COURT OF APPEALS DECISION DATED AND FILED

April 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **§ 808.10 and RULE 809.62, STATS.**

No. 97-2691

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN THE MATTER OF THE LIQUIDATION OF EXECUTIVE LIFE INSURANCE COMPANY - A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF CALIFORNIA AND LICENSED TO DO BUSINESS IN THE STATE OF WISCONSIN.

FARA FUHRMANN, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

PLAINTIFF-APPELLANT,

V.

WISCONSIN INSURANCE SECURITY FUND,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: WILLIAM D. JOHNSTON, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Deininger, J.

DEININGER, J. Fara Fuhrmann appeals a circuit court order which affirmed the denial of a claim she filed with the Wisconsin Insurance Security Fund (WISF). The circuit court also rejected her request for class action declatory relief. Fuhrmann was the beneficiary of an annuity issued by a California insurer, Executive Life Insurance Company (ELIC), which subsequently became subject to a court-ordered rehabilitation in California. Fuhrmann voluntarily opted into the California court's "Rehabilitation Plan" (the Plan) for ELIC. She claims in this appeal that the WISF failed to meet its statutory and contractual obligations as a "Participating Guaranty Association" under the terms of an "Enhancement Agreement" (the Agreement), which was incorporated into the Plan. Specifically, Fuhrmann argues that her benefits under the Plan and Agreement should be determined according to her status as a Wisconsin resident, and therefore the WISF is required to provide her benefits up to the Wisconsin statutory limit for WISF coverage, $300,000.[1] Fuhrmann also contends that she is entitled to initiate a class action in the Wisconsin circuit court against the WISF in this matter.

We conclude that the WISF acted within its statutory authority when it entered into the Agreement, and further that, once Fuhrmann voluntarily elected to participate in the Plan, she submitted to the jurisdiction of the California liquidation court. The California court approved the terms of the Agreement and ordered that the participating guaranty associations, including the WISF, were released "from any and all claims" from ELIC insureds who elected to participate in the Plan, other than those obligations the associations incurred under the

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[1] *See* § 646.31(4), STATS.

Agreement. We conclude that under the Full Faith and Credit Clause of the U.S. Constitution, this court may not disturb the provisions of the Plan and the Agreement.[2] Fuhrmann's claims regarding the Agreement and its implementation can thus be raised only in the California court. Finally, since we conclude that Fuhrmann's individual claim against the WISF is barred, we also reject her claim that the trial court erred in denying her petition for class action declatory relief. Accordingly, we affirm the circuit court's order.

BACKGROUND

As part of a personal injury settlement she entered into with Regent Insurance Company in 1985, Fuhrmann was to receive periodic payments spanning thirty-five years or more. To ensure compliance with the payment schedule, responsibility for making the payments was assigned under the settlement agreement to First Executive Corporation (FEC). The payments were to be provided through an annuity purchased from ELIC, a subsidiary of FEC. A few years after the settlement, ELIC became insolvent, and on April 11, 1991, a California state court placed ELIC in conservation.

The California court appointed the Insurance Commissioner of the State of California as conservator. ***Lawrence v. Illinois Life and Health Guar. Ass'n,*** 688 N.E.2d 675, 677 (Ill. App. Ct. 1997). The National Organization of Life and Health Insurance Guaranty Associations (NOLHGA) represented all participating state insurance guaranty associations in the matter, including the WISF. The conservator and the NOLHGA entered into an Agreement which

[2] Article IV, section 1, of the United States Constitution provides, in part: "Full faith and credit shall be given in each state to ... judicial proceedings of every other state."

"settled the dispute between the participating guaranty associations and the Commissioner, and settled policyholder claims against the estate and the associations." ***Quackenbush v. Aurora Nat'l Life Assurance Co.,*** 38 Cal. Rptr.2d 453, 482 (Cal. Ct. App. 1995). As a Participating Guaranty Association, the WISF assessed Wisconsin insurers some $50 million for its obligations under the Agreement.

The California court incorporated the Agreement into the Plan, set a date for hearings on the proposed Plan, and ordered the California Insurance Commissioner to publish notices of the hearing in two newspapers of national circulation. ***Lawrence,*** 688 N.E.2d at 677. The notice stated that any person wishing to be heard or to present evidence at the ELIC hearing was entitled to appear or submit written testimony by mail. ***Id***. The California court held the hearings, considered objections and then issued orders finalizing and approving the ELIC settlement, the Agreement and the Plan.

