates, and the language of Thao's policy bears this out.

6. Use of Pricing Mortality Assumptions

67. Plaintiff claims that the mortality assumption used by Midland in pricing the policy should be used as the Cost of Insurance Charge.[16]

68. In my experience, there is no reasonable basis to incorporate any of the assumptions or methods used in product pricing into a contractual right with regard to any of the nonguaranteed elements. Most insurance companies consider their internal pricing assumptions highly confidential for competitive reasons and do not disclose them outside the company.

69. As described previously, the Cost of Insurance Rates are generally expected by regulators and actuaries to include margins, positive or negative, for items such as adverse experience, profits, and expenses not provided for elsewhere.

70. It should be noted that while in the first year of Thao's policy, the Cost of Insurance Rate is greater than the pricing mortality assumption (as noted by the Plaintiff), in most, but not all, other durations, the Cost of Insurance Rate is less than the pricing mortality assumption.[17] Thus, based on this observation alone, there is no certainty that the Plaintiff's proposed remedy would provide any benefit to Thao.

71. In my opinion, utilization of the pricing mortality rates for the Cost of Insurance Rates is inappropriate, inconsistent with industry practice, and could, in fact, damage some members of the proposed class.

[16] Plaintiff's Motion for Class Certification, pp 8-9.

[17] Declaration of Jeremy Bills, Exhibit H.

VI. Regulatory Interpretation

72. In order to understand the reasons for the regulatory interpretation of the policy provision in question, the following is provided as background.

A. The Role of the State Insurance Regulator

73. The McCarran-Ferguson Act[18] explicitly provides for state regulation of the business of insurance. This act resolved a conflict over the role of the federal government in insurance regulation that was reflected in the contrasting decisions rendered in Paul v. Virginia[19] (which upheld states' authority to regulate insurance) and United States v. The South-Eastern Underwriters Association (which rejected states' authority to regulate insurance).[20]

74. Every U.S. insurance company is licensed and regulated by the state or territory in which it is located. The companies also are subject to regulation in other states in which they are licensed to sell insurance.[21] Primary regulatory responsibility rests with the state of domicile, but each state retains the right to protect its resident policyholders.[22]

75. Each state has an executive officer (e.g., a commissioner, superintendent, or director) that leads its regulatory insurance agency. (Hereinafter, this individual will be referred to as

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[18] The McCarran-Ferguson Act of 1945, Pub. L. No. 79-15.

[19] *Paul v. Virginia*, (1868) Wall. (U.S.) 168. The Supreme Court stated:

> Such contracts are not interstate transactions, though the parties may be domiciled in different states. . . .They are, then, local transactions, and governed by the local law. They do not constitute a part of the commerce between the states.

[20] *United States v. The South-Eastern Underwriters Association, et al.* 332 U.S. 533 at 533 (1944). The Supreme Court rejected the idea that insurance was not commerce and thus, the further notion that it was not properly the subject of federal regulation under the Commerce Clause of the U.S. Constitution.

[21] See, *e.g.*,Utah Code Annotated (hereinafter "Utah Code"), section 31A-1-104, Authorization to do Insurance Business.

[22] See Black & Skipper, Ch. 34.

"Commissioner"). State laws generally grant the Commissioner broad regulatory authority with respect to insurance company solvency and consumer protection.[23]

1. Solvency Regulation

76. State law and state regulators cannot prevent insurance company failures. But, they can reduce the risk of failures and they can act to protect policyholders, claimants, and creditors, as well as the residents of their states when insurance companies have financial difficulties. They accomplish this by requiring insurance companies to meet certain minimum standards and by monitoring insurance company financial performance. Regulators further protect policyholders, claimants, and creditors by identifying troubled insurance companies and interceding in their operations while they still possess sufficient resources to meet outstanding obligations.

2. Market Regulation to Protect Consumers

77. Market regulation involves a wide variety of concerns and is approached somewhat differently by the various states but all states conduct periodic examinations of insurers' market conduct and apply some degree of regulatory control over policy forms to ensure that they are in compliance with the law. Many states require that policy forms be submitted for review and approval before the insurance company markets the form. Other states provide greater latitude to insurance companies and require only that the policy be filed prior to use.[24]

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[23] Examples of this authority are found in the Utah Code, which is representative of most other jurisdictions:
Section 31A-2-102 (1) - The chief officer of the department is the insurance commissioner, who may exercise all powers given to, and shall perform all duties imposed on, the Insurance Department.
Section 31A-2-201 (2) General duties and powers - (1) The commissioner shall administer and enforce this title. The commissioner has all powers specifically granted, and all further powers that are reasonable and necessary to enable him to perform the duties imposed by this title . . .

