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Equity Indexed Annuities: "Securities," or Exempt Insurance Products Under the Federal Securities Laws?

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> "Depending on the mix of features, an equity-indexed security may or may not be a security."
>
> — U.S. Securities and Exchange Commission (July 2005)[1]

> "The question of whether a particular EIA is an insurance product or a security is complicated and depends upon the particular facts and circumstances concerning the instrument offered or sold."
>
> — National Association of Securities Dealers (August 2005)[2]

Introduction

It has been more than a decade since the investment vehicle known as the "equity indexed annuity," or EIA, was introduced to the investing public. Although the Securities and Exchange Commission (SEC) and the National Association of Securities Dealers (NASD) have had more than 10 years to study EIAs and opine on their nature, both organizations have, as of this writing, been unable to take a position. The question remains, are EIAs "securities" (and thus subject to the antifraud investor protection provisions of the federal securities laws), or are they "insurance" products which are exempt from the reach of those laws?

This article addresses the following issues. First, how did EIAs fall into this legal limbo, and why does it persist more than a decade after

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their introduction? Second, what does the classification of EIAs mean to brokers, dealers, investors, regulators, and attorneys? Third, what is the current state of the law?

In the lines that follow, the 1995 genesis of the EIA is discussed, and then contextualized against its better-known cousins, "fixed" and "variable" annuities. The EIA is a hybrid, mixing features of both, and is therefore neither fish nor fowl. The legal ramifications of classifying an EIA as a "security" or an insurance product are significant: variable annuities have been treated as "securities," while fixed annuities have generally been accepted as insurance products exempt from reach of the federal securities laws.

Since even the SEC and the NASD have not taken any definitive position on the nature of the EIA, it is hardly surprising that others, including investors, courts and lawyers, are similarly uncertain. The lack of consensus on the nature of EIAs is troubling because continued confusion about their classification impacts the way they are marketed and sold—and the manner in which disputes arising out of their purchase are handled, including the forms of relief available to investors.

EIAs, created in 1995, are now a multi-billion dollar industry

Billions of dollars in EIAs are sold each year, resulting in generous commissions paid to sales agents. This extremely lucrative market has created, as might be expected, the opportunity for great mischief, such as misleading, inappropriate, and downright fraudulent sales tactics. With the status of EIAs as "securities" in limbo, the industry and investors alike face unnecessary challenges when disputes inevitably arise.

The lure of EIAs proved immediately and wildly successful. Although only four EIA issuers initially existed in 1995, the first year of their sale, over 30 types of EIAs were available to the investing public by the end of 1996, with more than 50 product variations.[3] The increasing variety of choices, and the amount of money invested, increased in Malthusian proportions: 2004 sales rose more than 50% over 2003 numbers, from $14 billion (in 2003) to approximately $22 billion (in 2004).[4] These significant numbers continue to increase; according to one educated estimate, $25 billion in EIAs were sold in 2005.[5] Significantly, general insurance agents (not registered with the NASD as broker-dealers) account for a large percentage of those EIA sales.[6]

What is an EIA?

An EIA combines a mix of investment features typically found in the two more established and familiar annuity categories known as "fixed" and "variable" annuities. But what are annuities?

An annuity, in its broadest form, is a contract between an individual and an insurance company; that contract contains "an obligation to pay a stated sum, usually monthly or annually, to a stated recipient."[7] This simplistic definition requires some refinement, however, as annuities exist in multiple and myriad forms.[8] An annuity purchaser may fund the annuity with either a lump-sum payment, or through a series of payments. An insurer's payments back to the purchaser might begin immediately, upon some contingency, or at some future date certain. These details are regulated by the annuity contract.

