Life and Annuity Series: Excessive Fees—Different Theory

9/24/2015

A recent decision on "excessive fees," titled *Santomenno v. Transamerica Life* (C.D. Cal.), supports an even broader theory of ERISA liability than the "sub-advisor" claims I have previously reviewed, but it restricts that theory in its class certification analysis. Here is a brief summary of the key points:

- The court had already held, in an earlier decision, that Transamerica became an ERISA fiduciary when it issued group annuity contracts to 401-k plans. In the court's view, the contracts provided Transamerica with the power to perform "investment management services" (*i.e.*, offering menus of certain investment options to plans, adding and deleting those options, setting the variable account charges, and trading mutual fund shares through separate accounts) that created a fiduciary duty regardless of whether that power was actually exercised. As a result, the court concluded that Transamerica was subject to ERISA liability for charging plans "excessive" variable account fees—defined as any fee in excess of reasonable expenses—and for not selecting the lowest cost share classes.
- In the attached decision, the court addressed plaintiffs' motion for class certification on behalf of 7,400 ERISA plans. The Court first determined that plaintiffs had presented common proof of Transamerica's ERISA fiduciary duty to the class to set reasonable fees. Plaintiffs had also raised common questions as to whether Transamerica charged excessive variable account fees and failed to offer the lowest-cost share classes.
- The court's language in this section of the opinion will likely be quoted by plaintiffs' lawyers in future cases, as it recites many of the principles from the earlier decision, and expressly rejects the reasoning of other circuits that, to be an ERISA fiduciary, there must be some actual exercise of fiduciary power.
- Nevertheless, the court finally concluded that a class could not be certified because individualized issues regarding Transamerica's defenses would predominate at any trial. With respect to the excessive fee issue, there would be plan-by-plan inquiries required as to what the total fees were for each plan, what actual services were rendered to each plan for those fees, what disclosures were made to each plan regarding how the fees would be used, and what services each plan understood would be covered by the fees. The court

> recognized that ERISA "only requires a fiduciary to show that its expenses are reasonable—not that its naming and accounting for fees accurately reflects the breakdown of expenses." The total fees that were charged to each plan would have to be compared to the expense of providing services to each plan to determine whether they were "excessive," which would prevent any uniform, class-wide proof.

Even if the DOL's proposed fiduciary rule is adopted, this precedent on class certification issues shows that "excessive fee" claims under ERISA should not be certified because of all the individualized issues regarding the services actually provided for the fees.