

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

RUDEAN ELLENS, on behalf of herself  
and all others similarly situated,  
4081 East 139<sup>th</sup> Street  
Cleveland, Ohio 44105

Plaintiff,

vs.

GENWORTH LIFE AND ANNUITY  
INSURANCE COMPANY,  
(f/k/a Harvest Life Insurance Company),  
6604 West Broad Street  
Richmond, Virginia 23220

Defendant.

JUDGE GAUGHAN

CASE NO. 1:08CV2640

**FIRST AMENDED**  
**CLASS ACTION COMPLAINT**

**Jury Trial Endorsed Hereon**

Plaintiff Rudean Ellens (“Plaintiff”) on behalf of herself and all others similarly situated hereby alleges as follows upon information and belief against Defendant Genworth Life and Annuity Insurance Company, f/k/a Harvest Life Insurance Company (“Genworth Life”).

**PARTIES**

1. Plaintiff is a resident citizen of Cuyahoga County, Ohio. Plaintiff purchased two credit insurance policies from Genworth Life.

2. Genworth Life is an Illinois corporation that conducts continuous and substantial business in the State of Ohio, and is authorized to do business in Ohio. Genworth Life maintains its principal address in Richmond, Virginia. Genworth Life is formerly known as Harvest Life Insurance Company.

### **JURISDICTION AND VENUE**

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1332 because the amount in controversy exceeds Five Million Dollars (\$5,000,000) and there is diversity of citizenship between Plaintiff, the proposed classes, and Genworth Life.

4. Venue is proper pursuant to 28 U.S.C. §1391(b) because Genworth Life's misconduct that gives rise to Plaintiff's claims occurred, in substantial part, in this District.

### **FACTUAL ALLEGATIONS**

5. On July 30, 1998, Plaintiff leased a 1998 Chevrolet Blazer, VIN 1GNNDT13W4W2138787 (the "vehicle") from Bass Chevrolet, Inc. at 4493 Northfield Road, Warrensville Heights, Ohio. The vehicle sale was evidenced by a Smartlease Agreement between Plaintiff and Bass Chevrolet.

6. The vehicle was leased through Bass Chevrolet.

7. On or about July 30, 1998, Plaintiff purchased two credit insurance policies from Genworth Life ("the policy"). The terms, conditions, rights and duties under the policy are contained in the Certificate of Insurance and the Group Policy. The Certificate of Insurance and Group Policy are attached to this Complaint as Exhibits 1 and 2. The insurer was Harvest Life Insurance Company.

8. Upon information and belief, Defendant has a copy of the Certificate and Group Policy in its possession.

9. Plaintiff paid two one-time premiums for the credit insurance.

10. Genworth Life is in the business of issuing credit insurance policies. These policies are designed to assure those entities financing automobile purchases (e.g., automobile dealers, banks, and/or finance companies) that in the case the automobile purchaser/debtor

becomes disabled or dies, an insurance payout(s) would be available to satisfy the loan payments or balance. This practice reduces the credit risk facing lenders.

11. Plaintiff and those similarly situated (the “Class”) were purchasers of such credit insurance policies from Genworth Life. As part of the contracts, if the automobile loans were terminated early, (e.g., prepayment of the loan), the policyholders were expressly entitled to a refund of the unearned premium.

12. Plaintiff and the Class each paid a one-time, lump sum premium to purchase a credit insurance policy for the prescribed life of the subject loan.

13. By the terms of each subject policy, the insurance coverage would cease upon the termination of the loan.

14. By the terms of each subject policy and the statutory law of Ohio and other states, the debtor, (i.e., policyholder), is entitled to a refund of the unearned premium following an early termination, (i.e., full payment prior to final scheduled payment), of the loan.

15. Ohio Revised Code §3918.05 states, in relevant part:

In all cases of termination prior to scheduled maturity, a refund shall be paid or credited as provided in section 3918.08 of the Revised Code.

16. Ohio Revised Code Annotated §3918.08 states, in relevant part:

(B) Each individual policy, group certificate, or notice of proposed insurance shall provide that in the event of termination of the insurance prior to the scheduled maturity date of the indebtedness, ***any refund of an amount paid by the debtor for insurance shall be paid or credited promptly to the person entitled thereto***; provided, that the superintendent shall prescribe a minimum refund and no refund which would be less than such minimum need be made. [Emphasis added.]

