CARLTON FIELDS

Under a Spotlight, "Shadow Insurance" Lawsuit Fails Scrutiny

December 23, 2015

One of several class actions that arose in the wake of a 2013 investigation by the New York Department of Financial Services (NYDFS) into so-called "shadow insurance," *Robainas v. Metropolitan Life Insurance Co.*, has been dismissed by a New York federal court for lack of a cognizable injury. "Shadow insurance" is a term used to describe an insurer's reinsurance of a portion of its risk through a subsidiary or affiliate, which reduces the assets the insurer must maintain in support of its reserves under state regulations. Though legal, the NYDFS characterized these activities as a "loophole" that puts policyholders at risk. The *Robainas* plaintiffs' allegations were typical: that MetLife's letters of credit used by captive reinsurers were backed by contractual parental guarantees, meaning that less risk was transferred than regulatory filings suggested, and these "hollow assets" were not disclosed in annual filings which led to an artificially inflated risk-based capital ratio. Plaintiffs, MetLife policyholders, asserted a knowing misrepresentation in violation of New York Insurance Law Section 4226 and sought the penalty available for "aggrieved" persons. The court dismissed the plaintiffs' case for lack of a cognizable injury, rejecting each of plaintiffs' injury theories: that the policies were riskier than represented; that the "shadow insurance" inflated the premiums; that MetLife might be unable to pay insurance claims in the future; and that Section 4226 created a "right to be free from misrepresentation by the insurer." These theories failed to show the required "real or impending" injury for constitutional standing to sue, instead reflecting a conjectural or hypothetical injury. Section 4226 did not obviate this injury requirement but rather reinforced it—the word "aggrieved" suggesting an injury requirement coextensive with that of the Constitution. The court's decision shines a light on the greatest weakness to any potential "shadow insurance" suit—that the alleged harms of "shadow insurance" are inherently conjectural. Nonetheless, insurers should take note of the court's suggestion that an injury might be shown if plaintiffs could prove their premiums were higher as a result of "shadow insurance" activities. The court rejected this argument because it was contradicted by a study showing that shadow insurance in fact *reduced* the cost of life insurance. That study may be important in future related litigation as well.

Authored By

Jason H. Gould

Related Practices

Life, Annuity, and Retirement Litigation

Related Industries

Life, Annuity, and Retirement Solutions

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.