A "fixed" annuity is one where the insurer guarantees a minimum rate of interest while the account is growing, and guarantees (as the name suggests) that periodic payments will be made at a guaranteed, or fixed, amount.[9] In contrast, a "variable" annuity is one where the purchase payment is placed in a range of investment options (typically, mutual funds); as a result, the amount of the purchaser's return of investment will fluctuate, depending on the performance of the investment options selected.[10] Otherwise put, a fixed annuity "guarantees fixed payments, either for life or for a specified period," while a variable annuity "makes payments in varying amounts depending on the success of investment strategy."[11]

The classification of an annuity as "fixed" or "variable" has a direct and immediate impact on its legal treatment. Courts considering the classification of annuities have divided them by type, generally holding that while variable annuities constitute "securities" subject to Securities and Exchange Commission regulation, fixed annuities are *not* securities, and *not* required to be registered with (and are not regulated by) the SEC.

Should EIAs be treated as "securities"?

EIAs can operate like fixed annuities to the extent a particular EIA annuity contract may guarantee *minimum* returns, but an EIA contract might *also* pay returns *above* those guaranteed minimums based on the performance of equity markets. EIAs therefore include aspects of both variable and fixed annuities: guaranteed but fluctuating returns. In addition, EIAs—like stocks and other speculative investments—can lose money, particularly in the event the holder is forced to cancel the annuity contract early.[12] It is this unique and confusing mix of features—guaranteed returns combined with additional returns pegged to the performance of equity markets—that has caused the SEC and the NASD to refuse to take any general position on their categorization.[13]

This current legal limbo has significant legal consequences for annuity creators, sellers, purchasers, and regulators. If EIAs are not "securities," then investor claims which are typically predicated on the federal securities laws and regulations cannot be pursued.

Fundamental to the analysis of whether an EIA is a "security"—or not—are the various federal definitions of "security" Congress provided in the statutory schemes it created to regulate investments and investment companies. Also relevant is the definition of "security" supplied by the Supreme Court in the 1946 landmark case *S.E.C. v. W.J. Howey Co.*, sometimes referred to as the "*Howey*" test.[14]

Unfortunately, the definitions of "security" contained in the federal statutes vary. By way of example, the definition of "security" found in the Investment Company Act of 1940[15] differs slightly from the definition contained in Section 3 of the Securities Exchange Act of 1934.[16] Section 2 of the 1933 Securities Act provides yet another variation, which does not precisely match either "security" as defined in the 1940 Act *or* the 1934 Act.[17] To further complicate matters, state statutory schemes provide even further variations.[18] The resulting Byzantine labyrinth of conflicting and inconsistent definitions of "security" has only clouded any opportunity for classification of EIAs.

The United States Supreme Court's three-part *Howey* test attempted to define "security" some 60 years ago.[19] For an investment vehicle to be a "security," the Supreme Court ruled, three elements must exist: (1) an investment of money; (2) in a common enterprise; (3) leading the investor to expect profits derived solely form the efforts of a third party.[20]

Strict application of *Howey* suggests that EIAs would be considered securities. After all, EIA purchasers invest money in a common enterprise with the contracting entity, and the investor/purchaser expects to receive profits over and above the amount of the original purchase price, without doing any further work.[21] However, no federal court has yet applied the Supreme Court's *Howey* interpretation to declare that EIAs are "securities." In fact, as explained below, various federal appellate and district-level decisions to consider the issue have reached varying—and seemingly inconsistent—conclusions on the issue.

Should EIAs be eligible for the 1933 Act's "insurance exemption?"

Section 3(a)(8) of the Securities Act of 1933 includes an "insurance exemption" that exempts certain insurance policies and annuity contracts from the Act's registration requirements, providing that the issuer is a corporation subject to the supervision of the insurance commissioner, bank commissioner, or other state regulatory authority.[22] Even this statute has exceptions, however. The United States Supreme Court, more than 40 years ago (well before the genesis of EIAs) ruled conclusively that simply labeling a product an annuity contract will not invoke the insurance exemption. Since variable annuities pass the performance of a pool of assets through to the contract holder, those vehicles can be considered "securities" and are thus subject to—and not exempt from—the registration and antifraud provisions of the securities laws.[23]

In 1986, faced with a proliferation of annuity contracts, the SEC enacted Rule 151 as a "safe harbor" for certain annuity contracts—meaning that any annuity contracts meeting Rule 151's requirements are *not* required to be registered or otherwise comply with the requirements of the federal securities laws.[24] From that enactment forward, for a Rule 151 "safe harbor" exemption to apply, the following three conditions must exist: (1) the product must be issued by an insurer subject to state insurance regulation; (2) the insurer must assume investment risk; and (3) the product may not be marketed primarily as an investment.

