

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

RUDEAN ELLENS,	:	Case No. 1:08CV2640
	:	
Plaintiff,	:	Judge: Patricia A. Gaughan
	:	
v.	:	
	:	
GENWORTH LIFE AND ANNUITY INSURANCE COMPANY,	:	
	:	
Defendant.	:	

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DAVID MIDDLETON,	:	Case No. 1:08CV2741
	:	
Plaintiff,	:	Judge: Patricia A. Gaughan
	:	
v.	:	
	:	
GENWORTH LIFE AND ANNUITY INSURANCE COMPANY,	:	
	:	
Defendant.	:	

**FINDINGS AND ORDER PRELIMINARILY CERTIFYING CLASSES FOR  
SETTLEMENT PURPOSES ONLY, APPOINTING CLASS COUNSEL FOR THE  
CLASSES, DIRECTING THE ISSUANCE OF NOTICE TO THE CLASSES,  
AND SCHEDULING A FAIRNESS HEARING**

Before the Court is the Motion to Preliminarily Certify Classes for Settlement Purposes Only in the above-captioned actions (the “Actions”), and after a hearing, having considered the Motion and attachments thereto, the Stipulation of Settlement and all exhibits thereto (collectively the “Settlement Agreement”), the arguments of counsel, the evidence submitted, and all prior proceedings had herein, the Court finds and concludes as follows:

**1. Class Representative and Class Counsel.** Plaintiff Rudean Ellens is designated as Class Representative for the *Ellens* Class (as defined below), and Plaintiff David J. Middleton

is designated as Class Representative for the *Middleton* Class (as defined below). The law firms of Weisman Kennedy & Berris Co., L.P.A., Don Barrett, P.A., Barrett & Associates, P.A., and Charles A. Gower, P.C. are designated as Class Counsel for the purpose of settlement.

**2. Class Findings.** For purposes of the settlement of the Actions (and only for such purposes, and without an adjudication of the merits), after conducting a rigorous analysis of the requirements set forth in Fed.R.Civ.P. 23 and taking into consideration factors including, but not limited to: (i) the opinions of the participants, including Class Counsel and Genworth's Counsel; (ii) the complexity, expense, and likely duration of further litigation; (iii) the extent of discovery completed and the state of the proceedings; and (iv) the absence of any evidence that the proposed settlement is the product of fraud or collusion, the Court preliminarily finds that the requirements of the Federal Rules of Civil Procedure, United States Constitution, the Rules of the Court, and any other applicable law have been met in that:

(a) The Classes defined below are sufficiently ascertainable from Genworth's records and other objective criteria, and the Class Members are so numerous that their joinder before the Court would be impracticable.

(b) The commonality requirement generally is satisfied when members of the proposed classes share at least one common factual or legal issue. Here, Plaintiffs alleged several questions of fact and law purportedly common to the Classes, including whether Genworth breached credit insurance contracts by failing to refund Unearned Premiums allegedly owed to some Class Members. Considering the allegations of the Complaints, the Court preliminarily finds that the allegedly common questions of fact and law predominate over questions of fact and law affecting only individual members of the Classes.

(c) Based on Plaintiffs' allegations that Genworth engaged in uniform treatment of Class Members, the Court preliminarily finds that the claims of the Class Representatives are typical of the claims of their respective Classes, and that the Class Representatives and Class Counsel will fairly and adequately protect the interests of the Classes, in that:

- (i) the interests of the Class Representatives and the nature of their alleged claims are consistent with those of Class Members;
- (ii) there appear to be no conflicts between or among the Class Representatives and the Class Members;
- (iii) the Class Representatives have been and appear to be capable of continuing to be active participants in both the prosecution and the settlement of the Actions; and
- (iv) the Class Representatives and the Class Members are represented by qualified, reputable counsel who are experienced in preparing and prosecuting large, complicated class actions, particularly those involving the types of insurance claims alleged in the Complaints.

