

## Life and Annuity Series: ERISA—Shape of Things to Come

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The [class action complaint](#) titled *Bell v. Anthem, Inc., et al.* (S.D. Indiana) raises a number of novel ERISA allegations that could be a preview of the future, especially if the DOL fiduciary rule is adopted this year.

The complaint reads initially like a number of other ERISA class actions previously brought against fiduciaries of 401(k) retirement plans. It alleges generally that the trustees breached their fiduciary duties by "allowing unreasonable expenses" and retaining "high cost and poor performing" investment options. But instead of just pointing to the higher-cost, actively managed mutual funds on the plan menu, the complaint goes further. It asserts that:

- even the *Vanguard* mutual funds on the menu were imprudent when compared to lower-cost alternative investment options. Specifically, the plaintiff argues that larger plans must consider offering lower-cost "separate accounts" or "collective trusts" instead of retail and institutional share class mutual funds;
- recordkeeping and administrative fees that exceed more than \$30 per participant are excessive and unreasonable for a larger plan given the competitive market for those services on a stand-alone basis, and any "revenue sharing" that exceeds that amount must be capped or rebated to the plan participants; and
- it is a breach of fiduciary duty not to include stable value funds on the menu, instead of money market funds, because stable value funds have outperformed money market funds.

Each of these allegations rest on sweeping presumptions: that the lowest-cost investment options are normally in plan participants' best interests, that any higher costs are unreasonable in relation to the total services provided to most plans, and that plan fiduciaries have a continuing duty to include the lowest-cost options on the menu (and eliminate the higher-cost options) as they become available. Each of these allegations could of course be levelled against many providers of retirement plan products, such as insurance companies, and those claims could multiply if the proposed DOL rule is adopted.