As the third prong of the Rule 151 test suggests, the manner by which EIAs are marketed and sold will often prove determinative of whether any particular court or arbitration panel considering an EIA dispute will classify the EIA in question as a security. As the SEC has explicitly cautioned: "Marketing is another significant factor in distinguishing insurance from a security.... The Commission is concerned that the nature of equity index insurance products may make it particularly difficult to market these products without primary emphasis on their investment aspects."[25] EIAs sold for "growth" might qualify as "securities," while those sold for "stability" might be labeled insurance products.[26]

It is this Rule 151 final exemption requirement—that the product may not be marketed primarily as an investment—that is particularly vague and problematic, for disputes over investments typically contain a "he said, she said" element. As explained in the following section, both the SEC and the NASD have repeatedly cautioned marketers of EIAs to exercise caution.

The status of EIAs: legal limbo

Less than two years after EIAs were introduced to the market, and recognizing a problem then looming on the horizon, the SEC issued Release No. 7438 on August 20, 1997.[27] Release 7438 solicited public comment "on the structure of equity indexed insurance products, the manner in which they are marketed, and any other matters the Commission should consider in addressing federal securities laws issues raised by equity index insurance products."[28] The initial comment period of November 20, 1997, was extended on November 17, 1997, to run through January 5, 1998.[29]

Industry comments, not surprisingly, generally ran against treating EIAs as securities for purposes of applying the federal securities laws.[30] This approach, however, was not universal: some issuers and industry groups informed the SEC that they believed EIAs "to present significant investor protection concerns that can be addressed only by regulating them as securities."[31] This conflict of opinion apparently caused agency paralysis; to date, the S.E.C. has not taken a definitive position.[32]

The NASD has similarly failed to take a stand on the classification of EIAs, but NASD Release 05-50, subtitled "Equity-Indexed Annuities: Member Responsibilities for Supervising Sales of Unregistered Equity-Indexed Annuities," at least articulates the NASD's strong concern about unregistered EIAs and the abuses inherent in their inappropriate marketing and sale. While insisting that it "is not taking a position on whether a particular EIA is a security," the NASD simultaneously stresses that in order for a particular EIA to fall within the "safe harbor" insurance exemption to the federal securities laws, "the product may not be marketed primarily as an investment."[33]

While "many firms assume that EIAs that are not registered under the Securities Act are insurance and not securities," this assumption is not without, as the NASD has warned, an attendant risk:

> However, if a particular EIA were a security, and an associated person sold the EIA outside the regular scope of his employment with the firm, Rule 3040 requires that the firm treat the sale as a private securities transaction and supervise the sale in accordance with the provisions of that rule. The associated person must notify the firm in writing before participating in the private securities transaction [and] the firm must provide written approval of his participation in the transaction.[34]

Release 05-50 specifically articulates a very real concern that unscrupulous industry marketers and salespersons would use the potentially exempt status of EIAs to avoid NASD Rules 3030 and 3040, which are designed to police misconduct.

NASD Rule 3030 requires that an associated person promptly notify the firm in writing of a business activity outside the scope of his relationship with the firm, but firm supervision is not required. Rule 3030 does not require brokers or dealers to supervise (or even approve) outside business activities, and the liability of "associated persons" who engage in such activities can be denied or limited by firms. Rule 3040 requires prior notification to the firm of an associated person's intention to engage in a private securities transaction, and in such cases, the firm must treat such sales as securities transactions under the Rule and supervise those sales. A sale of an EIA which is considered to be an "outside business transaction" can thus escape regulatory scrutiny (and dealer liability) if the EIA is not deemed a "security."