Under the Plan and Agreement, ELIC, the California Insurance Commissioner, and all state insurance guaranty associations participating in the Agreement were released from all claims of individuals participating in the Plan. ***Id***. In exchange for these releases, Plan participants were granted enhanced benefits from Aurora National Life Assurance Company, an insurance company which, under the Plan, assumed ELIC's obligations to its policyholders. ***Id.*** The benefits were fashioned by restructuring the existing ELIC policies and enhancing ELIC's remaining assets with a contribution of $2 billion from the participating guaranty associations nationwide. ***Quackenbush,*** 38 Cal. Rptr.2d at 481-82. Additionally, the participating guaranty associations waived numerous statutory defenses under the Agreement and Plan that would otherwise have been available to them when responding to individual claims. ***Id***. at 482. In an April 16, 1992

order, the California court described the general nature of the Agreement and Plan as follows:

> To the extent that a covered policyholder participates in the Rehabilitation Plan and Enhancement Agreement, in general the Participating Guaranty Associations have agreed to make up the shortfall in the policyholders' account values or benefit payments within statutory limits. Generally, the "statutory shortfall" is the difference between the benefits the policyholder is statutorily entitled to receive from a Participating Guaranty Association and the benefits Aurora will provide to the covered policyholder through the restructured policy.

In December 1993, Fuhrmann's father and legal guardian received election materials regarding the ELIC Plan. The election package contained materials regarding the rehabilitation including: a Contract Value Summary Sheet of Fuhrmann's annuity; a "Single Election Package Information Booklet"; an "Election Form: To Participate"; and an "Election Form: To Opt-Out." The Contract Value Summary Sheet provided to Fuhrmann listed the California Life Insurance Guaranty Association (CIGA) as her Participating Guaranty Association. The election package also contained a letter designating the CIGA as the applicable guaranty association for Fuhrmann's annuity.

The CIGA's involvement with Fuhrmann's contract, and the resulting calculation of her benefits under the Plan, was based on FEC's ownership of Fuhrmann's annuity. Under the terms of the Agreement, FEC's ownership and California residency made California the relevant state by which to calculate the amount of enhancement due on Fuhrmann's annuity. This resulted in a benefit calculation based on the CIGA's statutory coverage limit of $100,000, which is significantly lower than the Wisconsin limit of $300,000 for claims against the WISF. The Election Package Information Booklet Fuhrmann received

with her election forms explained how her "relevant state" had been determined and advised her:

> **If you believe that the information shown under "State for Guaranty Association Coverage" on your Contract Values Summary is incorrect,** you must send proof of where you resided on December 6, 1991 and any other relevant facts to ELIC in the enclosed envelope along with your Election Form.

(Emphasis in original.)

By opting-in, Fuhrmann would receive payments having a present value of $241,811, approximately seventy-seven percent of the original annuity's value. Conversely, by opting-out, the present value of Fuhrmann's payments would be only $132,727, and she would "not be eligible for enhancements from any Guaranty Association under the Enhancement Agreement." If Fuhrmann opted out, she would forgo the certainty of the higher benefits offered by the Plan, but she would have retained the right to make an independent claim against the WISF due to her status as an insured annuitant resident of Wisconsin.[3]

Fuhrmann consulted an attorney regarding the election. Fuhrmann's counsel believed that because Fuhrmann was a Wisconsin resident and the WISF was a Participating Guaranty Association under the Plan, she should be classified as a Wisconsin insured covered by the WISF, thereby benefiting from our state's higher guaranty coverage limit. Fuhrmann's attorney contacted the Liquidation Division of the California Commissioner of Insurance regarding Fuhrmann's election. He sought guidance on how to file the Election Form while reserving

[3] The WISF concedes that, as an insured annuitant resident of Wisconsin under § 646.31(2), STATS., Fuhrmann could have made a claim against the WISF *if* she had chosen to opt-out of the Plan.

Fuhrmann's "rights to correct the Election Form to reflect [her counsel's] belief that [the] WISF also should have been a participating guaranty association for Fuhrmann." Fuhrmann's attorney was advised to submit the Election Form with a cover letter explaining Fuhrmann's position.

