IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:18-cv-01897-DDD-NYW

ADVANCE TRUST & LIFE ESCROW SERVICES, LTA, *as securities intermediary for, on behalf of itself and all others similarly situated other* Life Partners Position Holder Trust

Plaintiff,

v.

SECURITY LIFE OF DENVER INSURANCE COMPANY,

Defendant.

ORDER

This case is before the court on Defendant Security Life Insurance Company's motion for summary judgment (Doc. 91); Plaintiff Advance Trust & Life Escrow Services, LTA's renewed motion for class certification (Doc. 87); and Magistrate Judge Wang's report and recommendation that Advance Trust's motion to strike Security Life's non-retained expert be denied (Doc. 132). For the following reasons, the court grants in part and denies in part Security Life's motion for summary judgment; grants in part Advance Trust's motion to certify; and adopts Judge Wang's report and recommendation.

BACKGROUND

Advance Trust is a securities intermediary for a life insurance trust that owns five universal life insurance policies of two types, issued by Security Life. The product names for the policies are Strategic Accumulator Universal Life Insurance (SAUL) and Life Design Global Universal Life. Doc. 1 at ¶ 16. The policies are standardized form contracts.

Advance Trust seeks to certify a class of all SAUL and Life Design policy owners whose cost-of-insurance rates increased in 2015. *Id.* at ¶¶ 1–2. Advance Trust argues that the way Security Life decided to raise cost-of-insurance rates in 2015 violated the terms of the policies, and asserts one class-wide claim for breach of contract.

There are three key provisions of the policies for purposes of this dispute: the cost-of-insurance provision, the uniformity provision, and the non-participation provision.

First, each of Advance Trust's five policies contained the same cost-of-insurance provision, stating:

> The cost of insurance rate for each segment will be determined by us [Security Life] from time to time. Different rates will apply to each segment. The Company [Security Life] will refer to the gender and age of the insured as of the effective date of segment coverage, the duration since the coverage began, the amount of target death benefit and the segment premium class in applying its current rates for each insured. . . . The rates will never exceed those rates shown in the Table of Guaranteed Rates for the segment. These tables are in the Schedule.

Doc. 91 at 4; *see also* Doc. 106 at 2.

Second, the policies contain a uniformity requirement: "Any change in [cost-of-insurance] rates will apply to all individuals of the same premium class and whose policies have been in effect for the same length of time." Doc. 91 at 4; *see also* Doc. 106 at 2.

The third key provision is what the parties call the "non-participation" provision, which is really three provisions. The policies contain a provision under the heading "Nonparticipating" that says, "The policy does not participate in our [Security Life's] surplus earnings." Doc. 92-1

at 5. The first and last pages of the policies also contain a disclaimer stating, "This policy is nonparticipating and is not eligible for dividends." *Id.* at 2, 6.

Advance Trust brought this putative class action against Security Life for three breaches of each of its five policies, specifically the cost-of-insurance, uniformity, and non-participation provisions. Advance Trust says that in 2015 Security Life decided to raise cost-of-insurance rates based on factors unrelated to mortality rates (the likelihood that an insured is going to die), namely profit and past losses, in violation of the cost-of-insurance and non-participation provisions. Advance Trust also says that Security Life raised rates non-uniformly across premium classes, only applying the rate increase to SAUL policies but not to its other universal life products.

Security Life says that it referred to mortality factors (the gender, age, duration since coverage began, and the amount of target death benefit for the premium class) as well as other factors (profit and loss among them) when it raised rates in 2015. Doc. 91 at p. 5, ¶ 4. Security Life argues that the uniformity requirement only applies within each policy class, meaning, for example, that rate increases must be uniform across premium classes for SAUL policies, but they needn't be uniform *between* the same premium classes in *different* policies. Doc. 91 at p. 6, ¶ 9.

Advance Trust responds that Security Life couldn't have referred to mortality factors to raise rates, because mortality across the classes covered by the policies was going down. Doc. 107 at p.3, ¶ 4. That leaves Security Life's profit-and-loss considerations, which Advance Trust argues cannot be taken into account when setting cost-of-insurance rates. And, Advance Trust asserts, the uniformity provision applies on its face to all premium classes across Security Life's universal life products.

Earlier in the litigation, Advance Trust moved to certify a class of all SAUL and Life Design policyholders subject to the 2015 rate hike. Docs. 56, 57, 62. The court denied that motion without prejudice, explaining that although common factual issues clearly predominate over individual ones, Advance Trust had failed to demonstrate how the law of the various states that govern the policies treat ambiguity and how those difference affect manageability of the class. *Id.* at 15–16. The court instructed that in any renewed motion for certification, Advance Trust must address the state-law variation. *Id.* at 16.