(d) The Court preliminarily finds that a resolution of the Actions in the manner proposed by the Settlement Agreement is superior or equal to other available methods for a fair and efficient adjudication of the Actions. The proposed resolution of the Actions involves:

- (i) a refund of 100% of any Unearned Premium due under the terms of the Settlement Agreement;

- (ii) the payment of Attorneys' Fees and Expenses not to exceed \$775,000.00 (which amount includes incentive awards of \$5,000.00 to be paid to each Class Representative); and
- (iii) the payment, by Genworth, of all settlement administration and notice costs under the terms of the Settlement Agreement. The Court notes that the Claims Process offers a means to identify and resolve complaints without burdening the courts or regulators. The Court also notes that, because the Actions are being settled, rather than litigated, the Court need not consider manageability issues that might be presented by the trial of a multi-state class action. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-20 (1997).

In making these preliminary findings, the Court has considered, among other factors:

- (i) the interest of Class Members in individually controlling the prosecution or defense of separate actions;
- (ii) the impracticability or inefficiency of prosecuting or defending separate actions;
- (iii) the extent and nature of any litigation concerning these claims already commenced; and
- (iv) the desirability of concentrating the litigation of the claims in a particular forum.

**3. Preliminary Class Certification for Settlement Purposes.** Based on the foregoing findings, the Court preliminarily certifies the Classes for settlement purposes as follows:

(a) The *Ellens* Class consists of all persons who purchased a Certificate from Harvest Life Insurance Company, during the *Ellens* Class Period, who caused an early termination of their loan for which the Certificate was purchased and was entitled to receive upon notice to the insurer, but did not receive, a refund of Unearned Premium. Excluded from the *Ellens* Class are: (1) any person who has already released or obtained a judgment against Genworth on the claims raised in the *Ellens* Action, or upon whom Genworth obtained a judgment on the claims raised in the *Ellens* Action; (2) any person whose coverage under a Certificate has been rescinded; (3) any person who has made a claim for benefits under a Certificate; (4) any person who has or had ownership of a Certificate on which Unearned Premiums were refunded as a result of an Early Loan Payoff; (5) any person whose loan went into default and the security was repossessed or whose indebtedness was discharged in bankruptcy; and (6) any person who timely excludes himself/herself from the *Ellens* Class in accordance with the terms of the Settlement Agreement and this Preliminary Approval Order.

(b) The *Middleton* Class consists of all persons who purchased a Certificate from Federal Home Life Insurance Company, during the *Middleton* Class Period, who caused an early termination of their loan for which the Certificate was purchased and was entitled to receive upon notice to the insurer, but did not receive, a refund of Unearned Premium. Excluded from the *Middleton* Class are: (1) any person who has already released or obtained a judgment against Genworth on the claims raised in the *Middleton* Action, or upon whom Genworth obtained a judgment on the claims raised in the *Middleton* Action; (2) any person whose coverage under a Certificate has been rescinded; (3) any person who has made a claim for benefits under a Certificate; (4) any person who has or had ownership of a Certificate on which Unearned Premiums were refunded as a result of an Early Loan Payoff; (5) any person whose

loan went into default and the security was repossessed or whose indebtedness was discharged in bankruptcy; and (6) any person who timely excludes himself/herself from the *Middleton* Class in accordance with the terms of the Settlement Agreement and this Preliminary Approval Order.

The Court finds that, for the sole purpose of settlement, and without an adjudication of the merits, the Classes are sufficiently well-defined and cohesive.

**4. Findings Regarding Proposed Settlement.** The Court finds that:

(a) the proposed settlement resulted from extensive arm's-length negotiations and was concluded only after Class Counsel conducted discovery; and

(b) the proposed settlement evidenced by the Settlement Agreement is sufficiently fair, reasonable, and adequate to warrant sending notice of the Actions and the Settlement Agreement to Class Members and holding a full hearing on the proposed settlement. For purposes of this order, the Court accepts and adopts all definitions, terms, and conditions of the Settlement Agreement. To the extent there is any inconsistency between the Settlement Agreement and this order, the terms and conditions of the Settlement Agreement shall control.

**5. Fairness Hearing.** A hearing (the "Fairness Hearing") shall be held at 9:30 a.m. on March 18, 2010, at the Carl B. Stokes United States Courthouse, Courtroom of the Honorable Patricia A. Gaughan, 801 W. Superior Avenue, Cleveland, Ohio 44113-1830 to determine:

(a) whether the Actions should be finally certified as class actions for settlement purposes;

(b) whether the Settlement Agreement should be approved as fair, reasonable, and adequate;

(c) whether the Actions should be dismissed with prejudice pursuant to the terms of the Settlement Agreement;

(d) whether Class Members should be bound by the Release set forth in the Settlement Agreement;

(e) whether Class Members, and anyone acting on their behalf, should be permanently enjoined from (among other things) filing, commencing, prosecuting, maintaining, intervening in, participating in (as class members or otherwise), or receiving any benefits from, any other lawsuit, arbitration, or administrative, regulatory, or other proceeding or order in any jurisdiction based on or relating to the claims and causes of actions in the Actions, and/or the Released Claims or Released Transactions (as defined in the Settlement Agreement); and/or the facts and circumstances related thereto; and

(f) whether the Court should approve Class Counsel's application for an award of Attorneys' Fees and Expenses.

**6. List of Potential Class Members.** Pursuant to the Settlement Agreement, Genworth shall create a List of Certificates, including any and all information from which Class Members' names and addresses can be reasonably derived and provide the List to the Settlement Administrator within sixty (60) calendar days of entry of this Preliminary Approval Order. The Settlement Administrator shall: (1) use reasonable efforts to obtain current addresses for Class Members where practicable, for example if the information provided for a Class Member includes a social security number or date of birth; (2) provide notice of this settlement as described below; and (3) evaluate the Claim Files of Claimants to determine whether they are entitled to receive a refund of Unearned Premium pursuant to the terms of the Settlement Agreement.

7. **Pre-Hearing Notice to Potential Class Members.** The Settlement Administrator shall implement the notice process as described in the Settlement Agreement:

(a) Notice by Publication. No later than sixty (60) calendar days before the Fairness Hearing, the Settlement Administrator shall implement Publication Notice pursuant to the terms of the Settlement Agreement. Genworth shall be responsible for the costs associated with the Publication Notice. This Court approves the Publication Notice included as Exhibit 2 to the Settlement Agreement.

(b) Notice by Mail. No later than sixty (60) calendar days before the Fairness Hearing, the Settlement Administrator shall send the Class Notice Package, via First-Class Mail, with address correction requested, at Genworth's expense, to all Class Members for whom the Settlement Administrator reasonably believes a current address has been obtained. The notice shall be in substantially the form attached as Exhibit 1 to the Settlement Agreement. This Court approves the Class Notice Package included as Exhibit 1 to the Settlement Agreement.

The Settlement Administrator shall also mail the Class Notice Package to each potential Class Member who makes a request for the Class Notice Package via the internet, toll-free number, or in writing. Such Class Notice Package shall be sent via First-Class Mail, postage prepaid, to the address provided in the request within ten (10) business days after receiving the request.

(c) **Re-mailing of Returned Class Notice Packages.** For those Class Notice Packages that the U.S. Postal Service returns as undeliverable to the Settlement Administrator no later than thirty-five (35) calendar days before the Fairness Hearing, the Settlement Administrator shall:

- (i) once re-mail those returned Class Notice Packages that included forwarding addresses; and
- (ii) once submit any returned Class Notice Packages that do not include a forwarding address to the National Change of Address database maintained by the U.S. Postal Service, and re-mail those Class Notice Packages for which a different address is obtained from the database.

(d) **Proof of Mailing.** No later than fourteen (14) calendar days before the Fairness Hearing, the Settlement Administrator shall file with the Court a proof of:

- (i) mailing of the Class Notice Packages; and
- (ii) Publication Notice.

**8. Findings Concerning Notice.** Having considered, among other factors:

- (i) the cost of giving notice by various methods;
- (ii) the resources of the parties;
- (iii) the stake of each Class Member; and
- (iv) the likelihood that significant numbers of Class Members might desire to exclude themselves from the Class or appear individually, the Court finds that notice given in the form and manner provided in the Settlement Agreement and this Order is the best practicable

notice and is reasonably calculated, under the circumstances, to apprise the Class Members of the pendency of the Actions; of their right to seek benefits under the Settlement Agreement; of their right to exclude themselves from the Classes and the Settlement Agreement; that any judgment, whether favorable or not, will bind all Class Members who do not request exclusion; and that any Class Member who does not request exclusion may object to the settlement and, if he or she desires, enter an appearance personally or through counsel.

