

Alleged Misrepresentations to DFS Warrant SLUSA Preclusion

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The Southern District of New York recently granted defendant's motion to dismiss a putative class action claiming that AXA Equitable Life Insurance Company breached its contractual obligation by implementing a volatility management strategy for its variable annuities policies. The claims are similar to those that AXA settled with the New York Department of Financial Services (DFS) in 2014, including that AXA's "volatility management strategy could limit potential gains by holders of variable annuities during highly volatile markets thereby changing the nature of the products that these policyholders purchased." In May 2009, AXA introduced this "volatility management strategy" for certain accounts without obtaining DFS approval. After an investigation, DFS determined that AXA's Plan of Operation "failed to adequately inform and adequately explain ... that existing variable annuity policyholders (like Zweiman) who had not elected to participate in the volatility management strategy could nevertheless have this strategy applied to their policies." Applying this strategy, according to DFS, could limit potential gains by holders of variable annuities when the market was highly volatile. In an effort to avoid preemption, the named plaintiff in *Zweiman v. AXA Equitable Life Ins. Co.* argued that the misrepresentations did not induce her to buy, sell, or hold these securities. The district court found, however, that because plaintiff paid a premium for certain guaranteed benefits, her transaction had sufficient connection to the purchase or sale of a covered security, regardless of the passage of time and was thus preempted by the Securities Litigation Uniform Standard Act (SLUSA). Further the court held that even if plaintiff was unaware of the misrepresentation, the defendant's alleged misrepresentations to DFS created sufficient connection to the purchase or sale of a covered security to warrant SLUSA preclusion. This is true, the court noted, because "[a]bsent DFS approval, AXA would not have been legally permitted to introduce the [] strategy to plaintiff's variable annuity policy."

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