For The First Circuit, Transaction Costs in Structured Settlements are Not Fraud

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Liability insurers charge premiums in exchange for an agreement to cover certain claims against their policyholders. When settling a tort claim against a policyholder, the insurance company can pay a lump-sum of cash or, in some cases, will enter into a "structured settlement" with the claimant. Here, the insurance company purchases an annuity (or a stream of payments over a set period of time) from, for example, a life insurance company, under which the beneficiary/claimant will receive these payments to settle the claim. However, the process of buying an annuity generates certain transaction costs in the form of a broker's commission payable by the liability insurer to the life insurance agent. If the liability insurer were to purchase a stream of payments for the amount owed to the claimant but the claimant received less than the insurer paid, what should we call the missing funds: fraud or the price of doing business?

This is the issue raised in *Ezell v. Lexington Insurance Co.* Norma Ezell, along with two other plaintiffs, agreed to structured settlements with Lexington Insurance Company to settle their wrongful death and personal injury claims. Years after these agreements were executed, the plaintiffs noticed that they did not receive the full amount paid by Lexington, as some of it was used to pay commissions to the life insurance agent. These Plaintiffs then filed a putative class action suit against Lexington and other insurance companies, arguing that the insurers fraudulently misrepresented their payouts in the settlement documents and engaged in a scheme to defraud in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). After the District Court granted the Defendants' motion to dismiss, the matter came before the First Circuit.

On June 11, 2019, a First Circuit panel unanimously found that amounts deducted from settlement payments did not constitute fraud. Writing for the Court, retired Supreme Court Justice David Souter noted that the settlement language did not promise that the claimants would receive a certain amount; rather, the agreements stated that a certain amount of money would be "annuitized" to purchase revenue streams for their benefit. In this case, there was no dispute as to whether Lexington actually spent the listed amount to purchase the payment streams. The settlement agreements also set forth the payment stream each claimant would receive, and there was no dispute that these amounts were actually paid. Furthermore, the three appellants conceded that these "missing" funds were paid to brokers at a market rate. As such, Justice Souter stated that these commission payments "would have been accounted for as a standard element of the cost of doing business by the life insurance companies and reflected in the market prices that Lexington paid." *Ezell*, at *6. The terms of the settlement contract mandated the Lexington produce a stream of payments for the claimants; therefore, the claimants received "exactly those specific annuity payments the agreements had promised." *Ezell*, at *7. With no actionable claims left to judge, the First Circuit affirmed the District Court's dismissal of the amended complaint.

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