The Court further finds that the Class Notice Package attached as Exhibit 1 to the Settlement Agreement is written in plain English and is readily understandable to Class Members. In sum, the Court finds that the language in the proposed notices and the methodology for distributing notices, including Publication Notice as set out in the Settlement Agreement, are reasonable, that they constitute due, adequate, and sufficient notice to all persons entitled to be provided with notice, and that they meet the requirements of the Federal Rules of Civil Procedure, and United States Constitution (including the Due Process Clause), the Rules of the Court, and any other applicable law.

**9. Claims Process.** Any Class Member who wishes to claim a refund of Unearned Premium must complete, sign and timely return a valid Claim Form in compliance with the Claims Process set forth in the Settlement Agreement. Claim Forms must be received by the Settlement Administrator no later than twenty-one (21) calendar days after the Fairness Hearing date set herein. Any Class Member who does not complete, sign and timely submit a valid Claim Form in compliance with the Claims Process shall not be entitled to a refund of Unearned

Premium, but nonetheless shall be bound by the Release and provisions of the Settlement Agreement and the Final Judgment. However, Genworth, in its sole discretion, may accept Claim Forms from Claimants who were unable to submit their Claim Forms on a timely basis for good cause shown.

**10. Communications with Class Members.** Class Counsel and Genworth expressly reserve the right to communicate with and respond to inquiries from Insureds, Class Members, or Claimants orally and/or in writing. Such communications may also be done through any of Genworth's appropriate Producers or agencies. However, mass and/or generalized communications with proposed Class Members specifically about the proposed Settlement Agreement, whether by Class Counsel, Genworth or its current Producers, or Genworth's Counsel, and whether by mail, the establishment or encouragement of internet websites, or other internet communications, telephone scripts, or any other means, shall only be made jointly with, or with the approval of, the other Party.

**11. Retention of Settlement Administrator.** The Court authorizes Genworth at its own expense (and subject to Class Counsel's approval) to retain one or more Settlement Administrators, including The Garden City Group, Inc., to help implement the terms of the Settlement Agreement. Class Counsel and/or its designee shall be entitled to observe and monitor the performance of the Settlement Administrator, but such actions shall not increase the expenses of the Settlement Administrator unless approved by Genworth.

**12. Refund of Unearned Premiums.** Genworth is authorized to pay in the ordinary course of business any Unearned Premium refunds properly owed to and requested by Insureds, and to engage in any other communications within the normal course of Genworth's business.

**13. Exclusion from the Classes.** Any potential Class Member who wishes to be excluded from the Classes and settlement must mail a written request for exclusion to the Settlement Administrator at the address provided in the Class Notice Package. The request for exclusion must specify the Certificate or Certificates that the potential Class Member wants to exclude. The request must be received by the Settlement Administrator by the Opt-Out Date. If a Certificate has more than one Insured, then any one Insured's timely request for exclusion shall apply to and bind all Insureds. The Settlement Administrator's decision as to whether a request for exclusion was received by the Opt-Out Date is final and binding. A list reflecting all requests for exclusion shall be assembled by the Settlement Administrator and filed by the Parties no later than fourteen (14) calendar days before the Fairness Hearing. If the proposed Settlement Agreement is approved, any Class Member who has not submitted a timely, written request for exclusion from the Class shall be bound by all subsequent proceedings, orders, and judgments in the Actions, even if the Class Member previously initiated, has pending, or subsequently initiates, litigation, arbitration proceedings, or any other legal proceeding against Genworth or any Released Party relating to the Released Claims.

**14. Objections and Appearances.**

(a) Written Objections. Any Class Member who has not submitted a timely written request for exclusion and who wishes to object to the fairness, reasonableness, or adequacy of the Settlement Agreement, or to the award of Attorneys' Fees and Expenses, must deliver to the Court's Clerk, Class Counsel, and Genworth's Counsel a written objection that references the Actions and must include:

- (i) the objector's name, address and telephone number;

- (ii) the number of the Certificate that makes the objector a member of the *Ellens Class* or *Middleton Class*;
  - (iii) the name of these cases and the case numbers;
  - (iv) a statement of each objection; and
  - (v) a written brief detailing the specific reasons, if any, for each objection, including any legal and factual support the objector wishes to bring to the Court's attention and any evidence the objector wishes to introduce in support of the objection(s). If the objection is presented through an attorney, the written objection must also include: (i) the identity and number of Class Members represented by objector's counsel; (ii) the number of such represented Class Members who have opted out of the settlement; (iii) the number of such represented Class Members who have remained in the settlement and have not objected; (iv) the date the objector's counsel assumed representation for the objector, and (v) a list of the names of all cases where the objector's counsel has objected to a class action settlement in the last three years.
- Objecting Class Members must also make themselves available for deposition by Class Counsel and/or Genworth's Counsel in Cleveland, Ohio, and/or in their state of residence if outside of Ohio, or by telephone if Class Counsel and Genworth's Counsel so elect, between the time the objection is filed and the date of the

Fairness Hearing, and the objection must include the date when the objecting Class Member will so present for deposition.

Such written objections must be received by the Court's Clerk, Class Counsel, and Genworth's Counsel at least twenty-five (25) calendar days before the date of the Fairness Hearing, or as the Court otherwise directs, or the Class Member shall be forever barred from objecting to, or in any way collaterally attacking, the Settlement Agreement and the settlement. Any Class Member may so object either on his/her own or through an attorney hired at his/her own expense. If a Class Member hires an attorney to represent him or her, the attorney must: (1) file a notice of appearance with the Court's Clerk; (2) deliver to Class Counsel and Genworth's Counsel, at the address provided in the Class Notice, a copy of the same; and (3) comply with all of the Settlement Agreement's requirements to make an objection. The notice of appearance must be received by the Court's Clerk at least twenty (20) calendar days before the date of the Fairness Hearing, or the attorney will not be allowed to appear at the Fairness Hearing.

(b) Appearances. Any Class Member who files and serves a written objection meeting the requirements set forth herein, may appear at the Fairness Hearing, either in person or through counsel retained at the Class Member's expense, to object to the fairness, reasonableness, or adequacy of this Settlement Agreement or the award of Attorneys' Fees and Expenses. Class Members or their attorneys intending to make an appearance at the Fairness Hearing must deliver to Class Counsel and Genworth's Counsel and file with the Court, at the addresses provided in the Class Notice Package, a notice of intention to appear. Such notice of intention to appear must be received by the Court, Class Counsel, and Genworth's Counsel at least twenty (20) calendar days before the date of the Fairness Hearing or as the Court otherwise directs. The Court orders that the Parties may take the deposition of any Class Member (and any

witness identified by the Class Member) who has not filed a timely written request for exclusion and who files an objection to the fairness, reasonableness, or adequacy of the Settlement Agreement or the proposed settlement, or to the award of Attorneys' Fees and Expenses. Such Class Member shall make himself or herself available for a deposition at least two weeks before the Fairness Hearing.

(c) Response to Objections. No later than fourteen (14) calendar days before the Fairness Hearing, Class Counsel and Genworth's Counsel shall each be entitled to file and serve responses to any written objection by a Class Member.

(d) Frivolous Objections. If any objection filed is deemed frivolous, the Court may award appropriate costs and fees to Class Counsel and/or Genworth's Counsel.

(e) Non-Compliance. Any Class Member who fails to comply with the orders of the Court, including the requirements set forth in Paragraph 14 of this Order, shall waive and forfeit any and all rights he or she may have to appear separately and/or object, and shall be bound by all the terms of the Settlement Agreement and by all proceedings, orders, and judgments in the Actions.

**15. Preliminary Injunction.** All Class Members who have not been timely excluded from the Classes, and anyone acting on their behalf or for their benefit, are hereby enjoined from filing, commencing, prosecuting, maintaining, intervening in, participating in (as class members or otherwise), or receiving any benefits or other relief from any other lawsuit, arbitration, or administrative, regulatory, or other proceeding or order in any jurisdiction, based on or relating to the claims and causes of action in the Actions and/or the Released Claims and Released Transactions, or the facts and circumstances relating thereto. In addition, all persons are hereby preliminarily enjoined from filing, commencing, prosecuting, or maintaining any other lawsuit as

a class action (including by seeking to amend a pending complaint to include class allegations, or by seeking class certification in a pending action in any jurisdiction), a private attorney general action, or any other action on behalf of Class Members who have not been timely excluded from the Classes, if such other class action is based on or relates to the claims and causes of action in the Actions and/or the Released Claims or Released Transactions, or the facts and circumstances relating thereto. The Court finds that issuance of this preliminary injunction is necessary and appropriate in aid of the Court's jurisdiction over the Actions.