ANALYSIS

I. Security Life's Motion for Summary Judgment

Security Life moves for summary judgment on Advance Trust's claim for breach of contract. Security Life makes four arguments: (1) the cost-of-insurance provision merely required it to "refer to" mortality factors and did not preclude Security Life from consulting other factors; (2) non-participation means only that the policies don't participate in profits, not losses; (3) the uniformity requirement applies intra-policy class, not inter-policy; and (4) Advance Trust has adduced no evidence of damages.

A. Standard of Review

Summary judgment is proper "if but only if the evidence reveals no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *MarkWest Hydrocarbon, Inc. v. Liberty Mut. Ins. Co.*, 558 F.3d 1184, 1190 (10th Cir. 2009). In reviewing Defendant's motion, the Court views "the facts and all reasonable inferences those facts support in the light most favorable" to Plaintiffs. *Id.* at 1189–90. "An issue of material fact is genuine only if the nonmovant presents facts such that a reasonable factfinder could find in favor of the nonmovant."

S.E.C. v. Thompson, 732 F.3d 1151, 1157 (10th Cir. 2013) (alteration adopted).

B. Governing Law

The parties agree that the policies owned by Advance Trust are governed by the laws of Arizona, Colorado, Florida, New Jersey and Wisconsin. Doc. 91 at 9; Doc. 107 at 8. With the exception of Arizona, each state's laws follow the same basic approach to contract interpretation, using traditional tools of contract interpretation and looking to the plain language of an insurance policy to determine its meaning. *See Am. Family Mut. Ins. Co. v. Hansen*, 375 P.3d 115, 117 (Colo. 2016); *Washington Nat. Ins. Corp. v. Ruderman*, 117 So. 3d 943, 948 (Fla. 2013); *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 948 A.2d 1285, 1289 (N.J. 2008); *Town Bank v. City Real Estate Dev., LLC*, 793 N.W.2d 476, 484 (Wis. 2010). Arizona takes a slightly different approach. As discussed in greater detail below, if a party offers extrinsic evidence to prove the meaning of a policy provision, the court must consider it, even if the contract is unambiguous. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1140 (Ariz. 1993). Still, extrinsic evidence can be used to explain the written terms of an insurance contract only if the provision at issue is "reasonably susceptible" to the meaning propounded by the party introducing extrinsic evidence. *Id.*

C. Mortality Factors

Security Life did not breach the cost-of-insurance provision when it considered non-mortality factors as part of its decision to raise rates in 2015. Although Advance Trust casts its argument on the idea that the term "cost of insurance" is ambiguous, the actual theory behind this claim is more straightforward than that. The entire basis of this claim is, as Security Life points out, the contention that the policies require it

to base cost-of-insurance rates solely on listed mortality factors. Whether, in the abstract, the phrase "cost of insurance" might be ambiguous is perhaps an interesting question. But here, the question is not left in the abstract: the specific allegations are covered by specific contract provisions. Advance Trust favors a meaning of the phrase: *Security Life's cost of providing insurance*; whereas Security Life (according to Advance Trust) favors a meaning of the phrase: *the policyholder's cost of continuing coverage*. But this argument overlooks the determinative question: regardless of what cost of insurance means, what limits and obligations does the contract impose on Security Life when calculating cost-of-insurance rates?

The cost-of-insurance provision only contains the following commands: (1) that Security Life determine the cost-of-insurance rate "from time to time," (2) that any change in rates be uniform across "premium class[es]," (3) that the cost-of-insurance rate increases don't exceed the maximums "shown in the Table of Guaranteed Rates for the segment," and (4) that Security Life "refer to" the listed mortality factors when determining cost-of-insurance rates.

The parties' dispute centers on the last command—that Security Life "will refer to the gender and age of the insured as of the effective date of segment coverage, the duration since the coverage began, the amount of target death benefit and the segment premium class," *i.e.* mortality factors, "in applying its current rates for each insured." All agree this provision is mandatory. Security Life *must* refer to these factors when setting rates. But by its own terms, the factors it lists aren't exclusive. Security Life is free to refer to other factors relevant to determining the cost of insurance without violating the policies.

