

TENTH CIRCUIT RULES STABLE-VALUE FUND MANAGER NOT A FUNCTIONAL FIDUCIARY UNDER ERISA

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A large class action lawsuit, involving 270,000 plan participants and 13,000 plans, was filed against Great-West Life Annuity and Insurance Company (“Great-West”), which managed an investment fund that invested participant monies and guaranteed capital preservation. The fund employed a “conservative investment strategy,” and was invested in fixed-income instruments such as treasury bonds, corporate bonds, and mortgage-backed securities. Plan participant monies invested in the fund earned interest at a Credited Interest Rate set by Great-West on a quarterly basis.

Plaintiffs in the case alleged, among other things, that Great-West breached an ERISA fiduciary duty to participants invested in the fund because Great-West set the Credited Interest Rate for its own benefit. Under the terms of the fund, Great-West retained as revenue the difference between the total yield on the fund’s monetary instruments and the Credited Interest Rate. Plaintiffs alleged that Great-West set the Credited Interest Rate artificially low and profited by retaining the difference. On the issue of the fiduciary breach claim, a federal district court granted summary judgment for Great-West because its ability to set the Credited Interest Rate did not render it a fiduciary under ERISA – participants could effectively “veto” the chosen rate by withdrawing their money from the fund. Because the court found that Great-West was not a fiduciary, the district court rejected all of the plaintiffs’ claims, including the fiduciary breach claim stemming from Great-West’s ability to set the Credited Interest Rate.

The case was appealed to the Court of Appeals for the Tenth Circuit. In hearing the appeal, Great-West’s status as a functional fiduciary was the focus of the Tenth Circuit’s review of plaintiff’s fiduciary duty claims. Plaintiffs argued Great-West is a functional fiduciary because it exercised “authority or control” over plans and their assets by changing the Credited Interest Rate without plan or participant approval. Plaintiffs also contend Great-West had sufficient control over its own compensation to render it an ERISA fiduciary. The Tenth Circuit ruled that plaintiffs did not make an adequate showing in response to Great-West’s summary judgment motion to support these points. In particular, the plaintiffs needed to show that Great-West “(1) did not merely follow a specific contractual term set in an arm’s-length negotiation; and (2) took a unilateral action respecting plan management or assets

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without the plan or its participants having an opportunity to reject its decision.” Ultimately, because the Tenth Circuit found that the plaintiffs had not provided sufficient evidence to create an issue of material fact as to whether plans or participants were contractually constrained from rejecting a change in the Credited Interest Rate, the court could not conclude that Great-West acted as a fiduciary in setting the quarterly Credited Interest Rate. The court found that Great-West also lacked sufficient authority or control over its compensation.

This case provides some valuable insights as to the level of control over plan assets that may be needed to make a service provider into a functional fiduciary. Money managers no doubt see this as a favorable outcome for investment products such as stable-value funds. But the Tenth Circuit’s decision in this case likely is not the last we’ll hear of the functional fiduciary issue - other federal circuit courts may have the opportunity to consider similar issues and could reach a different conclusion. *Teets v. Great-West Life & Annuity Insurance Company* (10th Cir. 2019)

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