

# SLUSA Dismissal Affirmed in Variable Annuity Class Action: Eleventh Circuit Looks Behind Artful Pleading

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The Eleventh Circuit Court of Appeals recently affirmed the dismissal of a putative class action against a brokerage firm and its parent company, holding that the Securities Litigation Uniform Standards Act (SLUSA) barred the action. In *Cochran v. Penn Mutual Life Insurance Co.*, the Eleventh Circuit also formally accepted case law from sister circuits that it should look behind “artful” pleading in determining whether SLUSA bars a class action under state law.

The plaintiff had alleged that the brokerage firm had violated Georgia fiduciary duties by recommending that its clients purchase variable annuities in tax-deferred accounts. The plaintiff alleged that a variable annuity was always unsuitable for that type of account, such as a rollover IRA, because the tax benefits of a variable annuity had no value in an account that was already tax-qualified. The plaintiff alleged that the brokerage firm only recommended the annuities because of the higher fees due to the defendants from these annuities versus a more plain-vanilla investment, such as a low-cost index fund.

The defendants moved to dismiss under Rule 12(b)(1), arguing that SLUSA barred a class action, like this one, based on state law claims that allege material misrepresentations or omissions in connection with the purchase or sale of a security. The Northern District of Georgia agreed and granted the motion.

In affirming the dismissal, the Eleventh Circuit focused on the “gravamen” of the complaint and “not on the labels the plaintiff chooses to give his claims, and not on the artful way a plaintiff words his allegations.” The Eleventh Circuit acknowledged that it had “not previously articulated all those

principles explicitly” and noted that several other circuits had, including the Third, Fifth, Eighth, and Ninth.

The court held that the key allegations were “that through its investment advice and recommendations, [the defendant] affirmatively made false statements, or failed to disclose material facts, about the suitability of the variable annuity investment for the type of account that the plaintiff had.”

The plaintiff argued that the conflict of interest was the heart of his claim and that “no amount of disclosure can ever cure the breach of the duty caused by the conflict.” The court cited Georgia case law, though, in which a plaintiff arguing breach of fiduciary duty must show “both a conflict of interest and a material misrepresentation or omission.”

Also worth noting is that, in a footnote, the Eleventh Circuit aligned itself with the Ninth Circuit and explained that it would refer to SLUSA as “barring” a class action to vindicate certain state law claims rather than “preempting” any cause of action.

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