Creating a list of factors one must consider is a far cry from forbidding consideration of anything else. The ordinary meaning of "refer to" is "to have recourse to; to turn or appeal to, consult; esp. to consult a source of information in order to ascertain something." Refer, Oxford Eng. Dict. (3d. ed. 2009). The grammar of the word "refer" suggests consultation and influence. But "refer" does not suggest total obedience to the information pointed to. As long as consultation and influence occur, Security Life satisfies its duty.

Courts have held that even more restrictive language still leaves room for additional considerations. In *Norem v. Lincoln Ben. Life Co.*, 737 F.3d 1145 (7th Cir. 2013), for example, the court interpreted a provision of a life insurance policy that said, "the cost of insurance rate is based on the insured's sex, issue age, policy year, and payment class. The rates will be determined by us, but they will never be more than the guaranteed rates shown on Page 5." *Id.* at 1147. The court held that "based on," like refer to, meant "a main ingredient" or "a supporting or carrying ingredient," but did not mean exclusivity. *Id.* at 1150. The Seventh Circuit thus ruled that the insurer did not breach this provision when it consulted non-mortality factors in raising a cost-of-insurance rate. *Id.* at 1155. If anything, the phrase "refer to" is even more permissive than the phrase "based on," meaning Security Life's position is stronger than the insurer in *Norem*.

Advance Trust relies primarily on *In re Conseco Life Ins. Co. Life Trend Ins. Mktg. & Sales Practice Litig.*, 920 F.Supp.2d 1050 (N.D. Cal. 2012). There, the Northern District of California ruled that the term "'cost of insurance' is ambiguous because the policy nowhere explicitly defines the term; it merely sets a few parameters as to changes, maximums, and uniformity across age, sex and 'classification.'" *Id.* at 1061. But that conclusion isn't persuasive. The question isn't whether the

term "cost of insurance" is ambiguous, but whether Security Life had the authority to raise cost-of-insurance charges, and if so, what bounds the contracts put on that authority. In the overall context of these policies, which include other, more explicit limitations on the insurer's ability to raise rates (such as the uniformity provision and the Guaranteed Rate Table), it seems clear that the "refer to" provision is meant to guide, but not entirely circumscribe, Security Life's rate setting decisions. To be sure, there is a well-developed split of authority on this issue.[1] And

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[1] *Compare Norem*, 737 F.3d at 1150 (ruling that an insurer did not breach a COI provision by considering factors not referenced in the text of the policy); *Mai Nhia Thao v. Midland Nat. Life Ins. Co.*, No. 09-C-1158, 2013 WL 119871, at *2 (E.D. Wis. Jan. 9, 2013) (rejecting reading of COI provision that an insurer may only reference mortality factors), *aff'd,* 549 F. App'x 534 (7th Cir. 2013); *Coffman v. Pruco Life Ins. Co.*, No. 10-CV-03663 DMC MF, 2011 WL 4550152, at *3–4 (D.N.J. Sept. 29, 2011) (rejecting argument that insurer can't consider profit and other factors when determining "expected cost of mortality" charge); *Baymiller v. Guarantee Mut. Life Co.*, No. SA CV 99-1566 DOC AN, 2000 WL 1026565, at *2 (C.D. Cal. May 3, 2000) (express language of insurance policies do not limit insurer to considering insured's "sex, age and rating class" where policies dictate no specific formula to calculate cost-of-insurance charges and promise only that rates will be below the guaranteed rates); *with Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 763–64 (8th Cir. 2020) ("Looking at the language of the provision alone, we conclude that the phrase 'based on' is at least ambiguous because a person of ordinary intelligence purchasing an insurance policy would not read the provision and understand that where the policy states that the COI fees will be calculated 'based on' listed mortality factors that the insurer would also be free to incorporate other, unlisted factors into this calculation."); *In re Conseco Life Ins. Co. Life Trend Ins. Mktg. & Sales Practice Litig.*, 920 F.Supp.2d 1050 (N.D. Cal. 2012); *Yue v. Conseco Life Ins. Co.*, 282 F.R.D. 469, 483 (C.D. Cal. 2012) ("No reasonable policyholder could expect the plain language of the COI provision as permitting Defendant to change the COI rate in an 'infinite' number of ways."); *Fleisher v. Phoenix Life Ins. Co.*, 18 F. Supp. 3d 456, 471 (S.D.N.Y. 2014) ("So it would be perfectly plausible—and certainly not unreasonable—for an average insured to conclude, as Fleisher argues, that when Phoenix says it will calculate the COI rate for a particular Policy Month

the policies of course could have been clearer if they explicitly said something like, "including but not limited to the following factors." Or, for that matter, "refer solely to the following factors." Lawsuits such as this one are, for better or worse, the reason modern contracts often go on so long. But the fact that in hindsight the language might have been made even clearer does not mean that it is ambiguous in its current form. Indeed, courts are not permitted to supply contract language after the fact. In the court's view, the *Norem*-line of cases provides the best reading of similar cost-of-insurance provisions to the one at issue here.

