

Class Action Dismissed For Lack Of Subject Matter Jurisdiction

BY TODD FULLER

The U.S. District Court for the Southern District of New York recently dismissed a class action attempting to assert claims for breach of fiduciary duties under ERISA in connection with a group annuity contract endorsed by the New York State United Teachers (NYSUT) and used to fund School District 403(b) retirement plans throughout the State of New York. In *Montoya v. ING Life Insurance and Annuity Co., NYSUT, et al.*, two employees of the Long Beach City School District brought a putative class action against NYSUT, NYSUT Trust, ING Life Insurance and Annuity (ILIAC), and ten individual Trustees seeking to represent a class of all union members who chose to use ILIAC's Opportunity Plus tax deferred annuity under their employer's 403(b) retirement plan. The complaint alleged that ILIAC's group annuity contract was a separate ERISA plan, that defendants were ERISA fiduciaries, and defendants breached their fiduciary duties by paying and accepting endorsement fees and accepting "revenue sharing" payments from mutual funds. The complaint sought damages for various injuries allegedly suffered by the plans, including disgorgement of all endorsement fees received by NYSUT Trust, and disgorgement of all revenue sharing payments received by ILIAC. Jurisdiction was based entirely on ERISA.

ILIAC and the NYSUT defendants moved to dismiss for lack of subject matter jurisdiction, arguing that plaintiffs' 403(b) retirement plan was a "governmental plan" established by the School District and exempt from ERISA. The court agreed and dismissed the case in its entirety. The court held that, given the School District's involvement and funding of the 403(b) plan, it was clear that the School District had established a 403(b) retirement plan which was a "governmental plan" exempt from ERISA. The court rejected plaintiffs' contention that an ERISA "safe harbor" provision could be used to show that the School District did not establish or maintain the plan, explaining that the regulation applies only to private charitable organizations and not to governmental plans which are already exempt from ERISA. The Court also noted that the complaint failed because under Section 403(b) only an "employer" like the School District (and not a union) may establish a tax exempt 403(b) plan. The court observed that adopting plaintiffs' position "would call into question the validity of the tax benefits plaintiffs have received over the years by participating in [Opportunity Plus]." Jordan Burt successfully represented ILIAC in the case.

Life Settlement Activities Invite Regulatory Scrutiny

BY ANN FURMAN

The SEC has announced that it is paying special attention to the life settlement business, which represented a \$16 billion industry in 2008.

Chairman Mary Schapiro has established a *Life Settlements Task Force*, composed of senior officials throughout the SEC, to examine emerging issues in the life settlements market and to advise the SEC whether market practices and regulatory oversight can be improved.

The Task Force will study securitization of life settlements and whether securities offerings that purport to rely on exemptions from registration under the federal securities laws are doing so properly. The Task Force also will research life settlement sales practices, fees, and disclosure, both in terms of the sale of existing life insurance policies by contract owners and the sale of interests in life settlement pools to investors.



SEC to study life settlements

In September 24, 2009, testimony before the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises of the House Committee on Financial Services, Paula Dubberly, Associate Director of the Division of Corporation Finance, testified that "the SEC has taken the position that life settlements are securities, and, therefore, are subject to the requirements of the federal securities laws." Ms. Dubberly acknowledged, however, that courts have not taken a unanimous view on the securities status of life settlements.

The SEC Life Settlement Task Force intends to work closely with FINRA, NASAA, and the NAIC to coordinate regulatory efforts and analyze whether gaps in oversight exist. For its part, FINRA issued Regulatory Notice 09-42 in July, 2009 to remind FINRA members of their obligations with variable life settlement activities.