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United States Court of Appeals
Tenth Circuit

October 13, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

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
(D.C. No. 5:20-CV-04038-HLT-KGG)
(D. Kan.)

ORDER

Before **HOLMES**, Chief Judge, **HARTZ**, **TYMKOVICH**, **MATHESON**, **BACHARACH**, **PHILLIPS**, **McHUGH**, **MORITZ**, **EID**, **CARSON**, and **ROSSMAN**, Circuit Judges.

This matter is before the court on Appellee's *Petition for Rehearing En Banc* and *Appellants' Response to Petition for Rehearing En Banc*. The petition and the response were circulated to all judges of the court who are in regular active service, and a poll was called. The poll did not carry. Consequently, Appellee's request for en banc rehearing is DENIED.

Judges Hartz, Tymkovich, and Eid would grant the petition. Judge Hartz has filed a separate dissent from the denial of en banc rehearing, which is joined by Judges Tymkovich and Eid.

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk

Clinton v. Security Benefit Life Ins. Co., No. 21-3035
HARTZ, J., dissenting in the denial of en banc rehearing, joined by **TYMKOVICH**, J., and **EID**, J.

I respectfully dissent from the denial of en banc review. There are two fundamental errors in the opinion of the panel majority. First, it failed to use the proper standard of review in assessing the sufficiency of the allegations of the complaint, thereby enabling complaints to survive even when they unreasonably characterize the documents on which they are based. Second, it introduces an unprecedented notion of what constitutes fraud, requiring a seller of an investment product not only to describe every negative feature of the product but also to analyze the possible negative cumulative effect of those features and compare that cumulative effect to the effects of features in competing products but not in the product being sold. The en banc court should have corrected these errors and sent the case back to the original panel to analyze the complaint employing a proper standard of review and proper traditional law regarding fraud.

All the alleged fraud in this case is predicated on statements in sales documents provided to the Plaintiffs. In this context an allegation in the complaint regarding the contents of the sales documents is plausible only if it is reasonably supported by a fair reading of those documents. That is not the approach of the panel opinion. My dissent to the panel opinion discusses the various allegations relied on by that opinion. It will take only one to make my point. The complaint alleges that the sales documents "cherry-picked" an illustration of prior performance of an investment product to improperly suggest excessive returns on the investment. Yet the documents clearly identified the illustration as presenting the returns during the most successful 10-year period out of the immediately prior 20 years. And right next to that illustration the documents presented three other illustrations showing the returns during the least successful 10-year period during the immediately preceding 20 years, the median 10-year period, and the most recent 10-year period. The panel opinion points out that a seller could mislead an investor by picking unrepresentative periods. But could a reasonable person say that it was misleading to look at returns during the 20-year period immediately preceding the time of the sale? I fail to see how any reasonable person could describe the 20-year period or the four illustrations as cherry-picked; and the panel opinion fails to explain how it could be reasonable to do so.

The panel opinion is able to uphold the complaint only by adopting too narrow a view of when a document contradicts an allegation in a complaint. It confines the notion of contradiction to when the complaint misstates the language of the document. For example, it distinguishes from this case a Second Circuit opinion that held that a document contradicted an allegation in the complaint on the ground that in that case "the complaint alleged that the proposed merger consideration was said to 'consist of cash, at least in part,'" whereas the document itself "'stated that the consideration would consist of "cash *or* debt *or* equity securities."'" *Clinton v. Security Benefit Life Ins. Co.*, 63 F.4th 1264, 1275 n.10 (2023) (quoting *Kramer v. Time Warner Inc.*, 937 F.2d 767, 775 (2d Cir. 1991)). Elsewhere the panel opinion's discussion of the *cherry-picked* allegation appears to adopt the same view when it indicates that the allegation survived because the sales documents do not "utterly discredit" it. *Clinton*, 63 F.3d at 1287–88. The *utterly-discredit* language is taken from the Supreme Court's decision in *Scott v. Harris*, 550 U.S. 372, 380 (2007), where the Court held that a plaintiff's allegations describing a car chase could be rejected at the summary-judgment stage when a video of the event "blatantly contradicted" the allegations, *id.*

