

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-7092

September Term, 2018

FILED ON: MAY 7, 2019

UNITED STATES CONFERENCE OF MAYORS AND UNITED STATES MAYOR ENTERPRISES, INC.,
APPELLEES

v.

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-00660)

Before: SRINIVASAN and WILKINS, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia, and on the briefs and oral arguments of the parties. After full review of the case, the Court is satisfied that appropriate disposition of the appeal does not warrant an opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(b). It is

ORDERED and **ADJUDGED** that the decisions of the United States District Court for the District of Columbia be **AFFIRMED**.

Plaintiff-Appellees United States Conference of Mayors and United States Mayor Enterprises, Inc. (collectively, “the Mayors”) sued Defendant-Appellant Great-West Life & Annuity Insurance Company for breach of contract and breach of the implied covenant of good faith and fair dealing. The Mayors had entered into a contractual relationship with Great-West in which Great-West agreed to pay the Mayors to endorse Great-West’s Section 457 retirement program. The program failed to attract anywhere near the number of participants or revenue the parties expected based on Great-West’s projections. The Mayors terminated their agreements with Great-West and filed suit, alleging that Great-West had not made its best efforts to enroll participants and had failed to perform in accordance with professional standards as required by the parties’ agreements. The case went to trial, and the jury returned an \$8 million verdict for the Mayors and concluded that Great-West had breached both its contract with the Mayors and the

implied covenant of good faith and fair dealing. Great-West subsequently renewed its motion for judgment as a matter of law, which the District Court denied.

On appeal, Great-West argues that (1) the parties' agreements preclude recovery of the lost-profits damages the jury awarded to the Mayors; and (2) the Mayors' evidence was legally insufficient to prove that Great-West's breaches caused the Mayors \$8 million in damages. For the reasons articulated by the District Court, we reject Great-West's arguments and affirm the District Court.

With respect to Great-West's first argument, the language in the indemnification provisions does not evince the parties' "clear and unequivocal intent" to include first-party claims as required by the standard we set out in *Hensel Phelps Constr. Co. v. Cooper Carry Inc.*, 861 F.3d 267, 275 (D.C. Cir. 2017). The agreements provide that Great-West "agrees to defend, indemnify, and hold harmless" the Mayors in particular circumstances. Marketing Agreement, J.A. 735; Licensing Agreement, J.A. 821. That language applies most naturally to third-party claims. It makes little sense, for example, to suggest that Great-West will defend the Mayors from Great-West itself. If the parties intended to bar lost-profits damages in first-party disputes, they should have done so unequivocally. It is not our role to read such a restriction into the parties' agreements.

Great-West's second argument fares no better. As the District Court correctly found, the Mayors' testimony adequately established that Great-West's breach of contract caused damages to the Mayors, and the jury had enough evidence from Great-West's internal forecasts and historical evidence of the value of the contract to award \$8 million in damages without engaging in speculation or guesswork. See *Hawthorne v. Canavan*, 756 A.2d 397, 401 (D.C. 2000); *Hill v. Rep. of Iraq*, 328 F.3d 680, 684 (D.C. Cir. 2003). Among other things, Great-West's own worst-case-scenario projection forecasted enrollment of 14,000 to 16,000 participants per year, resulting in \$7.5 million of total fees and royalties for the Mayors over the ten-year term of the agreements.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after the disposition of any timely petition for rehearing or petition for rehearing en banc. See FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk