UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

TRANSAMERICA LIFE INSURANCE COMPANY, Plaintiff vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., ESTELLA RODRIGUES, EDWARD MAGGIACOMO, JR., LIFEMARK SECURITIES CORP., and PATRICK GARVEY, Defendants.	C.A. No. 09-471-S
TRANSAMERICA LIFE INSURANCE COMPANY, Plaintiff vs. LIFEMARK SECURITIES CORP., JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., and EDWARD MAGGIACOMO, JR. Defendants.	C.A. No. 09-549-S

CONSOLIDATED MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND REQUEST FOR RECONSIDERATION OF DEFENDANT EDWARD L. MAGGIACOMO, JR.

Pursuant to Fed.R.Civ.P. 8(a), 9, 11, and 12(b)(6), Defendant Edward L. Maggiacomo, Jr. ("Mr. Maggiacomo") has moved to dismiss plaintiff's Amended Complaints in the above matters, and for reconsideration of his earlier motions to dismiss to the extent those motions were

denied. He submits the following memorandum in support thereof, and in addition hereby joins in and adopts all the arguments and factual descriptions made in Defendants' Consolidated Memorandum Of Law In Support Of Their Motions To Dismiss And Requests For Reconsideration simultaneously filed on behalf of all other defendants in these actions and the related actions ("Consolidated Memorandum"). Mr. Maggiacomo also reargues and incorporates by reference all the arguments made in prior filings by him and all other defendants in support of their previous Motions To Dismiss as contained in the various Memoranda of Law filed in support of those motions.[1]

INTRODUCTION

In addition to, and/or in elaboration upon the points made in the Consolidated Memorandum, Mr. Maggiacomo submits the following:

CASE NO. 09-471

The Second Amended Complaint in Case No. 09-471 differs from the earlier Amended Complaint in three material respects. First is that the current iteration alleges that Mr. Maggiacomo was not only an agent of defendant Lifemark, but was also an employee or agent of defendant Estate Planning Resources, Inc. ("EPR"). The second is that there was a relationship of undefined character, scope or significance between Transamerica on the one hand and Mr. Maggiacomo and Lifemark on the other. And the third is that the new Complaint either adds or realleges in a different count or under a different heading, fraud allegations that have now been pled variously as fraud in the factum, or fraud in the inducement. The Complaint confusingly adds a specific fraud in the factum allegation to the existing rescission count (Count I), and separately adds fraud in the factum as an additional count (Count IV). It alleges that with respect

[1]The previous filings incorporated here include the following: in Case No. 09-471, ECF Documents numbered 26, 32, 33, 39, 40, 41, and 61; and in Case No. 09-549, ECF Documents numbered 9, 13, 14, 15, 21, 22, 23, and 37.

to the rescission claim, a fraud in the factum was perpetrated upon the annuitant (Mr. Garvey) and then adopts that theory in its separate claim. The new fraud claims, regardless of how characterized, appear to claim injury because of the coincidence of (a) Mr. Maggiacomo's alleged agency relationship with EPR, (b) the other, unspecified relationship between Transamerica and Mr. Maggiacomo/Lifemark, and (c) a fraud allegedly perpetrated upon Mr. Garvey.

CASE NO. 09-549

In Case No. 09-549, the Amended Complaint differs from the original in some of the same respects as do the complaints in the 09-471, but also in one other very important respect. While the Amended and Original Complaints in 09-549 differ from each other in the same way as those in 09-471 with respect to the new and newly characterized allegations of fraud, and the attribution of the new agency relationship between Mr. Maggiacomo and EPR, as well as the "relationship" between Transamerica and Mr. Maggiacomo/Lifemark, the fraud in the factum claims are augmented in 09-549, however, by the charge that the defendants, including Mr. Maggiacomo, actually forged the signatures of the annuitants on the annuity applications. Although the forgery allegations were made in the earlier versions of the complaint, they have now become the centerpiece of the fraud in the factum claims as either newly minted or recharacterized here.[2]

[2]There are at least two other defects appearing on the face of the Amended Complaint in 09-549. First, paragraph 132 (in the new Count II claiming Fraud In The Factum) alleges that the illegally constituted applications were submitted to Western Reserve [Life Assurance Company of Ohio], which is not the plaintiff in this case. The plaintiff is Transamerica [Life Issuance Co.]. Second, paragraphs 138 and 139 (in Count III, alleging Breach of Contract against only Lifemark) refer to the annuity application of Mr. Garvey, whose application is the sole subject of the 09-471 case and is not part of the 09-549 case. Without the allegations of paragraphs 138 and 139, the breach of contract claim is insufficiently alleged.

