

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:00-CV-589(H)

MONUMENTAL LIFE INSURANCE CO.

PLAINTIFF

V.

NATIONWIDE RETIREMENT SOLUTIONS, INC.

DEFENDANT

JURY INSTRUCTIONS

Members of the Jury:

Now that you have heard all of the evidence and the argument of the attorneys, it is my duty to give you instructions as to the law applicable in this case.

It is your duty as jurors to follow the law as stated in the instructions, and to apply that law to the facts you find from the evidence. Do not single out one instruction alone as stating the law but you should consider the instructions as a whole. Nor should you be concerned with the wisdom of any rule of law stated by the Court. You must apply the law given in these instructions whether you agree with it or not.

It is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record. It is your own interpretation and recollection of the evidence that controls. The statements, objections, and arguments made by the lawyers are not evidence. What the lawyers have said to you is not binding upon you. You are permitted to draw reasonable inferences, deductions, and conclusions from the testimony and exhibits which you feel are justified in the light of your own common sense.

In saying that you must consider all the evidence, I do not mean to suggest that you must necessarily accept all of the evidence as true or accurate. You are the sole judges of the credibility or believability of each witness and the weight to be given to the

testimony of each witness. In determining the credibility of any witness, you may properly consider the demeanor of the witness while testifying, frankness or lack of it, and his or her interest in the outcome of the case, if any.

The weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You should be guided in your deliberations by the quality and credibility of the evidence you have heard.

You have heard testimony about the preservation of e-mails. NRS had a duty to preserve all relevant e-mails after it knew about this lawsuit. NRS asked its employees to check and save all e-mails sent and received preceding the year 2000. The Court has determined that some NRS employees failed to do so. The parties may argue for, and you are free to make your own reasonable inferences from these facts.

The rules of evidence permit a witness who by education and experience has become expert in any art, science, or profession to state an opinion and the reasons for such an opinion. You should consider this evidence and give it such weight as you, in the application of your common sense, may think it deserves. If you should conclude that the reasons given by the expert witness in support of an opinion are not sound, or that the opinion is outweighed by other credible evidence in the case, or by the opinion of some other expert, then you may reject the opinion of such expert in whole or in part.

In this case it is responsibility of the party making the claim to persuade you that its claims are more likely true than not. If that party fails to persuade you on every essential element of its claim, then you should find for the other party on that claim. Thus, for example, if Monumental is alleging NRS breached the contract, Monumental must persuade you that is more likely than not that NRS breached the contract. Otherwise, you must find for NRS.

This case is about a business relationship between Monumental (including all its predecessors) and NRS (including all its predecessors) and about whether NRS has fulfilled its respective obligations under those contracts.

As you have heard, Monumental and NRS executed three written contracts that are at issue in this case.

- (1) On September 30, 1986, predecessors of Monumental (The People Security Life Insurance Co., Commonwealth Life Insurance Co., Georgia International Life Insurance Co., and National Home Life Assurance Co.), and predecessors of NRS (PEBSCO) entered into the “General Agent Agreement.”
- (2) On October 1, 1986, the National Association of Counties (“NACo”), PEBSCO, and Monumental’s predecessors entered into the NACo Agreement.
- (3) On March 31, 1987, the U.S. Conference of Mayors (“USCM”), PEBSCO, and Monumental’s predecessors entered into the USCM Agreement.

Because these contracts were executed by their legal predecessors, both Monumental and NRS are bound by the contracts. Those contracts and the relationships they establish form the underlying basis for the claims which Monumental has now asserted against NRS.

INSTRUCTION NO. 1

Monumental alleges that NRS breached certain provisions of these agreements. As to each claim that NRS breached one of the following contractual provisions, Monumental must prove that more likely than not:

- (1) NRS failed to fulfill its obligations stated in the contracts or did something in violation of the contracts, and
- (2) NRS's actions caused Monumental to suffer financial losses.

In addition to its enumerated contractual obligations, the law also provides that NRS and Monumental each owed one another the duties of good faith and fair dealing.

