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Second Circuit Affirms Dismissal of "Shadow Insurance" Lawsuits

April 10, 2017

In a summary order issued February 23, the United States Court of Appeals for the Second Circuit affirmed the dismissal of two so-called “shadow insurance” putative class action lawsuits — *Ross v. AXA Equitable Life Insurance Company* and *Robainas v. Metropolitan Life Insurance Company* — on the basis that the plaintiffs lacked standing under Article III of the United States Constitution to sue in the federal district court. The suits were two of several class actions that arose in the wake of a 2013 investigation by the New York Department of Financial Services into certain captive reinsurance transactions. Specifically, the complaints alleged that the insurance companies misused captive reinsurers domiciled in foreign jurisdictions to avoid higher reserve requirements of U.S. jurisdictions, resulting in the misstatement of their financial information and increased risks for plaintiffs. As reported in the Summer 2015 and Fall 2015 editions of *Expect Focus*, the district court dismissed the suits based on the plaintiffs’ failure to establish Article III standing. The court of appeals affirmed, and found the complaints failed adequately to allege that the plaintiffs had suffered injury-in-fact, a necessary element of Article III standing. First, the court rejected plaintiffs’ argument that allegations that the insurance companies had violated New York Insurance Law section 4226 sufficiently alleged injury-in-fact because of injury “inherent in the statutory violation.” The court held “[t]he mere fact that an insurer may make a misleading representation does not require or even lead to the necessary conclusion that the misleading representation is material or even likely to cause harm.” Second, citing *Spokeo, Inc. v. Robbins*, (2016), the court held that, to establish standing, plaintiffs had to allege the injury-in-fact was concrete, particularized, and “actual or imminent, not conjectural or hypothetical.” The court found the harm alleged in the complaints — an augmented risk that the insurers would be unable to pay death benefit claims in the event of an economic downturn and their policies’ inferior status, relative to policies unaffected by shadow transactions, which plaintiffs claim they would have been able to buy for the same price — was speculative and hypothetical, and insufficient to establish standing. While the Second Circuit’s ruling is non-precedential, it reinforces that the alleged harms of “shadow insurance” are inherently conjectural, a fundamental flaw in this genre of litigation when pursued in federal court.

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