

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

SHAWN V. MILLS, for himself
and all others similarly situated,

Plaintiffs,

vs.

No. CV 2003-01471

ZURICH LIFE INSURANCE
COMPANY OF AMERICA,

Defendant.

**AMENDED
CLASS ACTION COMPLAINT FOR BREACH OF CONTRACT,
UNJUST ENRICHMENT, BREACH OF COMMON LAW DUTIES,
BREACH OF THE IMPLIED COVENANT OF
GOOD FAITH AND FAIR DEALING AND
UNFAIR PRACTICE ACT VIOLATION**

COMES NOW Plaintiff, by his undersigned attorneys, and states:

GENERAL ALLEGATIONS

1. Plaintiff Shawn V. Mills ("Mills") is a resident of Bernalillo County, New Mexico and brings this case for himself and on behalf of all others similarly situated.
2. Defendant Zurich Life Insurance Company of America ("Zurich Life") is an insurance company incorporated under the laws of Illinois.
3. Zurich Life's principal place of business is located in Long Grove, Illinois.
4. Zurich Life is authorized to, and does, transact an insurance business in New Mexico and the remaining forty-nine (49) United States, the District of Columbia and Puerto Rico (collectively "the Covered Territories").
5. On or about April 1, 2001, Zurich Life issued to Mills, its Life Insurance Policy No. ZL9542658 in the face amount of \$250,000.00 ("the Mills Policy").

6. A true and complete copy of the Mills Policy is attached hereto as Exhibit A and incorporated herein by reference.

7. The Mills Policy is of a type commonly referred to in the insurance industry as term insurance, having no cash value.

8. The Mills Policy remains in effect.

9. The Mills Policy's General Section contains the following provision (the "Entire Contract Clause"):

CONTRACT This policy, with any proper changes, is the entire contract between you and us. Only our President, vice-president, secretary, or assistant secretary can change, modify, or waive any provisions of this policy.

This policy includes: 1. the Policy Specifications, 2. the attached application, and 3. any supplemental applications, riders, amendments or endorsements made a part of this policy.

10. The Policy Specifications of the Mills Policy include a table titled: "Guaranteed Maximum Annual Premiums after the First Policy Year." That table includes a column titled: "Total Annual Premiums" for each policy year beginning with the second policy year and continuing with each policy year through the insured's age of 94. The dollar amount inserted in the "Total Annual Premium" column is the premium amount charged when the insured pays the premium for one (1) year in advance.

11. The Mills Policy contains a CHANGE OF PREMIUM SECTION which includes the following provision:

We can never raise premiums above the respective
'Guaranteed Maximum Premiums After First Policy Year.'

12. Plaintiff Mills has been paying for the Mills Policy in monthly premiums and has been charged \$20.66 per month, which total \$247.92 on an annual basis.

13. The annual premiums of \$247.92 being charged Plaintiff Mills for the Mills Policy exceed the Total Annual Premium of \$237.50 set forth in the "Guaranteed Maximum Premiums after First Policy Year" table of the Policy Specifications of the Mills Policy.

14. The dollar difference being charged Plaintiff Mills on an annual basis, in excess of that permitted under the Mills Policy, is \$10.42.

15. The ratio of the monthly premiums being charged to Plaintiff Mills as compared to the "Total Annual Premium" specified by the Mills Policy is .087 (herein "the modal factor"), which represents an additional annual cost, expressed as an annual percentage rate, of approximately 9.5% per annum.

16. The modal factor used by Defendant to determine the dollar amount of quarterly premiums under the Mills Policy is .30, which represents an additional annual cost, expressed as an annual percentage rate, of approximately 54.8% per annum.

17. The modal factor used by Defendant to determine the dollar amount of semi-annual premiums under the Mills Policy is .52, which represents an additional annual cost, expressed as an annual percentage rate, of approximately 16.67% per annum.

18. The Mills Policy does not disclose the annual percentage rate associated with paying premiums monthly, quarterly, or semi-annually rather than yearly in advance.

19. The Mills Policy does not disclose the annual percentage rates applicable to the several available premium payment modes or options which Plaintiff Mills could have selected.

20. The Mills Policy includes a "Frequency" clause under its PREMIUM PAYMENT SECTION which gives the insured the valuable contract right and benefit of changing premium payment modes after the issuance of the Mills Policy.

21. The annual percentage rate implicit in and associated with paying premiums in installments, rather than annually, is material information which a reasonable insured might initially consider in deciding how to pay for his or her insurance policy.