[24] The Utah Code requires that policies be filed, but not approved, prior to use. The insurance company is responsible for ensuring that the form is in compliance with all requirements. The commissioner may disapprove the form at any time. See Utah Code section 31A-21-201.

78. Premium rates are subject to stringent control for some lines of insurance, such as automobile and homeowners' coverage, but not for other lines, such as commercial property/casualty lines and life insurance. Market competition is relied on to control potentially abusive premium rates for life insurance.[25] It is worth noting that this market competition works remarkably well and provides an environment where consumers are willing to enter into long-term contracts with insurance companies where those contracts, such as UL, allow the insurer to change nonguaranteed elements as they see fit so long as they do not inappropriately discriminate against some class of policyholders.

79. Controls have been adopted generally on the various materials used in the sales process to help avoid possible misrepresentation or misunderstanding of the products being sold. Sales and underwriting activities of insurance companies and their agents are regulated. The objective of these controls is to prevent abusive sales practices.

80. Those who sell insurance must be licensed.[26] To obtain a license, it is necessary that the agent or broker be trustworthy and pass an examination that tests the potential licensee's knowledge of general insurance principles; the line or lines of insurance for which the person is applying for a license; and the insurance laws of the subject jurisdiction.

3. The Policy Form Approval Process

81. Insurance regulators are given responsibility to maintain a reasonable and orderly insurance market and to protect the solvency of insurance companies. These dual missions inform the process of approving or rejecting a proposed new life insurance policy form.

82. First, the regulator must ask whether the policy conforms to all existing statutory and regulatory law. State laws, and the regulators who enforce those laws, try to ensure that policy provisions are reasonable and fair, and do not contain limits on coverage that are likely to be misunderstood by consumers

[25] See Black & Skipper, Ch. 34 (Life insurance premium rates are not directly regulated.).

[26] See *e.g.*, Utah Code section 31A-23, Insurance Marketing - Licensing Agents, Brokers, Consultants, and Reinsurance Intermediaries.

83. Second, the regulator must inquire whether the policy is designed to meet the promises and representations made to the purchaser and whether it can do so without endangering the economic stability of the insurance company. The regulator will pay particular attention to reserve formulas and nonforfeiture values and that representations regarding non-guaranteed benefits are not misleading.

84. Generally, an insurance company will be required to include an actuarial memorandum with each policy form filed. The actuarial memorandum is required to contain descriptions of the principal characteristics of the policy, and of the reserves and nonforfeiture benefit calculations. The company also will have to show that it is likely to be able to pay any illustrated nonguaranteed benefits. In the case of Midland's UL policy forms, regulators would consider whether the nonguaranteed charges, such as the Cost of Insurance Charge, meet regulatory requirements and can reasonably be supported by the insurance company's estimated future experience.

85. Third, a regulator may inquire as to whether a policy appropriately addresses the needs of the market for which it is designed.

B. The National Association of Insurance Commissioners

86. The NAIC, created in 1871, includes insurance regulators from the 50 states, the District of Columbia, and four U.S. territories. Both membership and participation are optional for each state, but all states, the District of Columbia, and four territories have elected to be members. The NAIC provides a wide spectrum of member services involving marketing, information systems, research libraries, continuing education, and professional publications. Through the NAIC, the state Commissioners develop model laws and financial reporting standards that it recommends to each state for adoption. The NAIC also provides a national forum for resolving insurance issues and developing coherent national policies that may be adopted by each state.

1. Model Laws

87. Insurance regulation on a state-by-state basis addresses the diversity of needs of the various states and provides the opportunity to experiment with innovative regulatory requirements.

At the same time, it underscores the fact that some degree of uniformity throughout the states may be desirable.

88. The model laws and regulations that the NAIC adopts have no legal effect unless and until they are adopted by a particular state. The states are under no obligation to adopt any model. In adopting a model, a state may make changes it deems appropriate.

