
D.C. Appeals Court Rules Against 151A

By Editor Test Thu, Jul 15, 2010

"Most likely this means that the SEC will drop efforts to regulate this product," said Eric Marhoun, general counsel of the Old Mutual Insurance Company.

Insurance agents and carriers who advocate regulating indexed annuities as insurance products and not securities have a favorable decision from the D.C. Circuit Court of Appeals in Washington, *National Underwriter* reported.

In the case of American Equity vs. SEC, a three-judge panel agreed with the plaintiff's that the SEC "failed properly to consider the effect of the rule upon efficiency, competition, and capital formation" when it decided that securities industry and not the insurance industry should own the indexed annuity business.

A rehearing was granted.

The ruling doesn't change much, because the SEC's proposed rule turning indexed annuities into securities has never gone into effect. But the insurance agents who sell indexed annuities considered it a victory.

Eric Marhoun, general counsel of Old Mutual Insurance Company, Baltimore, one of the leaders of efforts to fight Rule 151A, welcomed the appeals court ruling.

"Most likely this means that the SEC will drop efforts to regulate this product," Marhoun says. "We are very pleased by the court's action because it wipes the slate clean and clarifies that Rule 151A is null and void. This was a big victory both for agents and for consumers who have come to rely on the guarantees provided by FIAs, but we plan to stay vigilant until we're sure the threat has passed."

The fact that the court vacated the rule "was a nice bonus," says Phil Bartz of McKenna, Long & Aldridge, Washington. Bartz, Old Mutual's outside counsel, filed the petition on behalf of Old Mutual.

"We felt the court needed to do something to protect the agents and companies writing [indexed annuity] products, and so we conservatively asked for a 2-year implementation period," he says.

If the SEC's effort to regulate indexed annuities is eventually successful, only brokers with securities licenses will be able to sell the products. That would deprive insurance agents of a lucrative source of business.

In the courts, however, the issue has been whether SEC commissioner Christopher Cox adequately considered the enormous impact that a change in classification would have on the indexed annuity. It's not clear whether the Obama administration's SEC chief, Mary Schapiro, shares Cox' zeal to make index annuities securities.

The panel included justices David Sentelle, Douglas Ginsburg and Judith Rogers.

A SEC spokesman says, "Today's Court order maintains the status quo as the rule had not yet gone into effect."

The SEC "will study the court's order, as well as the legislative changes under consideration by Congress in the financial reform legislation to determine how best to proceed," the spokesman said.

Sen. Tom Harkin, D-Iowa, recently persuaded a congressional conference committee to add a provision to H.R. 4173, the financial services bill, that would classify indexed annuities governed by standards developed by the National Association of Insurance Commissioners, Kansas City, Mo., as state-regulated insurance products.

The House already has passed H.R. 4173, and Senate leaders tonight announced that they have the votes to get the completed bill through the Senate.

© 2010 RIJ Publishing LLC. All rights reserved.