22. The annual percentage rate implicit in and associated with paying premiums in installments, rather than annually, is material information which a reasonable insured might consider in deciding whether to change premium payment modes after issuance of the policy.

23. Mills relied on Zurich Life's material failure and omission to disclose the annual percentage rate implicit in the monthly premium payment he chose and the quarterly and semi-annual premium payments he could have chosen.

24. Reliance should be presumed or inferred in favor of Mills, as well as other policyholders of Zurich Life who selected installment premium payments, based on Zurich Life's failure or omission to disclose material information, including the annual percentage rates implicit in and associated with such installment premium payments.

25. During the six (6) year period immediately preceding the filing of this Complaint, Defendant has issued thousands of individual life insurance policies to individual insureds throughout the Covered Territories (collectively, the "Other Policies", which term includes the policy, insurance application, policy specification and endorsements, defined to be a part of such policies under the Entire Contract Provisions thereof).

26. The Other Policies include an Entire Contract Clause which is identical, or substantially similar, to that set forth in the Mills Policy and which is described in Paragraph 9 above.

27. The Policy Specifications of the Other Policies include a table titled "Guaranteed Maximum Premiums after First Policy Year", which includes a "Total Annual Premium" column reflecting the dollar amount of the premium payable annually or yearly in advance.

28. The Other Policies contain language identical or substantially similar to the following language in the Mills Policy:

We can never raise premiums above the respective
'Guaranteed Maximum Premiums After First Policy Year.'

29. The Other Policies include a provision giving the insured a right or option to change premium payment modes after policy issuance.

30. None of the Other Policies disclose the additional cost of paying premiums monthly, quarterly, or semi-annually, rather than annually in advance, in terms of an annual interest rate or annual percentage rate.

31. None of the Other Policies, excepting only those issued by the Defendant in the State of Pennsylvania, state the modal factors associated with the calculation of

monthly, quarterly, or semi-annual premium payment modes. Policies issued by Defendant for use in Pennsylvania do not explain or otherwise tell a policyholder what use to make of such modal factors.

32. Defendant drafted the Mills Policy and the Other Policies, which are then presented to its insureds as standardized and uniform printed contracts.

COUNT I
BREACH OF CONTRACT

33. Mills realleges and incorporates by reference Paragraphs 1 through 32, inclusive, of the General Allegations as part of this Count I.

34. Defendant Zurich Life had a contractual duty to Mills and its other policyholders not to charge them premiums in excess of the Total Annual Premiums shown in the Guaranteed Maximum Premium table of those policies.

35. Defendant Zurich Life breached its contractual duty under the Mills Policy and the Other Policies by charging those of its policyholders who have paid premiums more frequently than annually, (including those who have paid premiums monthly, quarterly and semi-annually) more than the Total Annual Premium stated in the Guaranteed Maximum Premium table of those policies.

36. In reliance on the policy, Mills and Zurich Life's other policyholders who have paid premiums in installments, have paid premiums in excess of what they were legally required to pay under the belief they were required to do so, such as to be entitled to restitution as to such excess.

37. Mills and the other policyholders of Zurich Life who paid their premiums in installments, rather than annually, are entitled to restitution of the excess they paid over the Total Annual Premium by reason of their part performance.

38. As a result of Defendant Zurich Life's breach of the policy, Mills and its other policyholders have been damaged in the sum equal to the additional amounts charged by said Defendant in excess of the Total Annual Premium amounts stated in the Guaranteed Maximum Premium tables of the policies.

39. Mills and Defendant Zurich Life's other policyholders who have paid their premiums more frequently than annually (including those who have paid premiums monthly, quarterly and semi-annually) are entitled to recover prejudgment interest on the damages they have sustained due to Defendant's breach of contract.

COUNT II
UNJUST ENRICHMENT

40. Mills realleges and incorporates by reference Paragraphs 1 through 39, inclusive, above as part of this Count II.

41. Defendant Zurich Life, by knowingly charging Mills, and its other policyholders who have paid premiums more frequently than annually, additional premiums without disclosure of material information, has wrongfully obtained a benefit in a manner such that allowing said Defendant to retain the benefit would be unjust.

42. Mills relied on Zurich Life's material omission in failing to disclose the annual percentage rates implicit in and associated with the monthly premium payment he chose and the quarterly and semi-annual premiums he could have chosen.