This is not to say that *Kramer* or *Scott* was wrongly decided. Far from it. When an allegation (even sworn testimony) clearly misstates the contents of a document or what happened during a video-recorded car chase, the allegation certainly can be rejected, because no reasonable person would accept the truth of the allegation. But a document (or a video) can also contradict an allegation at a higher level of abstraction than just the description of historical facts (such as what a document said or whether there were other cars on the road during a high-speed chase). It can contradict an allegation of reasonableness or unreasonableness, or contradict an allegation that a document was misleading or cherry-picked data. The test for whether such an allegation is contradicted—which is essentially the same as the test articulated in *Kramer* and *Scott*—is whether a reasonable person could agree with the allegation after seeing the video or reading the document. But the panel opinion does not undertake that analysis. What is missing from that opinion, for example, is an explanation of how a reasonable person could conclude after reading the sales documents that Defendant cherry-picked the data in the illustrations in those documents. Apparently, the panel majority did not think that our standard of review required it to address that question. This failure to apply the proper standard of review permeates the panel opinion.

I should add that this *cherry-picked* error in the panel opinion is not an inconsequential one. So long as it represents the law, at least in this circuit, any seller of an investment product will know that if it provides information on historical performance of the product, it will not be able to obtain dismissal of a strike-suit complaint. All the plaintiff need do is allege that the historical information was cherry-picked. I would think that the Defendant in this case would not be the only business to fear the precedent the panel opinion sets.

Turning to my second concern with the panel opinion, it adopts a view of fraud that goes beyond traditional standards. The investment products at issue here are annuities whose returns are linked to equity indices. The purported advantage of such products is that the return on the investment may be significantly higher than the return on traditional annuities whose returns are fixed at a specific interest rate. But these annuity products linked to equity indices also guarantee that the holder of the annuity will not lose money (the value of the product will not drop below the original investment), so the seller needs to cover its bets in case the equity index falls in value. As a result, the annuity products come with various features that can lead to a return on the product that is less than the return on the linked equity index. One such feature is a cap, which provides that no matter how much the index goes up, the percentage increase in the value of the annuity product will not be greater than, say, 7%. The investment products acquired by Plaintiffs did not have caps, although they did have other features that could reduce the return below the increase in the linked equity index.

Of course, the seller of such an annuity product needs to disclose such negative features. (My dissent from the panel opinion shows that those features were adequately disclosed.) The panel opinion, however, goes further. It upholds the allegation that Defendant committed fraud by not explaining that the disclosed features of the purchased investment products "collectively . . . operated in practice as caps." *Clinton*, 63 F.4th at 1284. This, even though none of the products had a cap.

To be sure, a statement can be misleading and fraudulent even when its contents are factually accurate if it is only a half-truth. A claim of fraud can be predicated on a statement that omits essential information. The statement to an investor that the company owns land with tremendous coal reserves can be fraudulent if it fails to disclose that the coal is too deep beneath the surface to be mined. But that does not mean that fraud can be based on just any omission. In particular, I am not aware of any authority saying that a seller of a product must compare its features to those of competing products. Yet that is the essence of the panel opinion's analysis. Even though none of the products sold to Plaintiffs had caps (and the sales documents provided to Plaintiffs before they invested do not describe any of the investment products as uncapped, having no cap, or the like), the panel opinion says that Defendant can be liable because it did not disclose that features of those products together "operated in practice as caps." 63 F.4th at 1284. What it means to "operate in practice" as caps is not explained in the complaint, or even in the panel opinion. The best I can figure out (see my dissent to the panel opinion) is that the negative features of the investment products at issue are said to be like caps only because they can reduce the return on the investment. In other words, the opinion is saying that a seller of an investment product commits fraud even when it discloses all the negative features of the investment if it does not explain the cumulative effect of all those features and then compare that effect to a feature, such as a cap, that may appear in competing products. There is no explanation why it is not enough simply to describe all the negative features of the marketed annuity products. The complaint contains no allegation that the purchasers of the investment products could not ascertain the cumulative effect and make the comparisons themselves. I see no limiting principle to the liability imposed by the panel opinion's theory of fraud. Because of the multitude of features that competing products may have, the disclosure requirements for marketers of investment products would be impossible to satisfy.

In short, the panel opinion overturns established doctrine regarding the analysis of the sufficiency of a complaint and the notion of fraud, and I fear that it will cause substantial mischief to the detriment of financial markets.