Life and Annuity Series: Trend in Excessive Fee Decisions

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The trend of excessive fee decisions relating to the insurance industry continues:

1. *In re Davis New York Venture Fund Fee Litigation*—The SDNY's opinion denying the motion to dismiss is notable for two reasons:

First, the SDNY permitted the Davis fund's shareholders to proceed with their complaint in New York even though they had already lost an excessive foe case in Arizona. Specifically, the Davis fund's shareholders had sued in Arizona federal court back in 2008, claiming (among other things) that the Davis fund's fees were excessive when measured against index fund fees, and that the Davis fund had failed to pass along economies of scale. The Arizona Court rejected those claims in 2011, and the Ninth Circuit affirmed earlier this year. The Ninth Circuit's decision emphasized (correctly in my view) the deference to be paid to the approval of fees by funds boards, and rejected the plaintiffs less-than-precise allegations regarding excessive fees that have become common in these types of complaints. (See a copy of the Ninth Circuit's decision.)

Despite this precedent, the New York federal court decided that the Davis fund shareholders were *not* collaterally stopped from another bite at the apple, reasoning that (a) the shareholders were complaining about more recent fees than those challenged in Arizona, and (b) the Arizona decision only evaluated the "sufficiency of the allegations' in that complaint, and "not whether the fund's fees were, in fact, excessive." In other words, shareholders have the right to keep bringing these excessive fee suits until they find some reason to avoid dismissal.

Second, the SDNY effectively ignored the deference that should be granted the fund's board. Instead, it ruled primarily that the shareholders had stated an excessive fee claim because the Davis fund's adviser fees were higher than the fees it charged to other funds for sub-advisory services, and there was nothing in the fund's disclosure documents suggesting that there were materially different services performed for those different fees. (If this is in fact the case, the funds must do a better job with their disclosure documents to make these differences clear.)

2. *Redus-Tarchis v. New York Life Investment Management LLC*—The NJ federal court concluded that NY Life's 47% share of fees with a sub-advisor gave rise to an excessive fee claim:

The court noted the principle that it should give "considerable weight" to the approval of NY Life's fee by the funds' boards of directors, but then seemed to give deference to plaintiffs' allegations. Most notably:

- NY Life argued that its adviser fees were reasonable as a matter of law based on the subadvisory agreements incorporated by reference in the complaint, which showed that NY Life performed a large number of services. The court found this was a "merits argument," even though the agreements directly contradicted some of the allegations in plaintiffs' complaint. The court rejected for the same reason NY Life's argument that the overall fees for the fund *declined* when NY Life entered into the subadvisory relationship.
- Plaintiffs' inconsistent allegations about the appropriate "breakpoints" for fee reductions might ultimately be "unconvincing." but did not defeat plaintiffs' claims as a matter of law.
- Plaintiffs did not have to allege that every dollar charged to the funds was excessive. It could show that the total fees were excessive simply by pointing to specific examples of the fees being disproportionate to the services rendered.