Fuhrmann submitted her Election Form designating her decision to opt-in to the Plan, along with a cover letter regarding her counsel's objection to the "relevant state" designation. The opt-in form which Fuhrmann signed provided, in part, as follows:

> I elect to participate in the Rehabilitation Plan and accept the Restructured Contract and the assumption of such contract by Aurora National Life Assurance Company. *I recognize that by participating in the Rehabilitation Plan, except as expressly preserved under the Enhancement Agreement, I am releasing all Participating Guaranty Associations from all payments and claims other than those provided under the Enhancement Agreement….*
>
> By participating in the Rehabilitation Plan, I accept the terms of the Rehabilitation Plan as approved by the Court. I realize that once I elect to participate and this form is received by ELIC, my decision is irrevocable.

(Emphasis added.) Counsel's cover letter included the following paragraph:

> Ms. Fuhrmann disputes that the only participating guaranty association is California. Ms. Fuhrmann was a resident of Wisconsin on December 6, 1991 and therefore is also entitled to the protection of the Wisconsin Insurance Security Fund. You have noted this on your computer records. We also understood from conversations with your office that Ms. Fuhrmann's election to participate in the plan does not waive or release any rights to pursue claims against the Wisconsin Insurance Security Fund or any applicable guaranty association. We understand that you will be forwarding forms to Ms. Fuhrmann to fill out regarding proof of her residency on December 6, 1991 and that her response to same will be considered a part of this election.

Fuhrmann's attorney subsequently wrote the WISF regarding the relevant state designation. The WISF rejected her claim for benefits from the WISF for the following reasons: (1) FEC's California residency dictated that the CIGA be the Participating Guaranty Association relevant to Fuhrmann's claim under the Plan and Agreement; and (2) Fuhrmann's signature on the Election Form constituted a release of the WISF from any further obligations to Fuhrmann. Fuhrmann appealed the WISF's decision to the WISF Board of Directors.[4] A hearing examiner concluded for the Board that:

> 3. By signing the opt-in form ... Fuhrmann engaged in a full, final and complete settlement and resolution of her claim arising out of the annuity policy with ELIC or First Executive Corporation, or participating insurance guaranty associations, of which the Wisconsin Insurance Security Fund was one.
>
> 4. The effect of the claimant signing the opt-in agreement was to also release the Wisconsin Insurance Security Fund from any further obligation.
>
> 5. The California liquidation court orders … are entitled to full faith and credit in the State of Wisconsin.

Fuhrmann petitioned for judicial review of the WISF Board's decision. She also sought declaratory relief in her petition for a class of persons situated similarly to her with respect to the ELIC Rehabilitation Plan. The trial court declined to permit a class action and affirmed the WISF's denial of her claim.

[4] Section 646.32, STATS., provides that a disappointed claimant may appeal the WISF's initial action on a claim to the WISF Board and, thereafter, may seek judicial review of the Board's decision.

ANALYSIS

(a) Standard of Review

In deciding an appeal from a circuit court's order affirming or reversing an administrative agency's decision, we review the decision of the agency, not that of the circuit court. ***Barnes v. DNR,*** 178 Wis.2d 290, 302, 506 N.W.2d 155, 160 (Ct. App. 1993). The parties have stipulated to the essential facts; thus the WISF Board's decision and our review involve only questions of law. While the WISF asks us to give great weight deference to its legal conclusions, it cites no specific experience, expertise or specialized knowledge, nor any long-standing statutory interpretation, which it applied in deciding to deny Fuhrmann's claim. *See* ***UFE Inc. v. LIRC***, 201 Wis.2d 274, 284-85, 548 N.W.2d 57, 61-62 (1996). Because the legal questions presented do not, for the most part, involve the application or interpretation of Chapter 646, STATS., but principles of contract and constitutional law, we conclude that we are as qualified as the Board to decide these issues. We conclude, therefore, that a de novo standard of review is appropriate. *See* ***State ex rel. Parker v. Sullivan***, 184 Wis.2d 668, 699, 517 N.W.2d 449, 460-61 (1994) (the weight due an agency's interpretation of law depends on comparative institutional capabilities and qualifications of the court and the agency).

(b) The WISF's Participation in the Agreement

The purposes of Chapter 646, STATS., as stated in § 646.01(2), STATS., are as follows:

> (a) To maintain public confidence in the promises of insurers by providing a mechanism for protecting insureds from excessive delay and loss in the event of liquidation of insurers and by assessing the cost of such protection among insurers; and

> (b) To provide where appropriate for the continuation of protection under policies and supplemental contracts of life insurance, disability insurance and annuities.