17. Pursuant to the law and the policy, these statutory sections are incorporated into the policy as if fully rewritten therein.

18. Genworth Life possesses information from various sources, including credit reporting agencies, lenders, banks, and their own agents, allowing it to ascertain readily which of its policyholders prepaid their loans (or otherwise caused early termination) and are therefore entitled to a refund of the unearned premium.

19. Plaintiff caused her loan to be paid in full before the life of the loan had expired. By the terms of the insurance policy and the law, Plaintiff is entitled to a return of the premium for the time period from the date the loan was terminated through the remaining term that was left on the loan at the time it terminated.

20. Genworth Life did not return to Plaintiff her unearned premium, to which Plaintiff is legally entitled, despite the fact that Plaintiff has satisfied all conditions precedent to a refund of unearned premiums.

#### **CLASS ACTION ALLEGATIONS**

21. Plaintiff brings this class action pursuant to the Federal Rules of Civil Procedure 23(a), 23(b)(2) and 23(b)(3) on behalf of a general class (the "Class") consisting of:

All individuals from November 3, 1993 (the "Class Period") who purchased a credit insurance policy from Genworth Life caused an early termination of the automobile loan for which the credit insurance policy was purchased, and did not receive a refund for the resulting unearned premium.

22. Excluded from the Class are all present and former agents of Genworth Life during the Class Period; all present and former employees of Genworth Life during the Class Period; any Class member who timely elects to be excluded from the Class; the judge to whom this case is assigned, and any member of his or her immediate family.

23. Plaintiff is a member of the Class and alleges that all Class members sustained injury in fact as a proximate result of the unlawful conduct alleged herein, specifically deprivation of the unearned premium.

24. Membership in the Class is so numerous as to make it impractical to bring all Class members before the Court. The exact number of Class members is unknown, but Plaintiff reasonably estimates and believes that there are thousands of persons in the Class.

25. Genworth Life has acted on grounds generally applicable to the Class thereby making injunctive relief appropriate.

26. There are questions of law and fact common to the Class which predominate over any questions which may affect only individual members of the Class, including but not limited to the following:

- (a) Whether Genworth Life's credit insurance policy contractually obligate(d) it to return a certain portion of the premiums to its policyholders upon early termination of the associated loans;
- (b) Whether R.C. §3918.08, R.C. §3918.05 and related statutes, by incorporation into the policy, create a legal duty for Genworth Life to return a certain portion of the premiums to its policyholders upon early termination of the associated loans.
- (c) Whether Genworth Life systematically did or did not return portions of premiums upon early loan termination;
- (d) What manner of restitution should ensue in the event of a finding of unjust enrichment (full or partial disgorgement, constructive trust, and/or other equitable remedies);
- (e) Whether Genworth Life breached its duty of good faith;
- (f) Whether Genworth Life engaged in wanton, willful, and/or intentional misconduct;
- (g) Whether Genworth Life's conduct has satisfied the criteria for the imposition of punitive damages; and

- (h) What manner of interest should be applied to a monetary judgment favoring Plaintiff and the Class.

27. Plaintiff is a member of the Class she seeks to represent. Plaintiff's claims are typical of the Class members' claims. Plaintiff will fairly and adequately protect the interests of the Class in that Plaintiff's claims are typical and representative of the Class.

28. There are no unique defenses which may be asserted against Plaintiff individually, as distinguished from the Class. The claims of Plaintiff are the same as those of the Class.

29. There exist no conflicts of interest as between Plaintiff and the other Class members. Plaintiff has retained counsel that is competent and experienced in complex class action litigation. Plaintiff and its counsel will fairly and adequately represent and protect the interests of the Class.

30. Plaintiff and Plaintiff's counsel have the necessary financial resources to adequately and vigorously litigate this class action. Plaintiff is aware of her fiduciary responsibility to the Class and agrees to diligently discharge those duties.

31. The questions of law and/or fact common to the members of the Class predominate over questions that may affect only individual members. The common nucleus of operative fact herein centers on the conduct of Genworth Life.

32. This class action is superior to any other method for the fair and efficient adjudication of this dispute. The damages suffered by many members of the Class are small in relation to the expense and burden of individual litigation and, therefore, it is highly impractical for individual Class members to attempt to vindicate their interests individually. There will be no extraordinary difficulty in the management of this Class action.