ARGUMENT

I. The Allegations As Stated

The Amended Complaint in 09-549 predicates its fraud-in-factum claims in particular (and all its fraud claims in general) on a series of repeated allegations. First is the allegation that the signatures of the annuitants were forged on the annuity applications (¶¶24, 40, 56, 72, 88 and 104); second is the newly-made allegation that Mr. Maggiacomo was an agent of EPR (¶¶ 31, 47, 63, 79, 95 and 111); third is the claim that neither Mr. Maggiacomo nor Lifemark had any involvement in the annuity application or verified any of its information (¶¶32, 48, 64, 80, 96, and 112); and last is that Transamerica's damage flows in part from some special but unexplicated relationship that it alleges existed between itself and Mr. Maggiacomo/Lifemark (¶134). Finally, although in each of the forgery allegations, plaintiff consistently claims the completely inconsistent alternatives of payment to the annuitant to sign the application, when it comes time to state the basis for the fraud in the factum claims, the payment allegations disappear and are replaced by an allegation, not made earlier, that the annuitants were tricked into signing the applications (¶130). [The principal difference in 09-471 is that there is no allegation of forgery (only because the sole annuitant there [Mr. Garvey] was deposed with no resulting evidence of forgery).] With or without the forgery allegations, the current versions of both complaints, to the extent they rely on similarly made allegations, utterly and completely fail to state a claim within the parameters of the Rules 9 and 11 of the Rules of Civil Procedure.

First, the allegations of forgery have no basis in fact. The forgery claims are clearly fraud claims and are therefore governed by the more stringent pleading requirements of Rule 9(b). See Consolidated Memorandum, at Section III.E. See also, Suna v. Bailey Corp., 107 F.3d 64, 68 (1st Cir. 1997). There is absolutely no information in the complaint delineating which of the

defendants (if any) performed the forgeries, or when or where they were accomplished. The forgery allegations also constitute a violation of Rule 11, which requires due diligence and a good faith basis for making any claim in a pleading. See, e.g., Murphy v. Maine, 2006 WL 2514012, *2, fn. 3 (D.Me. 2006). There are wholesale allegations of forgery made in the 09-549 Complaint, which are now being used to support the fraud-in-factum claims. These claims are not even made upon information and belief (not that this would excuse them).[3] They are made in direct and alternative allegations of either an illegal payment to an annuitant as a *quid pro quo* for his/her signature, or out-and-out forgery of the signature, with no basis in fact to support the latter. Because plaintiff believes there is no possible way the annuity applications would have or could have been submitted unless the annuitants were paid to sign them or their signatures were forged, by reverse implication, these must be adequate grounds for fraud in the factum. Not only is this ludicrous, and not within the scope of proper pleading, it is in direct contravention of the Rule that requires such allegations to have a good faith basis.

In addition, these allegations are directly contradicted by others in the complaint. In 09-549, each of the separate scenarios describing each annuity, repeats the same allegations verbatim, changing only the names of the annuitant and the claimant in each case. Using the Henry Rose annuity as an example, paragraph 24 alleges the forgery; but paragraph 37, which describes everything that Transamerica purportedly learned after Rose's death—and on which it bases its fraud claims—does not include a discovery that Mr. Rose's signature was forged. In fact, it includes an acknowledgement that Mr. Rose signed the application.[4]

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[3]See, Universal Communications Systems v. Lycos, Inc., 478 F.3d 413, 427 (1st Cir. 2007), quoting Romani v. Shearson Lehman Hutton, 929 F.2d 875, 878 (1st Cir. 1991).

[4]The same circumstance recurs in the Castillona annuity (¶¶40 and 53); the Carnevale annuity (¶¶56 and 69); the Robichaud annuity (¶¶72 and 85); the Horton annuity (¶¶88 and 101); and the DiGiovanni annuity (¶¶104 and 117).