43. Reliance should be presumed or inferred in favor of Mills and Zurich Life's other policyholders who paid premiums in installments, rather than annually, based on Zurich Life's failure to disclose material information, including its failure to disclose the annual percentage rates implicit in and associated with such installment premium payments.

44. Mills, and the other Zurich Life policyholders who paid premiums in installments, rather than annually, paid such premiums in excess of the Total Annual Premium specified by the policy in the belief that they were required to in reliance on the policy, such as to be entitled to restitution of such excess amounts.

45. Mills, and the other Zurich Life policyholders who paid their premiums in installments, rather than annually, are entitled to restitution of the amounts they paid in excess of the Total Annual Premiums specified in their policy due to their partial performance under the policy.

46. In addition to restitution of premium payments in excess of the Total Annual Premiums specified by their policies, Mills and Zurich Life's other policyholders who have paid premiums in installments, rather than annually, are entitled to recover prejudgment interest on such excess payments.

COUNT III
BREACH OF COMMON LAW
DUTY TO DISCLOSE MATERIAL FACTS

47. Mills realleges and incorporates by reference Paragraphs 1 through 32, inclusive, of the General Allegations as part of this Count III.

48. At all times material hereto, including prior to issuance of its policies and during its marketing of those policies, Defendant Zurich Life had a common law duty to disclose material facts to Mills and its other policyholders, including facts relating to the true cost of the insurance as affected by its frequency or mode of payment.

49. Defendant Zurich Life is, and at all material times was, a member of the Insurance Marketing Standards Association, ("IMSA").

50. As a condition of its membership in IMSA, Defendant Zurich Life agreed to conduct itself, during its pre-contract sales and marketing activities, in accordance with IMSA's "Principles and Codes of Ethical Market Conduct with Commentary" (the "IMSA Principles")

51. Among the IMSA Principles to which Defendant Zurich Life purports to ascribe is Code A under Principle 4 stating in pertinent part that: "All . . . sales or solicitation communications should be based upon the principles of fair dealing and good faith, and will have a sound basis in fact."

52. Defendant Zurich Life, by reason of its voluntary assumption of the IMSA Principles, is estopped to deny its duty of fair dealing and good faith owed to Mills and its other policyholders prior to policy issuance and during its marketing and sales activities.

53. Defendant Zurich Life breached both its common law duty to disclose material facts, as well as its duty under the IMSA Principles, to Mills and its other policyholders who have paid premiums more frequently than annually (including those who paid premiums monthly, quarterly, and semi-annually) by its failure to state or disclose the annual percentage rate they have been required to pay as a result of their election to pay premiums other than annually.

54. To the extent required for the claim stated under this Count III, reliance should be presumed or inferred from Zurich Life's failure to disclose material information, including the annual percentage rates implicit in and associated with installment premium payments.

55. The excess payments made by Mills and Zurich Life's other policyholders who paid more frequently than annually, were paid in reliance on their policies in the belief that such excess payments were legally required by the policies.

56. Part performance is an alternative to any reliance requirement with respect to the claim stated under this Count III. Mills and Zurich Life's other policyholders who paid more frequently than annually have rendered part performance under their policies.

COUNT IV
BREACH OF THE IMPLIED COVENANT
OF GOOD FAITH AND FAIR DEALING

57. Mills realleges and incorporates by reference Paragraphs 1 through 32, inclusive, of the General Allegations as part of this Count IV.

58. At all times material hereto, Defendant had a duty to perform its obligations under the Mills Policy and its Other Policies with the utmost good faith and fair dealing. Such duty included the obligation not to engage in conduct which would injure the rights of Defendant's policyholders under such policies or which would interfere with their enjoyment of the contractual benefits afforded by such policies.

59. The Mills Policy and the Other Policies issued by Defendant Zurich Life included a provision giving the insured an option to change premium payment modes after issuance and during the term of such policies. This contract right and benefit was valuable in that the insureds could save premium cost depending on the premium payment mode selected.

60. Defendant Zurich Life breached its covenant of good faith and fair dealing owed to Mills and its other policyholders when it denied them the material information they needed to make an informed decision with respect to the exercise of their valuable

contract right to select among the various premium payment modes available. Specifically, the material information withheld and concealed was the annual percentage rates implicit in and associated with each of the premium payment modes which could have been selected.

61. To the extent required for the claim stated under this Count IV, reliance should be presumed or inferred from Zurich Life's failure to disclose material information, including the annual percentage rates implicit in and associated with installment premium payments.

