

## 10th Circ. Hands Money Managers Good News

By **Emily Brill**

*Law360 (April 2, 2019, 10:28 PM EDT)* -- The Tenth Circuit's decision that Great-West Life & Annuity Insurance Co. was free to set a reimbursement rate for an investment fund without facing extra scrutiny under the Employee Retirement Income Security Act has financial services companies breathing a sigh of relief.

The issue of whether money managers act as ERISA fiduciaries when they make decisions about investment funds that appear in retirement plans has been percolating in the courts for some time, with last week's *Teets v. Great-West* ruling marking an early indication of how the litigation may play out.

Though it's hardly a sure bet that the Tenth Circuit will have the final word, especially considering that the Eighth Circuit is on track to weigh in on the matter, the ruling is good news for financial services companies, industry representatives said.

A ruling in favor of the investors would have imposed a level of responsibility on money managers that would have threatened the viability of investment products like stable-value funds, said Jan Jacobson, a senior attorney with the American Benefits Council focusing on retirement policy.

"Effectively, the insurers would no longer be able to offer these products," Jacobson said.

In the case, a class of 270,000 investors in Great-West's Key Guaranteed Portfolio Fund accused the company of socking away \$500 million over six years at savers' expense by setting an unfair rate for distributing the fund's profits.

The class sought a designation that Great-West acted as a fiduciary when it set this rate. That label would have legally obligated the company to put savers' interests first when deciding how to distribute the stable-value fund's profits.

That would've been great for 401(k) plan participants who chose the KGPF, but eventually it would have made the fund financially unviable for Great-West, Jacobson said.

"What's in the best interest of the participants is the highest rate possible. But that's not in the best interest of the ... shareholders," Jacobson said. "The company makes absolutely no money if it's set at [a high rate]."

Fortunately for Great-West, a Tenth Circuit panel ruled on March 27 that it wasn't a fiduciary when it set this rate. The panel's decision upheld a December 2017 ruling by U.S. District Judge William J. Martinez, who said Great-West wasn't a fiduciary when it set the rate because the company didn't have a high level of control over savers' assets or the assets of the 401(k) plans in which the fund appeared.

If savers didn't like the rate, they were free to "vote with their feet" and pull out of the investment fund, choosing another option in their employer's 401(k) plan, the judge said.

The Tenth Circuit agreed that Great-West wasn't exercising enough control over the plans' assets when setting the rate to render it a fiduciary, according to the court opinion.

A Great-West spokesman said the decision "helps assure the continued availability" of stable-value funds to Americans saving for retirement.

"These low-risk investment products ... help investors achieve the retirement security they deserve," the spokesman, Stephen Gawlik, said in a statement to Law360. "The combination of safety and return provided by [stable-value funds] make them especially beneficial for investors in or near retirement."

Nancy Ross, the co-chair of Mayer Brown LLP's ERISA litigation practice, said she hopes the Tenth Circuit's decision shuts down plaintiffs firms looking to challenge money managers' ability to set rates for their stable-value funds.

"This decision is particularly important given the current environment in which an aggressive plaintiffs bar is actively searching for alternative avenues of liability," said Ross, who authored an amicus brief in the case supporting Great-West on behalf of the U.S. Chamber of Commerce and the American Benefits Council. "The unequivocal rejection by the Tenth Circuit of this attempt to attach liability on fund providers as either a fiduciary or a party in interest preserves ERISA's fundamental balance and goals."

While the financial sector cheered the decision, attorneys for the class took it as a blow for consumers. John Stokes, an attorney for Stris & Maher LLP who helped represent the class, said Great-West did have a great deal of control over 401(k) savers' assets, because it imposed a 12-month waiting period on people looking to pull out of the KGPF.

"When someone has discretion to control something as important as the interest rate and they place an impediment on getting the money out if they don't like Great-West's decision, that's the kind of entity Congress intended to impose fiduciary status on," Stokes said.

--Editing by Kelly Duncan and Emily Kokoll.