Second, appearing for the first time in the current complaints is the allegation that Mr. Maggiacomo was an agent of EPR.[5] This also has no basis in fact. Moreover, there is no indication of the parameters of this alleged agency, so there is no way to asses or evaluate the sufficiency of the claim that any action taken by Mr. Maggiacomo was within its scope.[6]

Third, the allegations in Case No. 09-549 that neither Mr. Maggiacomo nor Lifemark had any involvement in the annuity application process cannot possibly have any good faith basis because there is nothing in the documents attached to or referenced in any of the pleadings that even remotely mentions such an issue (except documents that require or contain Mr. Maggiacomo's signature, which demonstrates the opposite), and there has been no discovery in the case in which anyone has provided any information concerning it. Presumably the only people who would know to what extent either Mr. Maggiacomo or Lifemark reviewed or verified the information in the application, or otherwise participated (alone or with each other) in the application process would be Mr. Maggiacomo or Lifemark, and neither defendant has thus far been the subject of any discovery. There simply cannot be any good faith basis on which to make this allegation.[7]

In addition, in 09-471, plaintiff alleges in paragraph 84 that Mr. Maggiacomo and Lifemark were very involved in the preparation and submission of the Garvey application. This

[5]In Case No. 09-471, this allegation appears at ¶34.

[6]It has been repeatedly represented throughout the proceedings that Mr. Maggiacomo is an independent contractor and not an employee or agent of EPR. He has separate counsel in part for that reason.

[7]Moreover, the allegation as made is essentially itself a fraud claim or part of a fraud claim. There is absolutely no specificity attached to that claim (to the extent it is capable of specification, as it claims to allege an absence of facts).

In addition, in 09-471, paragraph 45 alleges (a) that Mr. Maggiacomo falsely represented that he was the agent who sold the Garvey annuity, and (b) that neither Mr. Maggiacomo nor anyone from Lifemark was involved in the sale. In 09-549, paragraph 122 makes the same allegations about all five annuities at issue there. Aside from the fact that these allegations are simply wrong (Mr. Maggiacomo did sell the annuities), they makes no sense: the annuities were Lifemark annuities. They were issued. Transamerica paid commissions for their issuance. Someone had to have sold them.

is the opposite of what is alleged in 09-549 purporting to be the same scheme. This inconsistency makes any sense at all only with acceptance of the allegations in 09-549 that the signatures of all the annuitants were forged. As noted above, there is not only nothing offered in support of those allegations, there is clearly no good faith basis for making them.[8] In fact, the forgery allegations appear to be false.

Lastly, the new allegation made in the fraud-in-factum claims that Transamerica was prevented from discovering the fraud because of the "nature" of Maggiacomo's and Lifemark's "relationship" with Transamerica cannot be a basis for relief against Mr. Maggiacomo because (a) there is no allegation of any relationship between Mr. Maggiacomo and Transamerica, and (b) there is nothing in either Complaint that sufficiently pleads either the relationship or its parameters.

II. Assumption of the Risk

The Court is asked to reconsider the argument Mr. Maggiacomo made in his earlier filings[9] concerning what is, in effect, an assumption of the risk by the plaintiff, and that argument is restated as if fully set forth herein. While this is ordinarily an affirmative defense, it may be also be raised by a motion to dismiss. Blackstone Realty, LLC v. F.D.I.C., 244 F.3d 193, 197 (1st Cir. 2007). There is no doubt that these cases are document-driven. Here, it is crystal

[8]It is noteworthy in this regard that not one of the annuitants whose signatures were allegedly forged was deposed, or could otherwise have been able to deny his/her signature. They were all deceased well before plaintiff made these allegations.

[9]See, Memorandum of Law In Support of Motion to Dismiss of Defendant Edward L. Maggiacomo, Jr., in Case No. 09-471, ECF Document No. 33-2, pp. 10-17; see also, Memorandum of Law In Support of Motion to Dismiss of Defendant Edward L. Maggiacomo, Jr., in Case No. 09-549, ECF Document No. 14, pp. 4-9.

clear that the plaintiff had control of the documents.[10] They were, in fact, contracts of adhesion.[11] There is also no doubt that plaintiff had the ability and knowledge to specifically preclude or eliminate each and every occasion, opportunity or risk of misrepresentation, whether by omission or commission, to which they claim they were subjected by the defendants, either by simply asking the appropriate questions in their own documents or barring in the documents the conduct complained of.[12] The fact that they deliberately failed to do so allows the Court to draw the well-supported inference that such a failure was not only deliberate, but was done for the express purpose of broadening the market base of annuity customers to the greatest extent possible. The plaintiff here not only assumed the risk, it actually created the risk itself.