62. Any reliance requirement is satisfied by excess payments having been made in reliance on the policy and in the belief that such excess payment were legally required under the policy or, alternatively, by part performance of the policies.

63. As a result of its aforesaid breach of its covenant of good faith and fair dealing, Defendant Zurich Life has realized an unlawful monetary gain in the sum of additional premiums collected in excess of what Mills and its other policyholders would have paid had they selected the annual premium, which was the least expensive premium payment mode. Mills and the other policyholders are entitled to recover restitution for said excess premiums, together with prejudgment interest thereon.

COUNT V
UNFAIR PRACTICE CLAIM

64. Mills realleges and incorporates by reference Paragraphs 1 through 22, inclusive, and 25 through 32, inclusive, of the General Allegations as part of this Count V.

65. Zurich Life knowingly failed to disclose to Mills, and its other policyholders who elected to pay their premiums monthly, quarterly and semi-annually,

rather than annually, the annual percentage rate implicit in, and associated with, the modal premiums they paid, which withheld information was material and its non-disclosure has a tendency to deceive. Zurich Life's said failures to disclose annual percentage rates constitute unfair or deceptive trade practices in violation of the New Mexico Unfair Practices Act, NMSA 1978, §57-12-1 (1967) *et seq.* (herein "the New Mexico UPA").

66. As a result of Zurich Life's violations of the New Mexico UPA, as described in Paragraph 64 above, Mills and Zurich Life's other policyholders who have paid premiums monthly, quarterly or semi-annually, are entitled to injunctive relief and restitutionary damages equal to the additional premiums collected by Zurich Life in excess of the annual premiums payable on such policies, together with prejudgment interest thereon, their costs and reasonable attorney fees.

CLASS ALLEGATIONS

67. Defendant Zurich Life has, as with Plaintiff Mills, committed substantially the same breaches of contract, breaches of common law duties, breaches of its covenant of good faith and fair dealing and, has been unjustly enriched, with respect to its other policyholders who have paid their premiums more frequently than annually (including those who have paid their premiums monthly, quarterly and semi-annually) such that the claims asserted in Counts I through IV of this Complaint are properly maintainable as a nationwide class action pursuant to Rule 1-023 NMRA 2003, with respect to the following persons (herein "the Nationwide Class"):

All persons who reside in the fifty (50) United States, the District of Columbia and Puerto Rico (herein the "Covered Territories"), who have owned individual life insurance policies issued by Defendant Zurich Life Insurance

Company of America during the period January 1, 1985 through the date of class certification (herein "the Policies"); who have made premium payments on the Policies more frequently than annually (including those who have paid premiums on a monthly, quarterly or semi-annual basis); and whose policies were in force on or after March 1, 1997, excluding however, Defendant's directors, officers, executives, agents, brokers, legal counsel and their dependants.

68. The unfair practices and consumer fraud statutes in the following states are materially comparable to New Mexico's UPA: Arizona, California, Colorado, Connecticut, Illinois, Kentucky, Nebraska, North Carolina, Oklahoma, Pennsylvania, Tennessee, Washington and Wyoming (New Mexico and the foregoing 13 states being collectively hereafter called "the Multi-State Area").

69. The statutory claims alleged in Count V above are properly maintainable on a multi-state subclass action under Rule 1-023 NMRA 1999 (the "Multi-State Class") with respect to the following persons:

All persons who reside in the Multi-State Area, who have owned individual life insurance policies issued by Defendant Zurich Life Insurance Company of America during the period January 1, 1985 through the date of class certification (herein "the Policies"); who have made premium payments on the Policies more frequently than annually (including those who have paid premiums on a monthly, quarterly or semi-annual basis); and whose policies were in force on or after March 1, 1997, excluding however, Defendant's directors, officers, executives, agents, brokers, legal counsel and their dependants.

70. There are many thousands of class members in both the Nationwide Class and the Multi-State Class, such that their joinder is impracticable.

71. There are facts common to all members of the Nationwide Class and the Multi-State Class. These include, without limitation:

(A) Zurich Life has issued thousands of standardized individual term life insurance policies to class members which are identical or substantially identical to the Mills Policy;

(B) Zurich Life engages in the common practice of charging class members like Mills, who pay premiums more frequently than annually or on a monthly, quarterly or semi-annual basis, more than the Guaranteed Maximum Annual Premium as stated in their policies; and

(C) Zurich Life fails to disclose to class members the annual percentage rate implicit in and associated with the additional premiums they have been required to pay by paying premiums more frequently than annually or on a monthly, quarterly or semi-annual basis.