33. All Class members have been damaged in precisely the same fashion, by precisely the same conduct. The degree of damages suffered by individual Class members is calculable according to an ascertainable formula.

**COUNT I**

**BREACH OF CONTRACT**

34. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs.

35. Genworth Life's consistent failure to refund unearned premiums, upon the early termination of loans linked to the credit insurance policy, breaches an express obligation to Plaintiff and Class members uniformly present across such policy. Such provisions are also mandated by R.C. § 3918.08 and R.C. §3918.05 and are incorporated into the policy.

36. Plaintiff has satisfied all conditions precedent to the duty of Defendant to refund unearned premiums.

37. Genworth Life has no available defenses to justify its contractual breach with respect to its credit insurance policyholders.

38. Plaintiff and Class members have suffered pecuniary harm as the result of Genworth Life's failure to return these premiums.

**COUNT II**

**UNJUST ENRICHMENT**

39. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs.

40. The above-referenced conduct has unjustly enriched Defendant at the expense of the Plaintiff and Class. This unfair consequence simply results from the retention of unearned

funds, an unjust benefit contrary to good conscience and equity. Such a retention of moneys represents an act subject to the disdain of public policy.

41. Plaintiff and the Class are entitled to a payment from Genworth Life equal to the unearned premiums withheld and never paid, and also should receive statutory or other interest at the maximum rate allowed at law, and any and all other relief deemed appropriate by the Court.

### **COUNT III**

#### **VIOLATION OF DUTY OF GOOD FAITH AND FAIR DEALING**

42. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs.

43. At all times herein relevant, Genworth Life and Plaintiff are and were parties to an enforceable insurance contract.

44. Under the law, said contract includes a covenant of good faith and fair dealing.

45. Genworth Life's conduct, including its failure to refund unearned premiums owed to Plaintiff, was done in violation of its duty of good faith.

46. Genworth Life's violation and breach of its duty of good faith has harmed Plaintiff and the Class and they are entitled to damages under the law in an amount to be determined at trial.

47. Genworth Life has intentionally, knowingly, and willfully violated the duty of good faith.

48. Genworth Life's actions were intentional, fraudulent, willful, wanton, malicious and/or reckless, and in total disregard for the rights of Plaintiff and the Class such that punitive damages should be awarded.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff on behalf of herself and all others similarly situated, hereby demands the following relief:

- (a) For an order certifying this case as a class action and designating Plaintiff as class representative and the undersigned counsel as class counsel;
- (b) Compensatory damages in an amount to be determined at trial;
- (c) Punitive damages;
- (d) Injunctive relief; and
- (e) Such other relief as this Court deems just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury.

Dated: February 17, 2009.

Respectfully submitted,

/s/ Daniel P. Goetz  
R. ERIC KENNEDY (0006174)  
DANIEL P. GOETZ (0065549)  
**WEISMAN, KENNEDY &  
BERRIS CO., L.P.A.**  
Suite 1600 Midland Building  
101 Prospect Avenue, West  
Cleveland, Ohio 44115  
(216) 781-1111  
(216) 781-6747 (fax)  
ekennedy@weismanlaw.com  
dgoetz@weismanlaw.com

DON BARRETT  
**DON BARRETT, P.A.**  
P.O. Box 987  
404 Court Square North  
Lexington, Mississippi 39095  
(662) 834-2376  
(662) 834-2628 (fax)  
dbarrett@barrettlawoffice.com

CHARLES BARRETT  
**BARRETT & ASSOCIATES, P.A.**  
6518 Highway 100, Suite 210  
Nashville, Tennessee 37205  
(615) 515-3393  
(615) 515-3395 (fax)  
[cb@barrettandassociates.net](mailto:cb@barrettandassociates.net)

AUSTIN GOWER  
**CHARLES A. GOWER, P.C.**  
1425 Wynnton Road  
P.O. Box 5509  
Columbus, Georgia 31906  
(706) 324-5685  
(706) 322-2964 (fax)

Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on February 17, 2009, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Parties may access this filing through the Court's system.

/s/ Daniel P. Goetz  
DANIEL P. GOETZ (0065549)  
**WEISMAN, KENNEDY &  
BERRIS CO., L.P.A.**

Attorney for Plaintiff