There were no legal or regulatory requirements in Rhode Island (or anywhere else, for that matter) that would have or could have prevented the plaintiff from inquiring about and insisting upon being provided with the information it now claims was denied it, and which it claims was material and relied upon as the basis for their injury. Other insurance companies involved in the sale of variable annuity products created and utilized documents that specifically requested annuitant health information, investor-annuitant relationship information, and all the other facts not provided to plaintiff which it claims were material to the issuance of the annuities.

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[10]It has been held in contract circumstances, even where the parties were on somewhat equal footing, that "prudent contracting parties surely would be specific in describing the exact scope of any release or reservation of rights" [Bell BCI Co. v. United States, 570 F.3d 1337, 1341 (Fed.Cir. 2009), quoting Bell BCI Co. v. United States, 81 Fed.Cl. 617, 639 (2000)], and that "[t]o the extent ambiguity exists in [the documents], . . . the drafter of these documents 'must bear the risk of any contractual uncertainty, ambiguity or inequitable consequence.' " *Id.* at 639-40 (quoting *Firestone Tire & Rubber Co. v. United States*, 195 Ct.Cl. 21, 444 F.2d 547, 551 (1971))". Id.

[11]See the discussion of *contra proferentem* in Pan American World Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989, 1002-03 (2d Cir. 1974).

[12]This is not unlike what occurred in the insurance litigation arising from the aftermath of Hurricane Katrina. See, Axis Reinsurance Company v. Lanza, 2007 WL 1017323 (E.D.La., March 29, 2007), quoting the decision in In re Katrina Canal Breaches Consolidated Litigation, 2006 WL 3421012 (E.D.La.2006): "As noted by Judge Duval: The insurers could have drafted such a clear exclusion with very little effort, but they did not. . . If the insurers, who wrote every word of the policies, wanted to make the language clear ... it could have so drafted the policy language. For reasons only known to the insurer, it chose not to do so."

Plaintiff cannot now be heard to complain that it was hoist by its own petard. To allow plaintiff any relief in these circumstances would subvert the notion of justice and effectively turn the judicial system on its head. This very point was the subject of Scottish Guarantee Insurance Co., Ltd. v. Dyer, 1992 WL 601889, *11-12 (W.D.Wis., Nov. 27, 1992). There, the insurance company drafted a policy in such a way as to allow coverage it did not intend to provide and for which it had not been paid. The Court found that

> Scottish Guarantee finds itself in this situation because of how it chose to draft its policy. Although Scottish Guarantee's corporate thought process is irrelevant, if its intent was to exclude unequivocally any pollution claim whatsoever, it should have, in an abundance of caution, specifically listed in its pollution exclusion every conceivable route to coverage that an insured might infer from the policy, as other insurers have done.

As the court succinctly pointed out,

> Although [the insurer] in hindsight may prefer to have limited what events or occurrences trigger insurance coverage, when it has failed to do so in the insurance contract itself, this court will not rewrite the contract to create a new contract to release the insurer from a risk it could have avoided through a more foresighted drafting of the policy.

quoting Kremers-Urban Company v. American Employers Insurance Co., 119 Wis.2d 722, 743-44, 351 N.W.2d 156, 167 (1984).

CONCLUSION

For the foregoing reasons, Defendant Edward Maggiacomo, Jr., respectfully requests that this Court dismiss with prejudice all counts against him in both of Plaintiff's Complaints.

EDWARD L. MAGGIACOMO, JR.
By his Attorney,
/s/ Anthony M. Traini
Anthony M. Traini #4793
56 Pine Street, Suite 200
Providence, RI 02903
Tel. (401) 621-4700
Fax. (401) 621-5888
amt@trainilaw.com

CERTIFICATE OF SERVICE

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/s/ Anthony M. Traini