Case law: EIA classification remains elusive

Despite the Supreme Court's explicit recognition that "Congress plainly contemplated the possibility of dual litigation in state and federal court relating to securities transactions,"[35] federal courts retain exclusive jurisdiction over claims arising out of the 1934 Securities Exchange Act.[36] Few, if any, cases involving the nature of EIAs as securities (versus insurance products) have been decided in the state courts.[37]

In was made clear by the Supreme Court over 45 years ago that variable annuity contracts should be considered "securities" because they guarantee no minimum accumulation value in terms of principal or return. *SEC v. Variable Annuity Life Insurance Co. of America* ("*VALIC*").[38] Eight years after *VALIC*, the Supreme Court in *SEC v. United Benefit Life Ins. Co.* held that variable annuities which provide only a partial guarantee of principal, and no guarantee as to interest, are also securities.[39] These rulings hold today.[40] Fixed annuities, in contrast to variable annuities, are *not* considered to be securities.[41]

One of the factors the Supreme Court considered in *United Benefit* was the sales materials for the annuity contract in question. The primary advertisement was entitled "New Opportunity for Financial Growth," and the sales kit included displays emphasizing investment return and the experience of United's management in professional investing. The Court stated that the manner by which the annuity was sold affected its analysis:

> The test ... is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect. In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be.[42]

In Release 6558, the SEC articulated a sentiment similar to that expressed in *United Benefit*; that the way an annuity contract is marketed should affect its classification: "The Commission believes that insurers and others marketing a contract with primary emphasis on discretionary excess interest and other investment-oriented features, while relegating mention of the traditional retirement planning features of an annuity contract to the 'fine print, must be viewed as offering a contract and not insurance...."[43]

Conflicting interpretations persist, however. A 2002 analysis of index deferred annuities, *Malone v. Addison Ins. Marketing, Inc.*,[44] concluded that they were *not* securities and granted a motion to dismiss. The *Malone* court commented that a court "cannot dispositively classify [an] annuity as 'fixed' and thus exempt it from the reach of the Securities Act simply because the contract itself labels it so."[45]

Whether the product is a security or entitled to a safe harbor exemption remains a case-by-case matter (as the SEC and the NASD themselves posit):

> The modern day differences between fixed and variable annuities are not always immediately apparent in the context of indexed deferred annuities, such as this one, where the purchaser is guaranteed a fixed payment at a later date subject to an increase based on a stock index.[46]

Because the contracts at issue guaranteed a minimum return, the court concluded that they were not variable, and therefore not securities.[47]

An earlier example of seemingly inconsistent treatment of EIAs within the same federal circuit, is found in *Otto v. Variable Life Ins. Co.*[48] and *Associates in Adolescent Psychiatry v. Home Life Ins. Co.* [49] In *Otto*, the "fixed annuity" contract at issue was found to be a security, despite the name given in the contract, where the contract, although it had a specified minimum guaranteed rate, permitted the company complete discretion to modify the rate of excess interest at any time. [50] In *Home Life*, the contract was *not* a security, even though excess interest rates could be declared annually by the company's board. The *Home Life* court distinguished *Otto* on the basis that in *Otto*, the excess rate could be changed at any time, not merely once a year.[51] It bears commenting that this one-year distinction is a judge-made gloss; it does not come from any federal statute or SEC rule. *Malone* on its face considered neither the *Otto* nor the *Home Life* decision; had *Malone* considered those prior cases, it might have been resolved quite differently.

Conclusion

It is hardly surprising that some EIA creators, marketers, and sellers have argued that the statutory "safe harbor" insurance exemption from the federal securities laws and regulations applies to EIAs. But this approach, if accepted, means that the usual avenues for investor relief—lawsuits and arbitration claims based on the securities laws—would be precluded.