In order to achieve these purposes, the WISF is authorized under §§ 646.12(2)(d) and (g), STATS., to "make contracts … necessary to carry out its duties in the most efficient way," and to "[n]egotiate and contract with any liquidator to achieve the purposes of this chapter." Additionally, § 646.12(4) grants the WISF authority to work through NOLHGA to carry out its statutory duties and powers. The WISF therefore acted within its statutory authority when it entered into the Agreement, a matter which Fuhrmann does not dispute.

Fuhrmann asserts that she is not challenging the California court's "judgment regarding the Enhancement Agreement," but rather that hers is a "challenge [to] the WISF's post-judgment implementation of its obligations." Fuhrmann's specific claims include: (1) as a "covered contract holder," Fuhrmann's Wisconsin residency dictates that the WISF, and not the CIGA, is the appropriate guaranty association through which her enhancement amount should be calculated under the Plan; and, (2) even if the CIGA was responsible for enhancing her settlement under the Agreement, the WISF remains statutorily obligated to protect her to the full extent of Wisconsin's statutory guaranty provisions. She argues, in essence, that she was inadequately compensated under the Plan and Agreement; that she should not be held to the terms of her election to accept the Plan's benefits; and that she should not be bound by the California court's orders approving and implementing the Plan.

Notwithstanding Fuhrmann's assertion, we conclude that her claim against the WISF constitutes an attack on the provisions of the Agreement itself rather than on the WISF's implementation of the Plan and Agreement. We agree

with the WISF that there is nothing in this record to indicate that it "has not complied fully with its funding obligations under the Plan." Moreover, Fuhrmann does not assert that she has not received what she was promised under the Plan. As we discuss below, we conclude that by opting into the Plan, Fuhrmann released the WISF from any obligation to respond to her individual claim, and she subjected herself to the California court's jurisdiction. Since we must accord full faith and credit to the California court's judgment and orders, we therefore decline to entertain Fuhrmann's challenges to her treatment under the Plan as approved in that forum.

(c) The Opt-In and Fuhrmann's Purported Reservation of Rights

Fuhrmann asserts that she preserved her right to pursue claims against the WISF because, when she submitted her opt-in election form, her counsel also provided a cover letter explaining that she disputed the designation of only the CIGA, and not also the WISF, as her Participating Guaranty Association. We have quoted above, in the Background section of this opinion, the relevant paragraph from the cover letter. We fail to see how this provision in a letter to ELIC (or its California liquidator) can be held to deprive the WISF of the benefits it obtained under the Enhancement Agreement, specifically, the release of the WISF from individual claims of those who opted into the Agreement. The WISF had no notice or knowledge of Fuhrmann's purported reservation of rights, and it thus could not have assented to any waiver of its rights under the Agreement. *See* ***Batchelor v. Batchelor,*** 213 Wis.2d 251, 256, 570 N.W.2d 568, 570 (Ct. App. 1997) (waiver of a right must be "voluntary and intentional").

Fuhrmann was presented with two choices with respect to the Plan: she could opt in or opt out. Fuhrmann essentially seeks in this action to obtain a

third option: that she be allowed to retain the benefits of the Plan, while pursuing a claim for additional benefits from the WISF. This third option was not available to Fuhrmann under the Plan, nor under any of the relevant California court orders. She cites no language in these documents from which we might conclude otherwise. Not only did the opt-in election form expressly provide that Fuhrmann was releasing all participating guaranty associations "from all payments and claims other than those provided under the Enhancement Agreement," but the informational materials she received did so as well. Under the heading "Release of State Guaranty Associations," Fuhrmann was informed as follows:

> In return [for benefits through the Plan], covered Contract Holders who elect to participate in the Plan will release the Participating Guaranty Associations from all claims, except their rights to receive benefits under the Enhancement Agreement. By electing to participate in the Plan, you will be deemed to accept the terms of the Enhancement Agreement. You will also submit to the jurisdiction of the Conservation Court for the purpose of accepting the terms of the Enhancement Agreement.