89. Each company must comply with the laws of its state of domicile. In addition, when an insurance contract is entered into in a foreign state, the laws of that state will apply to protect the residents of that foreign state.[27]

2. Financial Analysis and Solvency Surveillance

90. In its simplest terms, insurance is a promise to pay if the insured incurs a specific loss or if a specific event occurs. The key to fulfillment of that promise is the insurance company's financial condition. The primary goal of insurance regulators is to provide consumer protection through solvency surveillance and regulation. The NAIC provides database services as important tools to aid state regulators in this effort.

91. Virtually all active U.S. insurance companies file their annual and quarterly financial statements electronically with the NAIC. That collection of financial data serves as the nucleus of the NAIC's financial surveillance function, aiding insurance regulators in identifying financially troubled insurance companies and protecting policyholders from loss. In my position as chair of the Financial Condition (EX4) subcommittee I had oversight responsibility over the entire NAIC effort for solvency surveillance.

C. Regulatory View of Claim of Breach of Contract

1. Universal Life Insurance Model Regulation

92. This model regulation was developed in the 1980s in order to supplement existing regulations in order to accommodate the development and issuance of UL insurance plans and to address issues relating to reserve valuation, nonforfeiture values, and disclosure.[28]

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[27] Black & Skipper, Ch. 35.

[28] *Universal Life Insurance Model Regulation*, National Association of Insurance Commissioners, 2001.

93. In my opinion as a former insurance regulator, there is nothing in the Universal Life Insurance Model Regulation that would require Midland to interpret the policy consistent with the Plaintiff's claim.

2. Life Insurance Illustrations Model Regulation

94. When the Life Insurance Illustrations Model Regulation was under development in 1995, the record shows that "a regulator suggested including a requirement that each element of the calculation be supportable; for example mortality charges related to mortality experience, credited interest rates supported by interest earned. Other members of the group agreed this was the ideal way to perform the calculations but decided to leave the draft as it was and revise later if the regulation proved ineffective."[29] It should be noted that this suggestion would not have required insurers to eliminate margins. I was present at the time of the referenced exchange and was Chair of the Working Group developing the regulation. The suggestion came from a regulator who was less familiar with industry practice. Most of those present, both regulators and industry representatives, were well aware that the suggestion would have been disruptive to the process of producing meaningful life insurance illustrations. Even so, this suggestion would not have meant that pricing mortality would have been the appropriate cost of insurance charge, only that margins in the cost of insurance charge would not be used to support deficiencies in other margins when deriving the Disciplined Current Scale used in producing illustrations.

95. In my opinion, based on my experience as a former insurance regulator, regulators would not require illustrations to be prepared in accordance with the Plaintiff's interpretation of the Thao policy nor would they require Cost of Insurance Charges to exclude margins or be equal to the pricing mortality assumption.

3. Regulator's Concerns about Plaintiff's Claim

96. Midland's policy interpretation of Thao's policy language is consistent with general industry practice. Consistent with that interpretation, insurance regulators across the country have reviewed and approved UL policy forms, illustrations and other marketing materials used by Midland and many other insurance companies. Policyholder expectations regarding UL

[29] Proceedings of the NAIC, 1995 2nd Quarter, p. 538.

policies have developed, also consistent with that understanding. It is unclear what disruption could occur in the insurance marketplace should the Plaintiff prevail in this case but the effect could be significant. If the Plaintiff were to prevail against Midland, similar actions against other insurance companies could also be material to those companies.

97. In my opinion, as a former insurance regulator, insurance regulators would be concerned about the potential disruption of policyholders' expectations with regard to their policies purchased by Midland. Further, insurance regulators would also be concerned about the broader impact on other companies that write UL and their policyholders.

