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United States Court of Appeals
Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ELLA CLINTON; WILLIAM CARRICK; TERRI L. STAUFFER-SCHMIDT; JEAN P. WRIGHT; MICHAEL A. WEBBER; DONALD P. COX; HOWARD ROSEN; WAI HEE YUEN; MARTHA MILLER COX,

Plaintiffs - Appellants,

v.

SECURITY BENEFIT LIFE INSURANCE COMPANY,

Defendant - Appellee.

No. 21-3035

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 5:20-CV-04038-HLT-KGG)

Andrew S. Friedman of Bonnett Fairbourn Friedman & Balint PC (Francis J. Balint, Jr. of Bonnett Fairbourn Friedman & Balint PC, Phoenix, Arizona; Adam M. Moskowitz and Howard H. Bushman of The Moskowitz Law Firm, PLLC, Coral Gables, Florida; and Eric D. Barton of Wagstaff & Cartmell, LLP, Kansas City, Missouri, with him on the briefs), for Plaintiffs-Appellants.

Robert D. Phillips, Jr. of Alston & Bird LLP (Samuel J. Park and Gillian H. Clow of Alston & Bird LLP, Los Angeles, California; Michael A. Valerio of Alston & Bird LLP, Washington, District of Columbia; and James D. Oliver, Anthony F. Rupp, and Holly Dyer of Foulston Siefkin LLP, Overland Park, Kansas, with him on the brief), for Defendant-Appellee.

Before **HARTZ**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

ROSSMAN, Circuit Judge.

Plaintiffs are consumers who sued Defendant Security Benefit Life Insurance Company under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, and state law, alleging Security Benefit developed a fraudulent scheme to design and market certain annuity products. This appeal requires us to determine whether the district court properly dismissed Plaintiffs' first amended complaint without prejudice for lack of particularity and plausibility in pleading fraud. Because we conclude Plaintiffs have alleged facially plausible fraud claims with the particularity required under Federal Rule of Civil Procedure 9(b), the district court erred in granting Security Benefit's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Exercising jurisdiction under 28 U.S.C. § 1291, we reverse and remand for further proceedings.

I

Background[1]

This case involves equity-indexed deferred annuities, a type of insurance product marketed and sold to Plaintiffs by Security Benefit. Before turning to

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[1] We rely on the complaint's allegations for our account of this appeal's background.

our analysis, we will explain the technical features of this annuity. As we discuss later, the complaint's principal fraud claims concern these features and the alleged undisclosed effects of their collective operation on Plaintiffs' investments.

A. Equity-Indexed Deferred Annuities

1. Basic Features

A deferred annuity is a contract between a consumer and an insurance company. A consumer purchases the deferred annuity with a single "up-front payment"—an initial premium—deposited into the consumer's account for a deferral period. Aplt. App. vol. 1 at 161 ¶ 23. The deferral period is a term of years specified in the annuity contract. The insurance company invests the consumer's initial premium over the deferral period. A deferred annuity is a long-term investment because an annuity owner often cannot access their initial premium during the deferral period without incurring a financial penalty. An annuity owner may receive a lump sum payment at the end of their deferral period, or a stream of periodic payments.

An equity-indexed deferred annuity—at issue here—gives consumers the choice to allocate their initial premium among several crediting options. Consumers may allocate their initial premium to a crediting option that provides a fixed interest rate "not less than a modest minimum guaranteed rate," or to a crediting option linked to designated stock indices. *Id.* at 161-62

¶ 24.[2] Equity-indexed deferred annuities are usually linked to third-party stock indices like the Standard & Poor's 500. One key feature of an equity-indexed deferred annuity is its performance is tied to the success of the linked financial market.

2. Participation Rates & "Caps"

The index-linked return credited to the investor can vary not only based on the performance of the stock index, but also based on the particular terms of the annuity contract. Participation rates and "caps" are common features of annuity products. A cap is a limit—usually a fixed percentage—on the amount an annuity owner earns from the underlying stock index's gains. A participation rate is the percentage of the underlying stock index's performance that the insurance company agrees to pass along to the investor.[3]

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[2] An equity-indexed deferred annuity "guarantees a minimum return to the contract owner if the contract is held to maturity." Equity Index Insurance Products, Securities Act Release No. 7438, Fed. Sec. L. Rep. (CCH) ¶ 85,957 (Aug. 20, 1997). In this way equity-indexed deferred annuities "combine features of traditional insurance products (guaranteed minimum return) and traditional securities (return linked to equity markets)." *Id.*

[3] The district court provides an example: if an annuity's participation rate is 70% and the underlying index increases by 10%, then the annuity account is credited with 70% of the index's increase, or 7%. Aplt. App. vol. 8 at 1951.

Higher participation rates and higher caps yield a higher rate of interest credited to the annuity holder's account. Many equity-indexed deferred annuities impose both caps and participation rates.

B. Security Benefit's Equity-Indexed Deferred Annuity Products

Shortly after being acquired by a private equity firm in 2010, Security Benefit developed and marketed equity-indexed deferred annuity products. It sold two annuities: the "Secure Income Annuity" and the "Total Value Annuity" (collectively, the "annuity products"). Aplt. App. vol. 1 at 157 ¶ 3. Investors paid fees and charges associated with the annuity products. Plaintiffs allege these annuity products share several features relevant to their fraud claims.

1. Proprietary Indices

Equity-indexed deferred annuities typically tie their performance to established financial markets like the Standard & Poor's 500. The annuity products at issue here were associated with proprietary stock indices used by Security Benefit.

From 2012 to 2015, Security Benefit used three proprietary indices. Two were linked to the Total Value Annuity product. One was linked to the Secure Income Annuity product.[4] Once a consumer bought one of these annuity

[4] The proprietary indices are called the "5-Year Annuity Linked TV Index," the "Morgan Stanley Dynamic Allocation Index Account," and the "BNP Paribas High Dividend Plus Annual Point to Point Index Account – Year 2." Aplt. App. vol. 1 at 158 ¶ 5. We discuss the individual proprietary

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