While the SEC and NASD have taken no definitive position on whether EIAs are "securities," those organizations– and particularly the NASD—have rung warning bells for investment firms that market EIAs as investments, but ignore the potential consequences. While the current case law focuses on marketing, courts should also consider the appropriate party to bear the risk when inappropriate investment vehicles are sold. The author believes that any doubt on whether EIAs are "fixed" or "variable" should be resolved in favor of the investing public, particularly when EIAs are merely another type of financial product, marketed and sold as investments. Hair-splitting technical distinctions, failing to subject EIAs to proper supervision, and failing to hold accountable the individuals and firms which misrepresent their value to investors will only frustrate the goals of a regulated marketplace.

NOTES

1. This S.E.C. publication dated July 19, 2005, entitled "Annuities," is available over the internet at: http://www.sec.gov/answers/annuity.htm. The "features" referred to are guaranteed minimum returns (generally an aspect of insurance products) and returns that are linked to the performance of equity markets (usually a feature of traditional securities). *Id.*

2. NASD "Notice to Members 05-50," dated August 2005. Notice to Members ("NTM") 05-50, like the SEC's publication (*supra* note 1), is available over the internet at: http://www.nasd.com/web/groups/rules_regs/documents/notice_to_members/nasdw_014821.pdf. In Section 4 of NTM 05-50, the NASD echoes the SEC's July 19, 2005 refusal to take a stand on the classification of EIAs, stating: "As discussed above, NASD is not taking a position on whether a particular EIA is a security, nor are we attempting to describe the circumstances in which an EIA would be deemed a security."

3. SEC Release No. 7438, "Equity Index Insurance Products," 65 S.E.C. Docket 451, 1997 WL 473102 (8/20/97), *see also*, Jack Marrion, "EIA Status Report: They Number Over 50," *National Underwriter* (July 21, 1997) at 13.

4. NASD Notice to Members 05-50 (*supra* note 2); "Background and Discussion" section.

5. Craig McCann, Ph.D. and Dengpan Luo, Ph.D., "An Overview of Equity Indexed Annuities," (Feb. 2006). A link to this research paper, published online, is available at: http://www.slcg.com/researchpapers.html.

6. James B. Smith, Jr., "Survey Shows Strong Interest in Offering EIAs," *National Underwriter* (Jan. 20, 1997) at 14; Jim Connolly, "Company Give Agents Extra Support with EIAs," *National Underwriter* (Sept. 1, 1997) at 23.

7. Black's Law Dictionary (7th Ed. 2000).

8. Black's, *supra*, lists approximately two dozen variations of annuity contracts, including the basic "fixed" and "variable" forms discussed in this article.

9. Black's, *supra*.

10. *Id.* For additional background information on annuities, *see* the SEC's publication "Annuities," *supra* note 1.

11. Courts follow these interpretations. A fixed annuity is one where the stream of payments begins immediately or soon after the annuity is purchased and an interest rate is specified, while a variable annuity is one where the seller invests the purchaser's money in various securities so its value rises and falls based on the performance of the underlying investments. *See, e.g.*, *Lander v. Hartford Life and Annuity Ins. Co.*, 251 F.3d 101, 104-105 (2nd Cir. 2001).

12. SEC publication entitled "Equity-Indexed Annuities," dated 8/30/05, (also found at http://www.sec.gov/investor/pubs/equityidxannuity.htm) states as follows: "You can lose money buying an equity-index annuity, especially if you need to cancel your annuity early. Even with a guarantee, you can still lose money if your guarantee is based on an amount that's less that the full amount of your purchase payments."

13. If the SEC and NASD cannot make a clear determination on the nature of EIAs, it is hardly surprising that courts and lawyers, let alone brokers and dealers, have failed to do so.

14. *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946).

15. 15 U.S.C.A. §80a-2(a)(36).

16. 15 U.S.C.A. §78c(a)(10).

17. 15 U.S.C.A. §77b(a)(1).