VII. Intent of Thao

98. When asked what she remembers about purchasing her policy from Midland, Thao stated:

> "The only thing I told Pa, that I wanted a life insurance that guarantees me the face amount of value, a fixed premium that never goes up and that it goes, you know, until the day I die. I didn't want to gamble or anything. So I just wanted that and she just sold me the Midland life insurance policy that you have there."[30]
>
> When Thao was asked, "At the time—at the time you purchased your policy, was it your plan to keep the policy in force until you die, whenever that might be?
>
> Answer: Yes."[31]
>
> When Thao was asked, "And is it correct that in purchasing your policy, it was not important to you whether it had cash value?
>
> Answer: That's correct."[32]

99. The key policy provisions related to Thao's insurance objectives are Paragraph 4.3, Initial No Lapse Guarantee Period, and Section 5: Extended No Lapse Guarantee. These provisions enable Thao to achieve her objectives by paying the Planned Periodic Premium, just as she planned to do. The Planned Periodic Premium of $28.83 per month which would assure that Thao would receive the benefit of the Initial No Lapse Guarantee and the Extended No Lapse Guarantee, as she indicated was her goal, are not related in any way to the Cost of Insurance Charge. It is clear, based on Thao's intent in purchasing her policy and plans for the policy in the future, that a change in the Cost of Insurance Charge would not make a difference in her achieving her goals regarding the policy. Thao has experienced no out-of-pocket cost associated with the Cost of Insurance Charge and a different Cost of Insurance Charge would have no effect. Further, the pricing mortality assumption is not mentioned or referred to in her policy and can have no affect on either no lapse guarantee.

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[30] Deposition of Mai Nhia Thao, Page 28: 2-8.

[31] Ibid. Page 35:22-25.

[32] Ibid. Page 37:2-4.

100. Whatever happens with regard to the Cost of Insurance Charge described in Paragraph 7.7 will not affect her goal of a guaranteed death benefit for a fixed premium.

101. In my opinion, Thao has not demonstrated that she has suffered any loss related to the Cost of Insurance Charge and, based on her stated intent for the future, she will not suffer any loss in the future related to the Cost of Insurance Charge.

VIII. Summary

102. With regard to this matter I have reached the following opinions based on my experience as an insurance regulator and more than forty-five years experience in the insurance industry:

- In my opinion, because of the widely varying product designs and how those designs are implemented, Midland may use different tables of Cost of Insurance Rates for different UL products and the effect on the members of the putative class from applying the remedy proposed by the Plaintiff would be far from uniform and would likely impair the ability of some policyholders to meet their insurance objectives.
- It is my opinion as a former insurance regulator and based on my years of experience in the life insurance industry, that Midland has the ability to set the current Cost of Insurance Rates at any level they choose except as limited by the Table of Guaranteed Monthly Cost of Insurance rates and this policy interpretation is consistent with general industry practice and is recognized by insurance regulators. At any given duration, Cost of Insurance Rates may be higher or lower than the mortality rates used to test policy pricing and there is certainly no reason to expect them to be equal.
- In my opinion, an actuary presented with just the five elements found in paragraph 7.7 of Thao's policy (i.e. issue age, completed Policy Years, Sex, Specified Amount, and Premium Class), without additional information, would have no idea about the array to which the five elements should apply and would find it impossible to conclude that mortality rates used to test product pricing should be that array.
- In my opinion, based on my experience as an insurance regulator and my experience in the insurance industry for more than forty-five years, reading similar insurance provisions, the provision that "Cost of Insurance Rates are based on the Issue Age, completed Policy Years, Sex, Specified Amount, and Premium Class of the Insured," does not mean that there is only one way to calculate the Cost of Insurance Rate, nor does it mean that the Cost of Insurance Rate must be equal to Midland's pricing assumption. Paragraph 7.7 makes it clear that Midland may declare different Cost of Insurance Rates so long as they do not exceed the Guaranteed Monthly Cost of Insurance Rates.

- In my opinion, Paragraph 7.8 makes it clear that Cost of Insurance Rates are not intended nor required to be the mortality rates used to test policy pricing. The Cost of Insurance Rates may be changed by Midland subsequent to policy pricing based on future expectations for a variety of elements.
- In my opinion, it is clearly illogical to conclude that a policy provision stating that, "Cost of Insurance Rates are based on Issue Age, completed Policy Years, Sex, Specified Amount, and Premium Class of the Insured," results in any unique table of rates, and the language of Thao's policy bears this out.
- In my opinion, utilization of the pricing mortality rates for the Cost of Insurance Rates is inappropriate, inconsistent with industry practice, and could, in fact, damage some members of the proposed class.
- In my opinion as a former insurance regulator, there is nothing in the Universal Life Insurance Model Regulation that would require Midland to interpret the policy consistent with the Plaintiff's claim.
- In my opinion, based on my experience as a former insurance regulator, regulators would not require illustrations to be prepared in accordance with the Plaintiff's interpretation of the Thao policy nor would they require Cost of Insurance Charges to exclude margins or be equal to the pricing mortality assumption.
- In my opinion, as a former insurance regulator, insurance regulators would be concerned about the potential disruption of policyholders' expectations with regard to their policies purchased by Midland. Further, insurance regulators would also be concerned about the broader impact on other companies that write UL and their policyholders.
- In my opinion, Thao has not demonstrated that she has suffered any loss related to the Cost of Insurance Charge and, based on her stated intent for the future, she will not suffer any loss in the future related to the Cost of Insurance Charge.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed at Alpine, Utah.

Dated: February 11, 2011 By: s/Robert E. Wilcox

Robert E. Wilcox, ASA, MAAA, FCA

Exhibit 1

ROBERT E. WILCOX

R.E. Wilcox & Company
1876 North Fort Canyon Rd.
Alpine, Utah 84004

Tel. (801) 492-1419
Cellular (801) 362-4363
Email:
robertewilcox@mac.com

EDUCATION AND PROFESSIONAL DESIGNATIONS

B.S., Mathematics, BRIGHAM YOUNG UNIVERSITY, 1963

Associate, SOCIETY OF ACTUARIES, 1966

Member, AMERICAN ACADEMY OF ACTUARIES, 1971

Fellow, CONFERENCE OF CONSULTING ACTUARIES, 1984

Independent Assessor, INSURANCE MARKETPLACE STANDARDS ASSOCIATION, 1997-2007

PRESENT POSITIONS

R.E. WILCOX & COMPANY, Alpine, Utah
Consulting Actuary, 1999 – Present

- Provides consulting and litigation support services to a variety of clients within and related to the insurance industry.
- Serves as expert witness testifying at trial or by deposition on numerous occasions.
- Provides analysis of reinsurance contracts and transactions.
- Assists companies with compliance and control issues.

AAA Northern California, Nevada and Utah, San Francisco, California
Director, 2003 – Present

- Audit Committee, Vice Chair.
- Finance & Investment Committee, Member

AAA CLUB AFFILIATES, INC., San Francisco, California
Director, 2004 – 2008

- HR/Governance Committee, Member.

PROFESSIONAL EXPERIENCE

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU, San Francisco, California
Director, 2003 – 2010

* Audit Committee, Vice Chair.
* Finance & Investment Committee, Member

DELOITTE & TOUCHE LLP, New York City, NY
National Director of Insurance Regulatory Consulting, 1997 − 1999

* As part of the firm's regulatory consulting practice for financial services, led and coordinated the senior regulatory consulting professionals who served the insurance industry.
* Directed the firm's participation and support of the Insurance Marketplace Standards Association.
* Member of the Office of the Chief Actuary.
* Was extensively involved in demutualization and mutual holding company reorganizations.

UTAH INSURANCE DEPARTMENT, Salt Lake City, Utah
Insurance Commissioner, 1993 − 1996

Insurance Department Operations

Managed a staff of 60 employees regulating all phases of insurance.

Receivership Office

Directed the seizure of insolvent companies and the operation of estates in liquidation.

National Association of Insurance Commissioners

Performed major roles in dealing with significant national issues in the regulation of insurance. Served for three years as Chair of the Financial Condition (EX4) Subcommittee as well as chair of more than ten other committees and as a member of many more. Some of the efforts which Mr. Wilcox led:

* Sales illustration of life insurance products,
* Solvency regulation of health insurers,
* Codification of statutory accounting,
* Genetic testing in underwriting,
* Restructuring of P&C companies with difficult liabilities, and
* Re-engineering of the NAIC financial information database.

MILLIMAN & ROBERTSON, Salt Lake City, Utah
Consulting Actuary and Manager of Salt Lake City Office, 1991 − 1993

* Moved the actuarial practice of Wilcox & Company to M&R and continued the development of that practice.

WILCOX & COMPANY, Salt Lake City, Utah
Consulting Actuary and Owner, 1973 − 1991

* Built and led a staff of consulting actuaries in becoming the premier actuarial firm in the Intermountain West.
* Clients included insurance companies, employee benefit plans, and governmental agencies as well as litigation support covering a wide range of issues.