Advance Trust raises the concern that Security Life's position gives it unfettered discretion to set cost-of-insurance rates. That's wrong for two reasons. First, the cost-of-insurance provision puts a hard cap on the maximum cost-of-insurance rate Security Life can charge. The parties do not dispute that the 2015 rate hikes were well below this limit. Second, this is not a case in which the insurer is alleged to have used the rate increases for purposes wholly unrelated to the provision of insurance. So even if the court were to accept Advance Trust's argument that the phrase "cost of insurance" is ambiguous and must be read to cabin Security Life's rate-setting discretion, the alleged actions here fall within that interpretation of the policy.

The only question remaining, then, is whether Security Life did in fact refer to mortality factors along with other considerations. Security Life's fourth undisputed fact says:

> When it increased cost-of-insurance rates in 2015, Security Life referred to the gender and age of the insured, the

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"based on" six specifically enumerated factors, those are the only six factors it will take into account when adjusting the rate.").

> duration since coverage began, the amount of target death benefit and the segment premium class.

Doc. 91 at 5. Advance Trust denies this assertion. Doc. 107 at 2. Its denial says that Security Life raised cost-of-insurance charges despite decreasing mortality rates. *Id.* But its denial doesn't quarrel with the fact the Security Life *actually did consult* mortality figures during its 2015 rate hike. What it disputes is that Security Life referred *only* to those figures, which is just a restatement of the legal argument the court just rejected. And although Security Life's analysis of those factors differs from how Advance Trust would have done so, that difference doesn't defeat Security Life's motion. The cost-of-insurance provision, as explained, gives Security Life substantial discretion to set cost-of-insurance rates. Security Life "referred to" the mortality factors the policies required it to, so Security Life did not breach the policies on this basis. Judgment is thus proper on this theory of breach.

D. Non-Participation

The court also concludes that Security Life did not breach the policies' non-participation provision by allegedly seeking to recoup losses. This argument is too clever by half. The policies use the term "non-participating" to mean that the policies don't share in Security Life's "surplus earnings." Doc. 91-2 at 5. Although the policies don't define the term "surplus" (or for that matter, "surplus earnings"), the plain and ordinary meaning of surplus is "an amount in excess" or "what remains over and above what has been taken or used." *Surplus*, Oxford Eng. Dict. (3d. ed. 2009). And "earnings" means "recompense, reward, esp. for service; gain, profit" or "the money made through working, trade or business activity." *Earnings*, Oxford Eng. Dict. (3d. ed. 2009). The term "surplus earnings," then, is synonymous with profits or dividends.

This understanding is supported by technical sources. *Couch on Insurance* says that "the policyholder of a nonparticipating policy is not entitled to any dividend distributed by the insurer." 5 *Couch on Ins.* § 80:50 (3d. ed. 2020). The *Dictionary of Finance and Investment Terms* defines a "nonparticipating life insurance policy" as a "life insurance policy that does not pay dividends. Policyholders thus do not participate in the interest, dividends, and capital gains earned by the insurer on premiums paid. In contrast, participating insurance policies pay dividends to policyholders from earnings on investments." John Downes and John Elliot Goodman, *Dictionary of Finance and Investment Terms* 497 (2014). Under this plain reading of the policies, the non-participation provision bars participation in profits only; the policies do not bar Security Life from raising cost-of-insurance rates to recoup past losses.

Advance Trust responds first that "nonparticipating" is undefined in the policies and is thus ambiguous at best. The court disagrees. The second reference to the term occurs under the heading "nonparticipating" and explains what that phrase means: "The policy does not participate in our surplus earnings."

Advance Trust next relies on the surplusage canon to argue that the use of "and" in the sentence "This policy is nonparticipating and is not eligible for dividends" means that "nonparticipating" means something different from "not eligible for dividends." But this is more properly understood as an additional effort at defining "nonparticipating" and something of a belt-and-suspenders drafting choice. *See TMW Enterprises, Inc. v. Fed. Ins. Co.*, 619 F.3d 574, 577 (6th Cir. 2010) (Sutton, J.) (insurance contracts often contain belt-and-suspenders drafting choices); *see also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012) ("Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a

flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach.").

