

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

United States Court of Appeals  
Fifth Circuit

**FILED**

March 18, 2013

\_\_\_\_\_  
No. 12-10360  
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Lyle W. Cayce  
Clerk

LINCOLN NATIONAL LIFE INSURANCE COMPANY,

Plaintiff-Appellee

COWBOY ATHLETICS INCORPORATED; T. BOONE PICKENS,

Defendants—Third Party  
Plaintiffs—Appellants

v.

MANAGEMENT COMPENSATION GROUP • LEE INCORPORATED; JOHN  
RIDINGS LEE; JOHN RIDINGS LEE COMPANY INCORPORATED;  
JAMES GLENN TURNER, JR.; LARRY KEITH ANDERS; SUMMIT  
ALLIANCE FINANCIAL, L.L.P.,

Third Party Defendants—Appellees

\_\_\_\_\_  
Appeal from the United States District Court  
for the Northern District of Texas  
No. 3:10-cv-00173  
\_\_\_\_\_

Before STEWART, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:\*

Cowboy Athletics Incorporated, a charitable organization benefiting  
Oklahoma State University (“OSU”), and T. Boone Pickens, a Cowboy board

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not  
be published and is not precedent except under the limited circumstances set forth in 5TH CIR.  
R. 47.5.4.

member and supporter (collectively, “Cowboy”), purchased \$10-million-dollar life insurance policies on each of twenty-seven OSU alumni. Plaintiff–Appellee Lincoln National Life Insurance Company (“Lincoln”) underwrote the policies, which the Third Party Defendants–Appellees, as independent insurance agents, marketed to Cowboy as an investment program by claiming the ability to select individual insureds who were likely to die in a pattern that would beat the actuarial tables. After two years passed without the occurrence of any insureds’ deaths, Cowboy became dissatisfied with the program’s lack of profitability, and the instant litigation ensued. The district court dismissed all of Cowboy’s claims on summary judgment. We affirm for essentially the reasons set forth by the district court.

Cowboy waived its rights with respect to its breach of contract claims. Oklahoma grants life insurance policyholders a “free-look” period of ten days following receipt of the policy during which to read and, if dissatisfied, rescind the policy.<sup>1</sup> Cowboy knowingly and voluntarily relinquished its free-look rights by (1) declining physical delivery of the policies in favor of allowing the independent agents to retain custody, (2) misleading Lincoln as to that fact by signing and returning receipts of delivery to Lincoln, and (3) enjoying coverage—and the potential of receiving proceeds—for two years following the issuance of its policies by Lincoln.<sup>2</sup>

With respect to fraud, the record reveals no triable misrepresentations. As a matter of Oklahoma law, representations about future events cannot support claims of actionable fraud.<sup>3</sup> A fraud claim also fails if the aggrieved

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<sup>1</sup> Ok. Stat. tit. 36, § 4003.1(A).

<sup>2</sup> See *Guardian Life Ins. Co. of Am. v. U.S. Tower Servs., Ltd.*, 714 A.2d 204, 210-11 (Md. Ct. Spec. App. 1998).

<sup>3</sup> See *Hall v. Edge*, 782 P.2d 122, 128 n.4 (Okla. 1989).

party “could have ascertained the truth with reasonable diligence.”<sup>4</sup> This was not Cowboy’s first rodeo. The undisputed record establishes that both the Appellees’ disclosures and Cowboy’s own due diligence apprised it of the inherent risks and assumptions underlying the investment program. To the extent that Cowboy hangs its hat on “doctored” life expectancy numbers or other purported misrepresentations of present fact, the record evidence is woefully insufficient to support Cowboy’s suggested inferences.<sup>5</sup>

The judgment of the district court is AFFIRMED.

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<sup>4</sup> *Slover v. Equitable Variable Life Ins. Co.*, 443 F. Supp. 2d 1272, 1282 (N.D. Okla. 2006).

<sup>5</sup> We also affirm in favor of Lincoln on the independent basis that Lincoln made none of the purported misrepresentations and is not vicariously liable, even under Okla. Stat. tit. 36, § 1435.3(A), for the fraud of independent insurance agents like Appellees. *See Nat’l Life & Accident Ins. Co. v. Cudjo*, 304 P.2d 322, 325 (Okla. 1956).

**United States Court of Appeals**

FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

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NEW ORLEANS, LA 70130

March 18, 2013

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or  
Rehearing En Banc

No. 12-10360, Lincoln Natl Life v. Cowboy Athletics, Inc.  
USDC No. 3:10-CV-173

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Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5<sup>TH</sup> CIR. RULES 35, 39, and 41 govern costs, rehearings, and mandates. **5<sup>TH</sup> CIR. RULES 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5<sup>TH</sup> CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5<sup>TH</sup> CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

The judgment entered provides that defendants-third party plaintiffs-appellants pay to appellees the costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk

By:   
Joseph M. Armato, Deputy Clerk

Enclosure(s)

Mr. James S. Bainbridge  
Mr. William A. Brewer III  
Mr. Jeremy Daniel Camp I  
Mr. Paul D. Clement  
Mr. Robert Steven Gianelli  
Mr. Bradley M. Gordon  
Mr. James C. Ho  
Mr. Clinton D. Howie  
Mr. Andrew George Jubinsky  
Mr. Peter Michael Jung  
Mr. William Ranney Levi  
Mr. Andrew J. Lorin  
Mr. Timothy James Morris  
Mr. Joel Wilson Reese  
Mr. James Stephen Renard  
Mr. Prerak Shah  
Mrs. Kendal Catherine Simpson  
Mr. Roy L. Stacy  
Mr. Charles J. Vinicombe  
Mr. Mark John Zimmermann