MILLIMAN & ROBERTSON, Salt Lake City, Utah
Consulting Actuary, 1971 − 1973

AMERICAN WESTERN LIFE INSURANCE COMPANY, Salt Lake City, Utah
Vice President and Actuary, 1969 − 1971

MILLIMAN & ROBERTSON, Salt Lake City, Utah
Consulting Actuary, 1967 − 1969

PACIFIC MUTUAL LIFE INSURANCE COMPANY, Los Angeles, California
Actuarial Student, 1963 − 1967

RELATED PROFESSIONAL EXPERIENCE

American Academy of Actuaries
With more than 15,000 members, the American of Actuaries represents U.S. actuaries from all practice areas as the profession's voice on public policy and professionalism issues.

President, 2004 – 2005
Vice President, Life Practice Council, 1997 – 1999
Board of Directors, 1994 − 1999, 2003 − 2007
Health Practice Council, 1994 – 2000
Financial Reporting Council, 1997 − 2004
Task Force on Health Risk Based Capital, 1994 − 1997
Life Practice Council, 1994 – 2002, 2006 – 2008
Task Force on Solvency Issues, 1996 – 1997
Task Force on Valuation, 1997 –2001, Chair, 1997 – 1999

Conference of Consulting Actuaries
The Conference of Consulting Actuaries serves the professional needs of consulting actuaries and promotes its members' views within the profession.

Board of Directors, 1997 – 2000
Vice President, Life, 1998 – 2000
Proceedings Committee, 1987 – 2001

Actuarial Standards Board

The actuarial Standards Board promulgates actuarial standards of practice for use by actuaries when providing professional services in the United States.

Member, 2000 – 2003

International Actuarial Association

The International Actuarial Association, with more than 75 member associations from around the world, promotes high standards of professional practice and represents the profession with international bodies.

Insurance Regulation Committee, 1998 – 2005
(SOA and CCA Representative)

State of Utah

Utah Defined Contribution Risk Adjuster Board, 2009 – 2010

Workers Compensation Advisory Council, 1993 – 1996

Utah Health Care Policy Option Commission, 1993

Commission on Recodification of Utah Insurance Laws, 1983 – 1986
This commission (appointed by the Governor) completely rewrote the Utah Insurance Code and managed its passage by the Utah Legislature.

Other Organizations

Presenter of papers and frequent speaker to organizations such as Society of Actuaries, American Bar Association, Conference of Consulting Actuaries, National Council on Compensation Insurance, American Council of Life Insurance, Conference of Insurance Legislators, Insurance Accounting and Systems Association, National Association of Independent Insurers, and Society of Financial Examiners.

January 2011

Exhibit 2

DISCLOSURE STATEMENT

Publications

During the ten-year period ending as of the date of this statement, I have authored the following:

Insurance Regulatory Issues, published as part of the proceedings of the 1996 American Bar Association annual meeting.

In connection with various meetings of the Society of Actuaries, Conference of Consulting Actuaries, and Casualty Actuarial Society at which I have spoken, those organizations have published various transcripts.

"Avoiding Legal Windmills: U.S. Actuaries and the Public Interest", published in *Contingencies*, American Academy of Actuaries.

"Regulators and Insureds Also Have a Stake in Mergers and Acquisitions," published in *The Actuary*, Society of Actuaries, May 2003.