We conclude, therefore, that Fuhrmann is bound by the terms of her election to accept the benefits awarded to her under the Plan. Her attempt to reserve the right to challenge the designation of California and not Wisconsin as her relevant state for the computation of benefits under the Plan, did not negate her release of the WISF from any and all liability beyond its obligation to fund the Agreement pursuant to its terms.

Fuhrmann also argues on appeal that her release of the WISF was induced by fraud and is therefore void. She did not make this allegation in the proceedings before the WISF Board. Thus, the record contains no findings by the WISF regarding whether false representations were intentionally made to Fuhrmann or whether she reasonably relied upon them. In appeals from agency determinations, we generally do not address issues not raised before the agency.

See ***Kelley Co., Inc. v. Marquardt,*** 166 Wis.2d 45, 57, 479 N.W.2d 185, 190 (Ct. App. 1991) *rev'd on other grounds,* 172 Wis.2d 234, 493 N.W.2d 68 (1992). We find no reason on this record to depart from this general rule.

(d) Full Faith and Credit

On August 13, 1993, the California conservation court entered an Order Authorizing Implementation of Approved Modified Plan of Rehabilitation. The order "specifically approves the terms of the Enhancement Agreement," finding it to be "a fair and reasonable settlement of claims of covered contract holders against state insurance guaranty associations participating in the … Agreement." The order also provides that ELIC policyholders who participate in the Agreement "will have submitted to this Court's jurisdiction and will have accepted the terms of the … Agreement, including the release of all claims other than their rights to the GA Enhancement Amount and the other obligations of the Participating Guaranty Associations under the … Agreement." Finally, the California court determined in the order that it had jurisdiction over the Agreement and "personal jurisdiction over all covered contract holders who participate in the … Agreement through their election to opt into the … Plan," and it acknowledged that the order "does not affect the rights of any contract holder who opts out vis-a-vis his or her respective state insurance guaranty association."

Thus, Fuhrmann's challenge to her treatment under the Plan and Agreement could have been raised either by opting into the agreement and pursuing the issue before the California liquidator and in the California court,[5] or,

[5] The record is silent regarding whether Fuhrmann ever pursued her challenge to the guaranty association designated in her Contract Values Summary, either before the liquidator or in the California court. The materials she received with her election forms appear to provide a mechanism for resolving such disputes. *See* the Background summary, above.

by opting out and proceeding directly against the WISF as she has attempted to do here. If we were to allow Fuhrmann to proceed in the present action, we would undermine the relief fashioned and approved by the California court, and thus violate our obligation under the United States Constitution to give the California court's judgment and order "'the same credit, validity and effect'" that it has in the state in which it was entered. ***Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Ass'n,*** 455 U.S. 691, 704 (1982) (quoted source omitted); *see also* **Padway v. Pacific Mut. Life Ins. Co.,** 42 F.Supp 569, 577 (ED. Wis. 1942) (federal court rejects Wisconsin insured's effort to overturn California Liquidation Court's order approving rehabilitation and reinsurance agreement after concluding that California proceedings were valid and that "full faith and credit must be given … to the orders and judgment of" the California court).

We conclude that the California court had subject matter jurisdiction to approve the Agreement and to order implementation of the Plan, and that it acquired personal jurisdiction over Fuhrmann once she opted into the Plan. We are not the first court to deny an ELIC policyholder who chose not to opt out of the Plan an opportunity to "make a collateral attack on the California court's judgment." *See* **Lawrence,** 688 N.E.2d at 680.

(e) Class Action

Because we conclude that Fuhrmann cannot bring her individual challenge to the provisions of the Agreement in a Wisconsin forum, the same would also be true for persons situated similarly to Fuhrmann. Additionally, the parties here stipulated to the facts which comprise the administrative record, and

Fuhrmann is bound by this record. *See* ***Wisconsin's Envtl. Decade, Inc. v. PSC,*** 79 Wis.2d 161, 170, 255 N.W.2d 917, 923 (1977) (judicial review of administrative decisions is confined to the administrative record). As such, even if we were to sustain her individual claim, Fuhrmann's petition for class declaratory relief would fail because the record is devoid of facts from which a court could determine that a class of persons situated similarly to Fuhrmann exists. We thus conclude that the circuit court did not err in denying Fuhrmann's request to maintain a class action.

CONCLUSION

For the foregoing reasons, we affirm the circuit court's order which upheld the WISF's denial of her claim and which denied her request to maintain a class action.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.