Monumental argues that NRS has breached three provisions of the contracts. The three provisions are listed below in this instruction. In considering whether NRS breached the contract, you may only consider NRS's actions taken after January 1, 2000. In order to find in favor of Monumental, you need only determine that NRS breached one of the contract provisions:

(1) Best Efforts Clause

Monumental claims NRS breached the NACo Agreement's "Best Efforts" clause. That provision states:

It is the intent of the Parties that the Policies be included in every Member County Plan to the exclusion of any other universal life or other interest sensitive life insurance product. NACo and [NRS] shall use their *best efforts* to accomplish this by, among other things:

- Including the Policies as a deferral option in all Program marketing efforts for all Member Counties; and by

– Encouraging all Member Counties to include the Policies in their Plans, plan descriptions and to adopt bid specifications permitting the inclusion of the policies as a deferral option to the exclusion of any other universal life or other interest sensitive life insurance product.

The Court further instructs you that a “best efforts” duty does not prevent NRS from exercising its right to give reasonable consideration to its own interests.

(2) Agreement to Promote

Monumental alleges that NRS violated Section VIII(H) of both the NACo and USCM Agreements which stated that NRS:

Agrees to promote [Monumental’s] interests and those mutual interests of [NRS] and [Monumental] as contemplated by this Agreement and shall at all times conduct itself, and see that its agents and employees shall conduct themselves, so as not to adversely affect the business reputation or good standing of either [NRS] or [Monumental].

In this case, Monumental’s interests included generally an interest in having its policies sold. A duty to promote Monumental’s interests includes, but is not limited to, a duty to attempt to sell or popularize by advertising. The parties are permitted to argue for or against other duties created by this provision.

(3) Agreement to Maintain a Force of Agents

Monumental alleges that NRS violated Section X(A) of the NACo and USCM Agreements which states that:

[NRS] shall organize and maintain a force of agents to enroll Member County [or City] employees in the Plan.

The Court instructs you that, in interpreting the contracts, you are to look at them in their entirety. All duties and obligations between and among the parties are determined by the written contract itself. You may not consider for any purposes any other promises, negotiations, understandings or contracts, whether written or oral, allegedly made between the parties which predate the execution of the General Agent, NACo, and USCM Agreements.

If you find that NRS's actions amount to a breach of any one of these provisions, or its implied duties of good faith and fair dealing, you should enter a verdict for Monumental on Question No. 1 on the Verdict Form. If you find NRS did not breach any of these provisions, you should enter a verdict for NRS on Question No. 1 on the Verdict Form.

Proceed to Instruction No. 2.

INSTRUCTION NO. 2

Monumental next alleges that NRS violated its fiduciary duties to Monumental. In this case, NRS and Monumental entered into a general agent agreement. NRS was Monumental's agent and, therefore, owed Monumental a "fiduciary duty" within the scope of the agency. That agency existed whenever NRS took action affecting the marketing of Monumental's policies.

This means that NRS had a duty to show the utmost good faith towards Monumental within the scope of that agency. This also means that NRS had a duty to act primarily for Monumental's benefit in matters arising out of their agency relationship, and that NRS had a duty not to assume a position which would bring its own interests into conflict with Monumental's interests. The Court instructs you that in considering the scope of the general agent agreement, you are to look at the agreement in its entirety.

In order to find for Monumental, you must conclude that:

- (1) NRS breached this fiduciary duty, and
- (2) NRS's breach caused Monumental to suffer financial losses

In considering whether NRS breached this duty, you may only consider its actions taken after January 1, 2000.

If you find that NRS's actions did amount to a breach of fiduciary duty, you should enter a verdict for Monumental on Question No. 2 on the Verdict Form. If you find NRS did not breach its fiduciary duties, you should enter a verdict for NRS on Question No. 2 on the Verdict Form.

Proceed to Instruction No. 3.

INSTRUCTION NO. 3

If you found for Monumental on Instructions 1 or 2, then you may award Monumental compensatory damages in an amount sufficient to compensate it for losses that were proximately caused by NRS's actions or inactions.