18. For instance, the Florida Securities and Investor Protection Act, §517.021(21) Fla. Stat. provides a simplified "bullet point" (compared to the federal statutes) definition of what constitutes a "security" which is quite unlike the lengthy narrative approach taken in the various federal statutes.

19. *Supra*, note 14.

20. *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946).

21. Were this not the case, EIA purchasers would simply buy fixed annuities, or set up guaranteed interest-bearing saving or money-market accounts, drawing down the principal and accrued interest over time. The lure of the EIA is the prospect of returns over and above the invested amount, and a fixed rate of return.

22. 15 U.S.C.A. §77c(a)(8) covers "any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of any insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia." Securities exempt from registration, however, are still subject to the 1933 Act's anti-fraud provisions. For that reason, whether an EIA is a "security" is of paramount concern.

23. *S.E.C. v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959); *S.E.C. v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967). These cases are discussed in greater detail later in this article.

24. SEC Release No. 6645, "Definition of Annuity Contract or Optional Annuity Contract," 35 SEC Docket at 963, Fed.Sec.Law Rep. (CCH) ¶84,0004 (May 29, 1968).

25. SEC Release No. 7438, 1997 WL 473102 *8.

26. In an October 22, 1997 keynote address at the 15th Annual ALA-ABA Conference on Life Insurance Company Products, the Director of the SEC's Division of Investment Management reiterated those concerns: "We are concerned that product marketing sometimes may create the misimpression that equity index insurance products are a means for participating fully in upside market returns without any downside risk.... Insurers should take particular care that they are not putting too great a distance between an initial determination that an equity index annuity need not be registered and subsequent attention to the distribution of the product—how it is advertised and marketed—in both written and oral sales presentations." A copy of this speech can be found at http://sec.gov/news/speech/speecharchive/1997/spch193.txt.

27. SEC Release No. 33-7438, 65 S.E.C. Docket 451; 17 C.F.R. 230, also reported at 1997 WL 473102 (8/20/97).

28. SEC Release No. 33-7438, 65 S.E.C. Docket 451; 17 C.F.R. 230, also reported at 1997 WL 473102 (8/20/97).

29. SEC Release No. 33-7476, 65 S.E.C. Docket 1957; also reported at 1997 WL 713989. This extension was motivated, at least in part, by a request from the American Council of Life Insurance for more time. *Id.*

30. For instance, on January 5, 1998, the National Association for Indexed Products, an entity organized in 1997 for the purpose of promoting EIAs and similar products, urged the SEC to find that EIAs were subject to Section 3(a)(8) exemption as insurance products, not securities. This comment can be found in its entirety at http://www.sec.gov/rules/concept/s72297/boros1.htm. That same day, the SEC heard from the Vice President and General counsel for Southland Life Insurance Company, doing business in 48 states. Southland Life also urged the SEC to find that EIAs are "innovative insurance products" not subject to the securities laws. *See* http://www.sec.gov/rules/concept/s72297/burton1.htm.

31. *See* December 30, 1997 letter from Investment Company Institute ("ICI") General Counsel Craig S. Tyle to the SEC, available at: http://www.ici.org/statements/cmltr/97_sec_eq_insur_com.html. The ICI's membership includes over 6,700 open-end mutual funds, and 440 closed-end mutual funds. *Id.*, n. 1. Insurance giant CNA, on behalf of itself and its various operating companies, elected to voluntarily register various EIAs, and thus subject their marketing activities to the restrictions of the securities laws, but articulated a concern that this compliance might place them at a competitive disadvantage. *See* CNA letter to SEC dated January 5, 1998, available at: http://www.sec.gov/rules/concept/s72297/any22971.txt.

32. This S.E.C. publication dated July 19, 2005, entitled "Annuities," is available over the internet at: http://www.sec.gov/answers/annuity.htm. The "features" referred to are guaranteed minimum returns (generally an aspect of insurance products) and returns that are linked to the performance of equity markets (usually a feature of traditional securities).