72. There are questions of law common to all members of the class. These include, without limitation:

(A) Whether Zurich Life has contractually breached its policies with class members?

(B) Whether Zurich Life's failure to state or disclose the annual percentage rate which class members have been required to pay constitutes a breach of its common law duty to disclose material facts?

(C) Whether Zurich Life's failure to state or disclose the annual percentage rate which class members have been required to pay

constitutes a breach of the implied covenant of good faith and fair dealing?

(D) Whether Zurich Life has been unjustly enriched by its practices as described in this Complaint?

(E) Whether Zurich Life's failure to disclose the annual percentage rate members of the Multi-State Class have been required to pay constitutes a violation of the New Mexico UPA and the similar unfair practices acts and consumer fraud statutes enacted in the Multi-State Area?

73. The claims of the representative Plaintiff Mills are typical of the claims of the class members whom he seeks to represent.

74. Mills will fairly and adequately protect the interests of the class which he seeks to represent. There is no conflict between the interests of Mills and of other class members, and he is cognizant of his duties and responsibilities to the entire Nationwide Class and Multi-State Class. Plaintiff's attorneys are qualified, experienced and able to conduct the proposed class action litigation.

75. This action should proceed as a class action under Rule 1-023 B (1) NMRA 2003, as to both the Nationwide Class with respect to Counts I through IV and as to the Multi-State Class under Count V, since the prosecution of separate actions by the individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for them and/or Zurich Life; or (B) adjudications with respect to individual members of the class which would, as a practical matter, be

dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

76. This action should also proceed as a class action under Rule 1-023 B (2) NMRA 2003, as to both the Nationwide Class with respect to Counts I through IV and as to the Multi-State Class under Count V, because Zurich Life has acted or refused to act on grounds generally applicable to the class, thereby making appropriate declaratory relief with respect to the class as a whole.

77. This action should proceed as a class action under Rule 1-023 B (3) NMRA 2003, as to both the Nationwide Class with respect to Counts I through IV and as to the Multi-State Class under Count V, because the questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Additionally:

(A) No class member has a substantial interest in individually controlling the prosecution of a separate action, but, if any such class member or members wish to do so, they may exclude themselves from this class upon the receipt of notice under Rule 1-023 C (2) NMRA 2003;

(B) Upon information and belief, there are no pending lawsuits of class members who may be similarly situated and which may potentially affect the matters raised in this action;

(C) It is desirable to concentrate the litigation of these claims in this forum. The determination of the claims of all class members in a single forum, and in

a single proceeding, would be a fair and efficient means of resolving the issues raised in this litigation as between Zurich Life and its policyholders;

(D) The difficulties likely to be encountered in the management of a class action in this litigation are reasonably manageable, especially when weighed against the virtual impossibility of affording adequate relief to the members of the class through numerous separate actions; and

(E) New Mexico law, which is not in material conflict with the law of other jurisdictions in the Covered Territory, may be constitutionally applied to resolve the claims of the Nationwide Class under Counts I-IV.

(F) New Mexico law, which is not in material conflict with the law of the other jurisdictions in the Multi-State Area, may be constitutionally applied to resolve the claims of the Multi-State Class under Count V.


WHEREFORE, Plaintiff requests that this Court enter judgment for Plaintiff and against Defendant Zurich Life and provide relief as follows:

1. Certifying the Nationwide Class identified and defined in Paragraph 66 of this Complaint;
2. Certifying the Multi-State Class identified and defined in Paragraph 68 of this Complaint;
3. Granting to Plaintiff Mills and all class members all restitutionary damages and other rights and remedies provided by law;
4. Granting Plaintiff Mills and all class members all appropriate injunctive relief; and

5. Granting Plaintiff Mills and all class members reasonable attorney fees and the costs of this action.

Respectfully Submitted,

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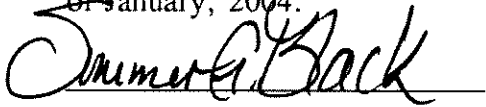
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I hereby certify that the foregoing was mailed to David F. Cunningham, Esq. of Rubin Katz Law Firm, 123 East Marcy, Suite 200, Post Office Drawer 250, Santa Fe, NM 87504-0250 and to J. Kevin McCall, Esq. and Clark Johnson, Esq. of Jenner & Block, LLC, One IBM Plaza, 330 North Wabash, Chicago, IL 60611 this 27th day of January, 2004.

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