National Underwriter
THE NEWS SOURCE FOR LIFE & HEALTH AGENTS

BREAKING NEWS

EIA Oral Arguments Begin

By ARTHUR D. POSTAL Published 5/8/2009

WASHINGTON -- A federal appeals court panel today heard lawyers talk about responsibility for the risk associated with equity indexed annuities.

The lawyers presented oral arguments concerning *American Equity Investment Life Insurance Company, et al, v. SEC,* Number 09-1021, to a three-judge panel at the U.S. Court of Appeals for the D.C. Circuit.

The plaintiffs are challenging Rule 151A, a regulation approved by the U.S. Securities and Exchange Commission that would classify some EIAs as securities and put them under SEC jurisdiction starting Jan. 12, 2011.

Rodney Page represented two of the plaintiffs, the National Association of Insurance Commissioners, Kansas City, Mo., and the National Conference of Insurance Legislators, Troy, N.Y. Eugene Scalia represented the insurers that challenged Rule 151A.

Page and Scalia argued that EIAs provide a guaranteed return of principal, pose little investment risk, are not securities and are adequately regulated by the states through a comprehensive set of regulations that include suitability requirements.

Insurers, not insureds, bear most of the investment risk associated with EIAs, and state regulation adequately protects consumers against the risk of EIA losses, Page said.

Rule 151A is an inappropriate attempt by the SEC to “trump state regulation,” Page said.

Scalia also argued that most of the risk is borne by the issuer, not the insured.

Judge David Sentelle, chief judge of the D.C. Circuit appeals court, responded to Page's argument about responsibility for EIA risk by saying, “We have not said how much risk is too much risk.”

At another point, Sentelle asked, "Isn't it [the SEC's] job to determine if there is investment risk?"

Sentelle is hearing the case along with Judge Douglas Ginsburg and Judge Judith Rogers.

Michael Conley, who represented the SEC in the case, said there is a ‘bright line” between regulation of fixed annuities and variable annuities. Variable annuities, which are regulated as securities, are under the jurisdiction of the SEC, but Section 3(a)(8) of the Securities Act of 1933 puts fixed annuities under the jurisdiction of the states, he said.

EIAs are hybrid instruments, not covered by a “bright line,” but instruments that the SEC can regulate through its authority under the Chevron doctrine, which gives the SEC the flexibility to interpret ambiguity, Conley said.

Moreover, because investors do not know what kind of return they will get on EIAs, they cannot weigh the costs and benefits of keeping their money in an annuity or paying a fee to surrender the plan, Conley said.

EIAs offer a guaranteed minimum value, but they also offer an additional return tied to the performance of a stock index, and that benefit creates enough of a risk for the insured that the SEC has the authority to regulate the product, Conley said.

Conley added that states do not offer uniform regulation of EIAs.

Scalia countered that argument by suggesting that Iowa and Minnesota account for two-thirds of the sales of EIAs and that their approach to EIAs “provides the most robust regulation” imposed by states.

Ginsburg questioned how well the SEC had gauged the impact of the regulation on capital accumulation and competition. He asked Conley whether the rule should be sent back to the SEC for further consideration in light of the possible impact that imposing dual regulation might have on EIAs' competitive position.

Sentelle asked Conley whether the SEC had adequately complied with the Administrative Procedures Act, which required the SEC to consider commentators' views on the proposed rule. He reminded Conley of a point that Scalia had made: that the American Academy of Actuaries, Washington, had stated that EIAs are clearly fixed annuities.

Conley told Sentelle that the SEC had reviewed the actuaries' comments before publishing Rule 151A.