Contrary to Advance Trust's assertion, nor does the term "surplus earnings" encompass "positive *and negative* values" as a matter of industry usage. *See* Doc. 107 at 11 (emphasis added). Neither of the decisions upon which Advance Trust relies for this assertion, *Branch Banking & Tr. Co. v. Price*, 520 F. App'x 262 (5th Cir. 2013), and the concurrence in *In re Penn Treaty Network Am. Ins. Co.*, 119 A.3d 313 (Pa. 2015), considered the terms "nonparticipating" or "surplus earnings," and thus offer no authority that nonparticipating encompasses losses as well as profits. Rather, the leading industry authorities cited above support the opposite conclusion.

Advance Trust urges the court to construe the provision against Security Life, as the drafter of the policies. Doc. 107 at 11. But the rule that ambiguous policy terms are construed against the insurer doesn't apply because, as explained above, the term is not ambiguous. *Penzer v. Transportation Ins. Co.*, 29 So. 3d 1000, 1005 (Fla. 2010) ("To find in favor of the insured on this basis, however, the policy must actually *be* ambiguous."). "The fact that [a court] must consult traditional tools of contract interpretation to determine the meaning of nonparticipating doesn't mean that the terms are ambiguous." *Gov't Employees Ins. Co. v. Macedo*, 228 So. 3d 1111, 1113 (Fla. 2017) ("The ambiguity must be genuine, and the lack of a definition for an operative term 'does not, by itself, create an ambiguity.'").

Finally, Advance Trust contends that, for purposes of the policies governed by Arizona law, the court must consider extrinsic evidence to determine whether the nonparticipation clauses are actually ambiguous. Under Arizona law, when extrinsic evidence is offered by a party,

"the judge first considers the offered evidence and, if he or she finds that the contract language is 'reasonably susceptible' to the interpretation asserted by its proponent, the evidence is admissible to determine the meaning intended by the parties." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1140 (Ariz. 1993). The question whether contract language is ambiguous, necessitating admission of extrinsic evidence, is a question of law for the court to decide in the first instance. *In re Estate of Lamparella*, 109 P.3d 959, 963 (Ariz. Ct. App. 2005). Importantly, when determining whether a contract term is ambiguous, "the judge may properly decide not to consider certain offered evidence because it does not aid in interpretation but, instead, varies or contradicts the written words." *Taylor*, 854 P.2d at 1139.

The primary extrinsic evidence offered by Advance Trust is an internal board memorandum prepared for Security Life's Board addressing "proposed adjustment to certain non-guaranteed element . . . of in-force universal life insurance policies issued by . . . Security Life." Doc. 107-14 at 2. The memo states, "we were also mindful of the 'non-participating' provision of the policies. That provision states that the policyholder is no entitled to share in the profits of the Company, and the Company may not attempt to recoup past losses from the policyholder. That is also consistent with the determination/redetermination policy." *Id.* at 7. Advance Trust argues that this extrinsic evidence proves that the parties intended the nonparticipation clauses to prohibit Security Life from recouping past losses. Doc. 107 at 11. But it contains no analysis of the actual language of the policies or why Security Life (as opposed to the drafters of the memorandum) would understand the non-participation clauses to vary from their ordinary meaning. Advance Trust also says that the deposition testimony of Security Life's corporate representative establishes that the term "nonparticipating" means the policies don't

participate in profits or losses. Doc. 107 at 11–12. But there is no reasonable construction of the testimony cited to support that proposition. Security Life's representative defines a "participating policy [as] one that is – commonly offers dividends." Doc. 107-6 at 103:7–8. And to the extent Security Life's corporate representative suggested otherwise by, say, appearing to agree with the memorandum described above, he made clear that he wasn't a lawyer and he would consult an attorney before interpreting the nonparticipating provisions. *Id.* at 104:4–107:12. But most fundamentally, this is a case where Advance Trust's reading of the contract finds no support in its language and is thus unreasonable.

All in all, the term "non-participating" as defined in the policies and according to its plain and ordinary usage means that the policies don't participate in Security Life's profits, but does not deal with its losses. Security Life is thus entitled to judgment on this theory of breach.

D. Uniformity

The uniformity requirement says, "any change in [cost-of-insurance] rates will apply to all individuals of the same premium class and whose policies have been in effect for the same length of time." Doc. 91 at 4. Advance Trust argues that Security Life breached this provision when Security Life raised cost-of-insurance rates on underwritten SAUL policies, but not on Guaranteed Issue SAUL policies. Doc. 107 at 13–18.

