

## Bartlit Beck Wins CAFA Challenge for Northwestern Mutual

By Jan Wolfe  
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Last year, a team of lawyers including David Boies III (the son of David Boies of Boies, Schiller & Flexner) won a ruling that Northwestern Mutual Insurance Company improperly changed its approach to paying dividends to 3,600 policyholders in Wisconsin. The elder Boies got involved in the case soon after, pressing an intriguing argument that the Wisconsin ruling should apply nationwide.

It remains to be seen if the maneuver will work, but on Wednesday Boies and son fell short in their bid to have a state court judge decide the case's fate. In a 9-page ruling, the U.S. Court of Appeals for the Seventh Circuit sent the case to federal court, concluding that removal is mandatory under the Class Action Fairness Act. The better-known Boies argued on behalf of the plaintiffs that the case fell under an exception to CAFA for disputes involving the "internal affairs" of a corporation. But the court disagreed, siding with Northwestern Mutual's lawyers at Bartlit Beck Herman Palenchar & Scott and Quarles & Brady.

Here's the backstory: In 1985, Northwestern Mutual changed its formula for paying dividends to certain annuity insurance policyholders. In 2001 a small law firm called Kersten & McKinnon in Mequon, Wisc., brought suit in Wisconsin state court on behalf of all Northwestern Mutual annuitants across the country. Unfortunately for Kersten & McKinnon, a judge ruled in 2006 that a nation-wide class isn't manageable. The question of damages was too individualized, the judge ruled. Also, 45 percent of the policies contained choice-of-law provisions specifying application of the law of the annuitant's home state, rather than Wisconsin.

The judge later stayed the Noonan case to allow Kersten & McKinnon--now joined by Boies III's Fairfax, Va.-based law firm Straus Boies--to pursue a separate case brought on behalf of just the 3,600 Wisconsin policyholders. The plaintiffs made headway in the streamlined case after a two-week bench trial in March 2011, when Judge Dennis Flynn in Racine, Wisc., state court ruled that Northwestern Mutual breached

its fiduciary duties by tweaking its annuities formula. The Milwaukee Journal-Sentinel reported that extrapolating the ruling to all 35,000 or so Northwestern Mutual annuitants nationwide would "expose the company to hundreds of millions of dollars in damages."

The ruling emboldened the plaintiffs to super-size the case again despite the 2006 decision, and they amended their complaint to include all policyholders nationwide. George Kersten of Kersten & McKinnon told us that as the bench trial unfolded, it became clear to his team that the case could have gone forward on behalf of a nationwide class in the first place. "We moved to include the other people as a simple matter of justice," he said. "Their rights were obviously affected by what was proved at trial."

Northwestern Mutual quickly removed the case to U.S. district court in Milwaukee under CAFA, which provides that most cases involving more than 100 plaintiffs must be heard in federal court. But a federal judge remanded the case back to state court in September, ruling that the case falls under an exception to CAFA for disputes that solely implicate a company's internal affairs.

To get the ruling affirmed, the plaintiffs brought on the elder David Boies. At an oral argument in October, he squared off against Adam Hoeflich of Bartlit Beck for Northwestern Mutual. Hoeflich came out on top in Wednesday's ruling, which was penned by Seventh Circuit Judge Frank Easterbrook. "The annuitants are entitled to be paid, not to a role in Northwestern Mutual's corporate governance." Easterbrook wrote for the panel. "This is a contract case, not a corporate-governance case."

"The court got it exactly right," Hoeflich told us. "This is why the Class Action Fairness Act was created."

Neither the younger nor the elder Boies was immediately available to comment. "We'll soldier on," Kersten & McKinnon's Kersten told us. "We have complete confidence in the court system to see that these people will receive the money they're due."