Robert E. Wilcox — Recent Testimony History

Date	Type	Case	Role	Forum	Plaintiff Counsel	Defense. Counsel
1/19/2007	Hearing	The Proposed Acquisition of Royal Indemnity Company, et al.	Expert Witness for policyholder, WTC Properties	Insurance Department of the State of Delaware	Wachtel, Lipton, Rosen & Katz	
3/13/2007	Deposition	Bendzak v. Midland National Insurance Company	Expert Witness for Defense	United States District Court for the Southern District of Iowa, Central Division	Hagens Berman Sobol Shapiro	Reed Smith
4/6/2007	Deposition	Migliacio v. Midland National Insurance Company	Expert Witness for Defense	United States District Court for the Central District of California, Western Division	Bonnett, Fairbourn, Friedman & Balint	Reed Smith
7/10/2007	Deposition	Suter v. PricewaterhouseCoopers, et al.	Expert Witness for Defense	Superior Court of New Jersey, Law Division: Mercer County	Mazie Slater Katz & Freeman, LLC	Orrick, Herrington & Sutcliffe LLP
2/8/2008	Deposition	MetLife Demutualization Litigation	Expert Witness for Plaintiff	Unites States District Court, Eastern District of New York	Stamell & Schager, LLP	Debevoise & Plimpton LLP
5/13/2008	Deposition	Avritt, et al. v. Reliastar Life Insurance Company	Expert Witness for Plaintiff	United States District Court, District of Minnesota	Sulloway & Hollis, PLLC	Stites & Harrison, PLLC
9/5/2008	Deposition	Woffinden v. Health Markets et al.	Expert Witness for Defense	Superior Court of the State of California for the County of Los Angeles	Stuart Law Firm	Brown & White LLP
12/18/2008 2/24/2009 & 3/2/2009	Deposition Trial	Cumbre v. State Compensation Insurance Fund	Expert Witness for Defense	Superior Court of the State of California for the County of San Bernardino	Nossaman, Guthner, Knox & Elliott, LLP	Sheppard, Mullin, Richter & Hampton, LLP
10/15/2009	Deposition	Peterman v. North American Company for Life and Health Insurance	Expert Witness for Defense	Superior Court of the State of California for the County of Los Angeles	Gianelli & Morris	Reed Smith, LLP

Date	Type	Case	Role	Forum	Plaintiff Counsel	Defense. Counsel
11/24/2009	Deposition	Public Service Company of Colorado, et al. v. Provident Life & Accident Insurance Company	Expert Witness for Plaintiff	District Court Boulder County Colorado	Faegre & Benson	Jorden Burt
10/23/2009 12/8/2009	Deposition Trial	Mass Mutual v. United States	Expert Witness for Defense	United States Court of Federal Claims	Skadden, Arps	Department of Justice
5/20/2010	Deposition	Bleazard et al. v. Regence Bluecross Blueshield of Utah	Expert Witness for Defense	Third Judicial District Court Salt Lake Count, Utah	Brian S. King Attorney at Law	Jones Waldo Holbrook & McDonough
8/6/2010	Deposition	Stevens v. Hartford Life & Annuity Insurance Company, et al.	Expert Witness for Defense	Superior Court of California for the County of San Diego	Crandall, Wade & Lowe	Morrison & Foerster LLP
8/10/2010	Deposition	VLI, Inc. et al. v. Hartford Life Insurance Company et al.	Expert Witness for Defense	Superior Court of Gwinnett County Georgia	Robert R. Elarbee, Esq.	Morrison & Foerster LLP
10/13/2010	Deposition	Doble v. Mega Life and Health Insurance Company	Expert Witness for Defense	United States District Court Northern District of California San Francisco Division	Kerr & Wagstaffe, LLP	Sheppard, Mullin, Richter & Hampton LLP

Exhibit 3

Facts and Data Considered In Forming Opinions

1. Class Action Complaint
2. Plaintiff''s Motion for Class Certification with Exhibits 1 through 24.
3. Defendant's Answer and Affirmative Defenses to Plaintiff's Class Action Complaint
4. Transcript of Deposition of Mai Nhia Thao
5. CUL-G Product Memo including Attachments I through V (MNTHAO-0186257).
6. CUL-G Base Mortality Table 02vbtnb.xls (MNTHAO-0186398).
7. CUL-G Issue Age and Duration Factors – 07iadur.xls (MNTHAO-0186399).
8. CUL-G Smoking Factor – 07clas2.xls (MNTHAO-0186400).
9. CUL-G Underwriting Class Factors Band 1 – uw_ntc21.xls (MNTHAO-0186401).
10. CUL-G Underwriting Class Factors Bands 2 & 3 – uw_mts2/xls (MNTHAO-0186402).
11. IUL2 Product Memo with Attachments (MNTHAO-0186269).
12. IUL2.2 Product Memo with Attachments (MNTHAO-0186270).
13. IUL2.3 Product Memo with Attachment 1 (MNTHAO-0186271).
14. VUL-DB Product Memo with Attachments (MNTHAO-0186281).
15. Declaration of Jeremy Bill with Attachments
16. Other Documents as Referenced in Footnotes