33. This S.E.C. publication dated July 19, 2005, entitled "Annuities," is available over the internet at: http://www.sec.gov/answers/annuity.htm. The "features" referred to are guaranteed minimum returns (generally an aspect of insurance products) and returns that are linked to the performance of equity markets (usually a feature of traditional securities).

34. This S.E.C. publication dated July 19, 2005, entitled "Annuities," is available over the internet at: http://www.sec.gov/answers/annuity.htm. The "features" referred to are guaranteed minimum returns (generally an aspect of insurance products) and returns that are linked to the performance of equity markets (usually a feature of traditional securities), page 4.

35. *Matsushita Elec. Ind. Co. v. Epstein*, 516 U.S. 367, 383 (1996).

36. Although some federal statues have concurrent state court jurisdiction, cases implicating the 1934 Securities Exchange Act must be brought in federal court. *See* 15 U.S.C.A. §78aa (exclusive federal court jurisdiction of 1934 Act claims); 15 U.S.C.A. §77v(a) (concurrent jurisdiction of 1933 Act claims); 15 U.S.C.A. §80a-43 (same for 1940 Investment Company Act claims); 15 U.S.C.A. §214 (same for claims made under the 1940 Investment Advisors Act).

37. The author has not attempted to conduct a state court analysis of decisions involving EIAs. A Westlaw search for cases involving equity indexed annuities in Florida, for instance, yielded no cases.

38. *SEC v. Variable Annuity Life Insurance Co. of America* ("*VALIC*"), 359 U.S. 65 (1959).

39. *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967).

40. *See Gilmore v. Mony Life Ins. Co.*, 165 F.Supp.2d 1276 (M.D. Ala. 2001) (variable annuities are securities even if the issuer is not registered, so long as they are sold through a registered investment company); *Winne v. Equitable Life Ass. Soc.*, 315 F.Supp.2d 404, 411 (S.D. N.Y. 2003) (variable annuities are securities).

41. *Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127, 1131 (7th Cir. 1986), cert. denied 486 U.S. 1026 (1988) (fixed annuity is insurance product exempt from securities regulation).

42. 387 U.S. at 211, n. 15, citing *SEC v. Joiner Leasing Corp.*, 320 U.S. 344, 352-353 (1943).

43. The Commission noted in proposing Rule 151 that under a traditional annuity contract, the insurer assumes the investment risk because it guarantees the principal amount and a specified rate of interest. SEC Release 6558, 31 SEC Docket at 912, Fed.Sec.L.Rep. (CCH) ¶83,710 (Nov. 21, 1984).

44. *Malone v. Addison Ins. Marketing, Inc.*, 225 F.Supp.2d 743 (W.D. Ky. 2002).

45. *Malone v. Addison Ins. Marketing, Inc.*, 225 F.Supp.2d 743, 748 (W.D. Ky. 2002).

46. *Malone v. Addison Ins. Marketing, Inc.*, 225 F.Supp.2d 743, 750-751 (W.D. Ky. 2002).

47. *Malone v. Addison Ins. Marketing, Inc.*, 225 F.Supp.2d 743 (W.D. Ky. 2002).

48. *Otto v. Variable Life Ins. Co.*, 814 F.2d. 1127 (7th Cir. 1986). Several yeas before *Otto*, but consistent with that decision, the 7th Circuit, in *Peoria Union Stock Yards Co. v. Penn Mutual Life Ins. Co.*, found that a contract which gave a fixed rate only on deposits made during the first 3 years was an investment contract subject to the federal securities laws. 698 F.2d 320 (7th Cir. 1983).

49. *Associates in Adolescent Psychiatry v. Home Life Ins. Co.*, 729 F.Supp.1162 (N.D. Ill. 1989), affirmed 941 F.2d 561 (7th Cir. 1991).

50. *Otto v. Variable Life Ins. Co.*, 814 F.2d. 1127, 1142 (7th Cir. 1986).

51. *Associates in Adolescent Psychiatry*, 729 F.Supp. 1162, 1173-1174 (N.D. Ill. 1989).