A bit more background is helpful to understand this theory of breach. According to a pricing memorandum authored by Security Life, the substance of which the parties don't dispute, SAUL products come in "five different versions," two of which are at issue here: "Fully Underwritten" and "Guaranteed Issue." Doc. 92-13 at 3. "The Guaranteed Issue version of SAUL differs from the Fully Underwritten version in" four ways, according to Security Life's pricing memorandum. *Id.* at 4. Guaranteed

Issue SAUL has "higher per policy expense charges," "higher cost of insurance charges," "no underwriting – application questions only," and "no preferred classification available." *Id.*

Security Life admits that it didn't raise cost-of-insurance rates for Guaranteed Issue SAUL policies. Doc. 91 at 6. It maintains, however, that it didn't breach the uniformity provision because underwritten SAUL policies and Guaranteed Issue SAUL policies are in different "policy classes" and the uniformity requirement applies intra-policy class only. *Id.* Security Life relies on Actuarial Standard of Practice 2, section 3.4, which says:

> Policy Classes—Policies will usually be grouped into classes for purposes of determining nonguaranteed charges or benefits. The determination policy may include a definition of the policy classes to be used. If the policy classes have not been defined in the determination policy, the actuary should establish policy classes considering criteria such as the following:
>
> a. the similarity of the policy types;
>
> b. the structure of policy factors and nonguaranteed charges or benefits;
>
> c. the similarity of anticipated experience factors;
>
> d. the time period over which the policies were is--sued; and
>
> e. the underwriting and marketing characteristics of the policies.
>
> In addition, the actuary may consider combining policy classes that are reasonably consistent based on the above criteria if, in the actuary's professional judgment, such combinations would be appropriate.

Doc. 92-12 at 4; *see also* Doc. 91 at 6. Security Life says that Guaranteed Issue SAUL policies are "subject to distinct nonguaranteed charges,

including 'higher cost of insurance charges' because risks associated with GI SAUL policies are different those for fully underwritten policies." Doc. 91 at 6. According to Security Life's expert, Timothy Pfeifer, at the time of SAUL's development, "GI policies underwent separate financial review . . . with different projected experience assumptions" and mortality rates. Doc. 91 at 7 (quoting Doc. 92-8 at ¶ 47). In light of Standard of Practice 2, the differences between Guaranteed Issue SAUL and SAUL policies led Security Life to increase cost-of-insurance charges on SAUL policies only. According to Security Life, Guaranteed Issue SAUL policies are in a different premium class from regular SAUL policies. Doc. 91 at 15–16.

Advance Trust responds that the policies contain none of this. Instead, the policies use the term "premium class" which the policies use synonymously with the term "rate class," *e.g.*, "Nonsmoker Standard." Doc. 107 at 14. So when Security Life raised cost-of-insurance rates for nonsmoker-standard fully underwritten SAUL policies it also had to do so for nonsmoker-standard Guarantee Issue SAUL policies.

Unlike the other two theories of breach, this theory cannot be resolved with reference to the four corners of the policies alone. The question isn't so much what "premium class" means, but to which policies and products does the uniformity requirement apply. The proper question is one of scope: what group of policies must comply with the uniformity requirement? The policies do not answer that question and are ambiguous as a result.

What's more, there exists a dispute of material fact on how to determine the meaning of the uniformity provision. On the one hand, Security Life points to its application of Standard of Practice 4.2 for the interpretation that the uniformity requirement didn't apply to Guaranteed Issue

SAUL policies. On the other hand, Advance Trust points to evidence that Advance Trust treated all SAUL products as one for purposes of premium class determination, Doc. 107-16 at 20 (chart grouping all SAUL policies together to display risk classes); Doc. 107-11 at 3 (spreadsheet showing that premium classes are treated the same across SAUL policies). This dispute renders summary judgment inappropriate on this theory of breach.

E. Damages

Finally, Security Life argues that Advance Trust has failed to identify legally cognizable damages for each of the three theories of breach it alleges. Doc. 91 at 16–20. The parties agree that the amount of damages sought by Advance Trust is the same for each theory: the amount of cost-of-insurance rate increase across the putative class's policies. Doc. 91 at 17; Doc. 107 at 27. This, though, is not appropriate for summary judgment. Security Life's position is that the proper measure of damages for breach of the uniformity provision is the delta between what cost-of-insurance rates were and what they would have been had the rate increase been spread uniformly, *see* Restatement (Second) of Contracts § 347 (1981) (damages are measured by "the loss in the value to [the injured party] of the other party's performance caused by its failure or deficiency"), not that Advance Trust has failed to show that it would be entitled to any damages, which might render summary judgment proper. To the extent Security Life is correct about this, it can seek to narrow Advance Trust's damages through a motion in limine on this basis.

