

BB&T Boli Plan Tr. v. Mass. Mut. Life Ins. Co., 2015 NCBC Order 2.

NORTH CAROLINA  
FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09 CVS 4007

BB&T BOLI PLAN TRUST,

Plaintiff,

v.

MASSACHUSETTS MUTUAL LIFE  
INSURANCE COMPANY,

Defendant.

**ORDER ON PLAINTIFF'S  
MOTION IN LIMINE NO. 1**

1. **THIS MATTER** is before the Court upon Plaintiff BB&T BOLI Plan Trust's ("Plaintiff") Motion *In Limine* to exclude evidence and testimony relating to OCC Bulletin 2004-56, "Interagency Statement on the Purchase and Risk Management of Life Insurance" ("Plaintiff's Motion #1" or the "Motion") in the above-captioned action. After considering the Motion, briefs and documents in support of and in opposition to the Motion, and the arguments of counsel at the February 12, 2015 hearing, the Court, in the exercise of its discretion, hereby **DENIES** the Motion.

I.

FACTUAL BACKGROUND

2. The factual and procedural background of this case is recited in detail in *BB&T BOLI Plan Trust v. Massachusetts Mutual Life Insurance Company*, No. 09 CVS 4007 (N.C. Super. Ct. Aug. 15, 2013) (denying motion for summary judgment) and in the Court's Order granting Defendant's Motion in Limine No. 1.

## II.

### LEGAL STANDARD

3. “A motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial . . . .” *Hamilton v. Thomasville Med. Assocs.*, 187 N.C. App. 789, 793, 654 S.E.2d 708, 710 (2007). The Court’s ruling on motions *in limine* is interlocutory and “subject to modification during the course of the trial.” *Id.*

## III.

### ANALYSIS

4. In Plaintiff’s Motion #1, Plaintiff seeks to exclude all evidence and testimony relating to OCC Bulletin 2004-56, “Interagency Statement on the Purchase and Risk Management of Life Insurance” on grounds that any such evidence and testimony is irrelevant and prejudicial. The OCC Bulletin is a document “issued by four federal agencies with primary regulatory authority over banks like BB&T to address banks’ purchase and use of BOLI policies . . . . Those agencies issued the Bulletin nearly two years before BB&T purchased the policy at issue here to ‘provide[] general guidance for banks . . . regarding supervisory expectations for the purchase and risk management for [BOLI]’ and to outline ‘supervisory expectations for a thorough prepurchase analysis and a sound risk control framework used to address BOLI exposures on an ongoing basis.’” (Def.’s Resp. Pl.’s Mot. #1, p. 2; Ex. A, p. 1.)

5. The OCC Bulletin provided the following guidance related to BOLI plans:

Before entering into a BOLI contract, institutions should have a comprehensive risk management process for purchasing and holding BOLI . . . . A prudent risk management process includes: . . . [e]ffective senior management and board oversight; . . . [a]nd thorough pre-purchase analysis of BOLI products; and [a]n effective ongoing system of risk assessment, management, monitoring, and internal control processes, including appropriate internal audit and compliance frameworks . . . management should have a thorough understanding of how the insurance product works and the variables that dictate the product’s performance.

....

An institution should ensure that it understands the product it is purchasing and that it selects a product that best meets its needs. Management, not just the vendor, must demonstrate a familiarity with the technical details of the institution's insurance assets, and be able to explain the reasons for and the risks associated with the product design features they have selected . . . . An institution should not delegate its selection of product design features to its vendors. An institution that is unable to demonstrate a thorough understanding of BOLI products it has purchased and the associated risks may be subject to supervisory action.

(Def.'s Resp. Mot. #1, p. 3; Ex. A, p. 7.)

6. Plaintiff claims the OCC Bulletin is irrelevant to this action because it (1) is only regulatory without the force of law, relying on *Mwantembe v. TD Bank, N.A.*, 669 F. Supp. 2d 545, 553 (E.D. Pa. 2009); (2) does not tend to prove or disprove any of the facts or claims at issue; (3) does not contain a recognized industry standard of care; and (4) applies only to BB&T Bank. (Pl.'s Br. Supp. Mot. #1, p. 5-7.)

7. “‘Relevant evidence’ means evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *State v. Graham*, 186 N.C. App. 182, 190, 650 S.E.2d 639 (2007) (quoting N.C.G.S. § 8C-1, Rule 401). Generally, all relevant evidence is admissible. *Matthews v. James*, 88 N.C. App. 32, 39, 362 S.E.2d 594 (1987). However, relevant evidence “‘may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, [or] misleading the jury . . . .’” *Id.* “[A]ll evidence favorable to plaintiff will be, by definition, prejudicial to defendants” and vice versa. *Id.* The test is whether such prejudice is unfair. *Id.*

8. The Court concludes that the OCC Bulletin appears to be relevant to Defendant's defenses to Plaintiff's claims and, in particular, to the standards applicable to BB&T's board of directors and management for due diligence both before and after purchasing the BOLI policy; whether Plaintiff's alleged reliance on Defendant's representations was justified or reasonable; the credibility

of certain witnesses for both parties; the intention of the parties in purchasing the BOLI policy; and Defendant's defenses of contributory negligence, assumption of risk, failure to mitigate damages, and causation. The Court further concludes that it does not appear that the admission of the OCC Bulletin will cause Plaintiff unfair prejudice and that the risk of confusing the issues or misleading the jury does not substantially outweigh the OCC Bulletin's probative value.

IV.

CONCLUSION

9. For the foregoing reasons, the Court, in the exercise of its discretion and without prejudice to the Court's right to modify its rulings during the course of the trial, **DENIES** Plaintiff's Motion *In Limine* to exclude evidence or testimony relating to OCC Bulletin 2004-56, "Interagency Statement on the Purchase and Risk Management of Life Insurance."

**SO ORDERED**, this the 14th day of April 2015.

/s/ Louis A. Bledsoe, III  
Louis A. Bledsoe, III  
Special Superior Court Judge  
for Complex Business Cases