**16. Other Filings by the Parties; Service of Papers.** No later than fourteen (14) calendar days before the Fairness Hearing, Class Counsel and/or Genworth's Counsel shall file with the Court and serve on each other and all other parties who have filed notices of appearance any further documents in support of the settlement, including any memoranda in support of final approval of the Settlement Agreement and any application for an award of Attorneys' Fees and Expenses. Class Counsel and Genworth's Counsel shall promptly furnish to each other any and all objections or written requests for exclusion that may come into their possession.

**17. Termination of Settlement.** This Order shall become null and void, and shall be without prejudice to the rights of the parties, all of whom shall be restored to their respective positions existing immediately before this Court entered this Order, if

(a) the proposed Settlement Agreement is not finally approved by the Court, or any appellate court, or does not become final pursuant to the terms of the Settlement Agreement; or

(b) the proposed Settlement Agreement is terminated in accordance with its terms or does not become effective as required by the terms of the Settlement Agreement for any other reason.

In such event, (i) the Settlement Agreement shall be null and void and shall have no force or effect, and the Parties shall not be bound by any of its terms; (ii) all negotiations, statements, and proceedings relating to the Settlement Agreement shall be without prejudice to the rights of Genworth, Plaintiffs, or any other Class Member, all of whom shall be restored to their respective positions existing immediately before the execution of the Settlement Agreement; (iii) Genworth and the Released Parties shall be entitled to assert all defenses, arguments, and motions as to all claims that have been or might later be asserted in the Actions, including (without limitation) any applicable statutes of limitation and their argument and objections that the Actions may not be litigated as class actions; (iv) Plaintiffs shall be entitled to assert all motions as to, and arguments in support of, all claims that have been or might later be asserted in the Actions; (v) neither the Settlement Agreement, nor the fact of it having been made, shall be admissible or entered into evidence for any purpose whatsoever in the Actions or in any other action or proceeding; (vi) Class Counsel shall, within ten (10) calendar days of termination of the Settlement Agreement by any Party, return to Genworth's Counsel the List of Certificates and any and all data, Claim Files, communications, and reports received from the Settlement Administrator; and (vii) any subsequent amendment, order, or judgment entered by the Court relating to the Settlement Agreement shall be deemed vacated and shall be without any force or effect.

**18. Use of Order.** This Order shall be of no force or effect if the Settlement Agreement does not become final or approved and shall not be construed or used as an admission, concession, or declaration by or against Genworth of any fault, wrongdoing, breach, or liability. Nor shall the Order be construed or used as an admission, concession, or declaration by or against Plaintiffs or Class Members that their claims lack merit or that the relief requested

in the Complaints is inappropriate, improper, or unavailable, or as a waiver by any party of any defenses or claims he, she, or it may have.

19. **Capitalized Terms.** Capitalized terms used in this order but not defined herein shall have the meaning ascribed to them in the Settlement Agreement.

20. **Amendments to the Settlement Agreement.** The terms and provisions of the Settlement Agreement may be amended, modified, or expanded by agreement of the Parties in writing and with approval of the Court without further notice to the Classes, so long as such changes are consistent with this Order and do not limit the rights of Class Members; provided, however, that the Parties may reach further written agreement on issues necessary to the efficient and effective administration of the Settlement Agreement without further notice to the Classes or approval of the Court.

21. **Continuance of Hearing.** The Court reserves the right to continue the Fairness Hearing without further written notice. If the Fairness Hearing is continued from its currently scheduled date, information regarding a rescheduled Fairness Hearing will be posted only on the settlement website.

SO ORDERED this 7th day of October 2009.

/s/ Patricia A. Gaughan  
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The Honorable Patricia A. Gaughan  
United States District Judge