II. Advance Trust's Renewed Motion for Class Certification

A. Class Certification Standard

One or more members of a class may sue or be sued as representative parties on behalf of all members only if the class is so numerous that joinder is impracticable; there are questions of law or fact common to the class; the claims or defenses of the representative party is typical of those of the class; and the representative party will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). If these requirements are met, a court may certify a class if it:

> finds that the questions of law or fact common to class members predominate over any questions affecting only in- dividual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3); *see also Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 615 (1997). A court has "no authority to conduct a preliminary inquiry into the merits of a suit at class certification unless it is necessary to determine the propriety of certification." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013).

B. Predominance

The court denied without prejudice Advance Trust's motion for class certification on the ground that it had failed to adequately explain "that the law is sufficiently manageable such that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Doc. 81 at 15. The court ordered that, in any renewed motion, Advance Trust must address the "current law in all fifty states regarding the role of extrinsic evidence in interpreting unambiguous and ambiguous form contracts." *Id.* at 16. This question of predominance was the only remaining issue to address as it was clear that "factual issues predominate." *Id.* at 15.

Advance Trust has done its homework and renewed its motion for class certification under Federal Rule Civil Procedure 23(b)(3). Advance Trust preliminarily seeks to certify a "COI Overcharge Class" of:

> All owners of Strategic Accumulator Universal Life ("SAUL") and Life Design Guarantee Universal Life ("GUL") policies subjected to Security Life of Denver Insurance Company's ("SLD") cost of insurance ("COI") rate increase announced in September 2015, excluding owners whose policies issued in Alaska, Arkansas, New Mexico, Virginia, and Washington, and SLD, its officers and directors, members of their immediate families, and their heirs, successors, or assigns.

Doc. 87 at 2. Advance Trust alternatively moves for certification of the following classes:

> Five State Class. All members of the COI Overcharge Class whose policies were issued in Arizona, Colorado, Florida, New Jersey, and Wisconsin (*i.e.*, the states in which ATLES' policies were issued).
>
> Uniformity Class. All members of the COI Overcharge Class who are owners of SAUL.

> Non-Participation Class. All members of the COI Overcharge Class (but certified only as to the non-participation clause breach).

Id. Advance Trust also seeks appointment of Susman Godfrey as class counsel. *Id.* at 1.

Along with its renewed motion, Advance Trust submitted a fifty-state survey of how the jurisdictions at issue (1) determine whether a contract term is ambiguous, and (2) if those terms are ambiguous, how a court may determine that term's meaning. See Docs. 87-2, 82-3, 87-4. At what Advance Trust terms as "Stage 1," there are three groups of states: those that only consider the plain language of the contract to determine ambiguity; those that consider objective extrinsic evidence from the time the contract was made in addition to the plain text; and those that consider objective extrinsic pre- and post-contract formation evidence in addition to the plain text. Doc. 87 at 5. At Stage 2, Advance Trust likewise groups the states into three categories: those states that automatically apply the rule that an ambiguous term is to be construed against the insurer (*contra proferentem*); those that apply *contra proferentem* equally with extrinsic evidence; and those that apply *contra proferentem* as a last resort. *Id.* at 7.

These groupings and the fifty-state survey submitted by Advance Trust satisfy the court's previous order and make this case proper for class certification. To be sure, extrinsic evidence is likely needed to prove the meaning of the only remaining provision at issue, the uniformity requirement. But any such extrinsic evidence will be common to the class as the policies at issue are form contracts. Indeed, neither party points to any individualized extrinsic evidence that would make class certification untenable. Class certification is thus proper under Rule 23(b)(3). *See Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 255 (5th

Cir. 2020) (noting that "suits involving form contracts often lend themselves to class treatment" except when "individualized extrinsic evidence bears heavily on the interpretation of the class members' agreements."). Because Security Life's motion for summary judgment narrows the theories of breach to one (the uniformity issue), the court only will certify the "Uniformity Class" suggested by Advance Trust.