You must decide what amount of money will fairly and reasonably compensate Monumental for its actual losses resulting from NRS's breach of contract (Instruction No. 1) or breach of fiduciary duty (Instruction No. 2) Monumental has a right to be placed in the position in which it would have been in, but for NRS's conduct.

You should not award compensatory damages more than once for the same injury. If you find in favor of Monumental, it is entitled to be made whole again, but it is not, under this Instruction, entitled to recover more than it lost.

Damages must be shown with reasonable certainty, and cannot be based upon mere speculation. You must therefore only award damages that compensate Monumental for the actual damages that it has proven to you with reasonable certainty.

An injury or damage is "proximately caused" by an act, or a failure to act, whenever it appears from the evidence that the act, or failure to act, played a substantial part in bringing about or actually causing injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

If you find for Monumental, but you find that Monumental failed to prove that it was more likely than not that it suffered any amount of damages, you may award Monumental nominal damages. "Nominal" means trifling or small. Nominal damages are generally \$10 or less.

The law imposes on an injured person the duty to take responsible advantage of opportunities to reduce or minimize its losses. Thus, Monumental may not recover for any losses that it could have avoided through a reasonable effort. If you find that Monumental unreasonably failed to take advantage of an opportunity to lessen any

losses, you should reduce Monumental's recovery for those damages by the amount that it could have avoided had it taken advantage of that opportunity.

NRS has the burden of proving that it is more likely than not that such a strategy was possible and that Monumental could have actually reduced its losses in this manner. You may not base a decision to reduce Monumental's damages upon speculation.

Please indicate the amount of compensatory damages NRS owes Monumental on Question No. 3 of the Verdict Form. If you found for Monumental on Question No. 2, please turn to Instruction No. 4. Otherwise, you may return to the courtroom.

INSTRUCTION NO. 4

If you found for Monumental on Instruction No. 2 (breach of fiduciary duty), then you may also award punitive damages. You may not consider punitive damages on Monumental's claim for breach of contract. You are not required to imposed punitive damages.

Punitive damages are damages used as punishment to the wrongdoer and as a deterrent to wrongdoers and others from similar activities in the future. You may only award punitive damages to Monumental if you believe from the evidence that it is more likely than not that NRS acted towards Monumental with either "malice" or "gross negligence."

Under the law, "malice" means conduct by NRS that was specifically intended to cause tangible or intangible injury to Monumental, or conduct by NRS that was done with reckless disregard of Monumental's rights.

Under the law, "gross negligence" means something more than the failure to exercise slight care. There must be an element either of malice or willfulness, or such an utter and wanton disregard of the rights of others from which it may be assumed the act was malicious or willful.

If you award punitive damages, the amount should be fair and reasonable under all the facts and circumstances. It should not be excessive, nor influenced by passion, sympathy, or prejudice.

If you determine that NRS acted with malice or gross negligence and you think punitive damages should be awarded, you should consider the following factors in determining the amount of punitive damages to award:

- (1) The likelihood at the relevant time that serious harm would arise from NRS's misconduct;
- (2) The degree of NRS's awareness of that likelihood;

- (3) The profitability of the misconduct to NRS;
- (4) The duration of the misconduct and any concealment of it by NRS; and
- (5) Any actions by NRS to remedy the misconduct once it became known to NRS.

Please enter your verdict of punitive damages, if any, in Question No. 4 of the Verdict Form

Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty as jurors, to consult with one another, and to deliberate with a view to reach an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in Court. A verdict form has been prepared for your convenience. You will take this form to the jury room and, when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the verdict upon which you unanimously agree with respect to each issue in this case; you will then return with your verdict to the courtroom.

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VERDICT FORM

Question No. 1:

Monumental _____ NRS _____

Question No. 2:

Monumental _____ NRS _____

Question No. 3:

Compensatory Damages: \$ _____

Question No. 4:

Punitive Damages: \$ _____

FOREPERSON

Date