

## 8th Circ. Ruling Creates More Targets For ERISA Suits

By Emily Brill

*Law360 (February 5, 2020, 1:51 PM EST)* -- A recent Eighth Circuit decision greenlighting a challenge to Principal Life Insurance Co.'s rate-setting practices took a broad view of ERISA fiduciary liability that could get more companies roped into federal benefits class actions, attorneys say.

In a published ruling issued Monday, the appeals court provided further clarity about an issue that has plagued the courts in recent years: What makes a company or person a “functional fiduciary” under ERISA?

“It’s a significant decision,” said Jerome J. Schlichter, founding partner of the influential ERISA plaintiffs’ firm Schlichter Bogard & Denton LLP. “The court’s holding upholds the principle that control over plan assets makes one a fiduciary.”

In a concise opinion, the Eighth Circuit ruled that Principal’s rate-setting for the Principal Fixed Income Option gave it enough control over the assets of 401(k) plans containing this investment option to render it a fiduciary to those plans. Principal had this control because its actions significantly affected the plans and couldn’t be justified by pointing to the plan contracts, the Eighth Circuit ruled.

In ruling this way, the Eighth Circuit reached a different conclusion than the Tenth Circuit did last year, using a legal test extrapolated from the Tenth Circuit’s decision.

In last year’s ruling, the Tenth Circuit held that service providers act as fiduciaries when their actions affect plans without giving workers “an opportunity to reject its decision,” and when those actions “[do] not merely follow a specific contractual term set in an arm’s-length negotiation.”

The Eighth Circuit ruled that workers weren’t free to reject Principal’s rate-setting decisions, because Principal erected a number of obstacles to workers removing their savings from the Principal Fixed Income Option.

If workers unilaterally rejected Principal’s rates, their 401(k) plan would need to withdraw any money invested in the Principal Fixed Income Option, a process that carries a surrender charge of 5% or requires workers to wait a year. By erecting these obstacles, Principal was exerting enough control over the plan to make it a fiduciary, the Eighth Circuit wrote.

Principal's rate-setting choices also couldn't be explained away by pointing to its contracts with the workers' 401(k) plans, the Eighth Circuit ruled.

"Principal asserts that it is acting pursuant to the contract because [the contract] authorizes Principal to set the [rate]. This assertion conflates two issues. Although the contract empowers Principal to set the [rate], the rate is not a 'specific term of the contract,'" the Eighth Circuit wrote. "A service provider may be a fiduciary when it exercises discretionary authority, even if the contract authorizes it to take the discretionary act."

In *Teets v. Great-West Life & Annuity Ins. Co.*, the Tenth Circuit decision from which the Eighth Circuit took its two-part test, the appellate court ruled that Great-West didn't act as a fiduciary when setting the rate at which savers would receive profits from its Key Guaranteed Portfolio Fund.

This was because workers could leave the fund after they learned of the rate, meaning that workers had "an opportunity to reject [Great-West's] decision," the Tenth Circuit ruled.

But Great-West, like Principal, also required plans that wanted to drop the fund to wait for a year before removing their money. The Eighth Circuit may have considered this an obstacle.

Nancy Ross, the co-chair of the ERISA litigation practice area at Mayer Brown LLP, said that the Eighth Circuit's and Tenth Circuit's divergent decisions illustrate how "fluid and unpredictable" the results of tests to determine fiduciary status can be.

"Here, the Eighth Circuit found a way to parse the actions of Principal from those of Great-West to support its conclusion that Principal acted as a fiduciary while Great-West did not," Ross said.

She said that it's "unclear" whether the case would go up to the Supreme Court, especially considering "the Eighth Circuit's effort to avoid a circuit split."

John Stokes, an associate at Stris & Maher LLP who helped work on the *Rozo v. Principal* case for the plaintiffs, said Tuesday that his legal team was "very pleased by the Eighth Circuit's decision."

"The court rightly recognized that when a company has control over the interest rate on people's retirement savings — and can lock people into the interest rate it chooses — that's exactly the kind of circumstance where Congress intended ERISA's fiduciary protections to apply," Stokes said.

Counsel for Principal did not respond to a request for comment Tuesday, though a spokeswoman said Monday that the company "disagrees with the allegations in the lawsuit and will continue to vigorously defend against them."

The suit accused Principal of breaching its fiduciary duty to 401(k) savers by knowingly setting the Principal Fixed Income Option's interest rate too low. Filed in 2014, the case nearly ended in September 2018 when U.S. District Judge John A. Jarvey granted Principal's motion for summary judgment. But the Eighth Circuit revived the suit Monday, reversing Judge Jarvey's decision.

--Editing by Rebecca Flanagan and Alyssa Miller.