The most significant concern raised by Security Life is the applicability of the rule *contra proferentem*. That rule generally applies to ambiguous insurance coverage provisions. *E.g.*, *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947 (Ind. 1996) (noting that, under Indiana law, the rule of *contra proferentem* applies in particular "where a policy excludes coverage"). But the uniformity provision at issue here doesn't affect coverage. It affects costs. So it's not clear that *contra proferentem* will even come into play. Yet assuming that to be true, Security Life's argument cuts against its opposition to certification. Eliminating the additional wrinkle surrounding the application of *contra proferentem* makes class management easier, not harder.

The remaining arguments raised by Security Life have little merit. The fact that some federal courts have ruled on similar questions isn't determinative of the issue presented at this juncture—what are the underlying legal rules governing Advance Trust's claims. Nor are the slight differences in how states frame whether there is an ambiguity in the first place enough to defeat certification. Those differences are semantic. For example, Security Life offers no explanation of the practical difference of how Wisconsin frames the question of ambiguity (*i.e.* a contract term is ambiguous under Wisconsin law "if an innocent reader would find [the] contract unclear," *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539 (7th Cir. 2000)) and how South Dakota frames that question (*i.e.* a contract is ambiguous is a "reasonably intelligent person" would consider

its so, *Bunkers v. Jacobson*, 653 N.W.2d 732, 738 (S.D. 2002)). These arguments do not defeat Advance Trust's motion class certification.

C. Class Counsel

Advance Trust moves the court to appoint Susman Godfrey as class counsel. Doc. 87 at 1. Under Federal Rule of Civil Procedure 23(g), "a court that certifies a class must appoint class counsel." Fed. R. Civ. Proc. 23(g)(1). In doing so, a court must consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
> (iii) counsel's knowledge of the applicable law; and
> (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. Proc. 23(g)(1)(A). A court may also "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. Proc. 23(g)(1)(B). Overall, the court must be convinced that "class counsel" will "fairly and adequately represent the interests of the class." Fed. R. Civ. Proc. 23(g)(4).

Security Life does not oppose appointment of Susman Godfrey as class counsel, and the court finds that Susman Godfrey will adequately and fairly represent the class. In support of its initial motion to certify, Advance Trust submitted evidence that demonstrates Susman Godfrey's extensive experience handling class actions, including class actions involving highly similarly factual and legal issues to this one. Doc. 56-28 at 6. Susman Godfrey has already expended substantial time investigating potential claims in this case. And Susman Godfrey has demonstrated that it will expend significant resources in representing the class. The

court thus concludes that appointment of Susman Godfrey as class counsel is proper.

III. Magistrate Judge Wang's Report and Recommendation

Judge Wang recommended that the court deny Plaintiff Advance Trust's motion to strike Security Life's non-retained expert disclosure (Doc. 102). The recommendation states that objections to the recommendation must be filed within fourteen days after its service on the parties. (Doc. 132 at 10 n.5 (citing 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); and *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995).) The recommendation was docketed October 26, 2020, and no party has objected to the recommendation.

In the absence of a timely objection, the court may review a magistrate judge's recommendation under any standard it deems appropriate. *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) (*citing Thomas v. Arn*, 474 U.S. 140, 150, 154 (1985)). In this matter, the court has reviewed the recommendation to satisfy itself that there is "no clear error on the face of the record." Fed. R. Civ. P. 72(b) Advisory Committee Notes. Based on that review, the court has concluded that the recommendation is a correct application of the facts and the law.

CONCLUSION

Accordingly, it is **ORDERED** that:

Security Life's motion for summary judgment (Doc. 91) is **GRANTED IN PART** and **DENIED IN PART**.

Advance Trust's renewed motion to certify (Doc. 87) is **GRANTED IN PART**, and the court **PRELIMINARILY CERTIFIES** a class of: All members of the COI Overcharge Class who are owners of SAUL. Advance Trust is **APPOINTED** as class representative, and Susman Godfrey is **APPOINTED** as class counsel.

The report and recommendation on motion to strike Security Life's non-retained expert disclosure (Doc. 132) is **ACCEPTED** and **ADOPTED**, and Advance Trust's motion to strike (Doc. 102) is **DENIED**.

Advance Trust's motion to restrict (Doc. 71) is **GRANTED**. Exhibits C, D, E, G, H, K, and L to the Declaration of Lora J. Krsulich in Support of Plaintiff's Reply in Support of Motion for Class Certification shall remain on the docket at a Level 1 restriction.

DATED: January 6, 2021

BY THE COURT:

Hon. Daniel D. Domenico