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## Life and Annuity Series: 8th Circuit Excessive Fee Decision

JANUARY 26, 2016

The 8th Circuit's recent decision on "excessive fees" under ERISA, titled *McCaffree v. Principal Life*, is instructive for three reasons:

First, it adds to the line of circuit court precedents holding that an insurance company does not owe a fiduciary duty to an ERISA plan when negotiating and contracting for its fees as that plan's product provider. Specifically, the 8th Circuit determined that Principal was not an ERISA "functional fiduciary" based on its initial selection of investment options for its retirement products. Since the plan remained free to reject Principal's selected menu of investments in those products, and to choose an alternative provider, Principal could not have been exercising any authority over the McCaffree plan assets at the time the plan contracted for the allegedly excessive fees.

Second, the 8th Circuit's decision underscores the Supreme Court's principle in the *Pegram* case—that an insurance company is only liable under ERISA if there is a connection between the insurance company's alleged wrongdoing and the actions that caused it to be a "functional fiduciary." Specifically, 8th Circuit held that even though Principal allegedly had the discretion in its contracts to increase its fees and expenses to the plan, the plaintiff had not adequately pleaded a connection between that alleged fiduciary conduct (i.e., its discretionary authority to increase the fees) and Principal's alleged wrongdoing (i.e., the contracted-for fees were excessive).

Third, the 8th Circuit recognized that once the McCaffree plan had negotiated an arm's-length contract with Principal for the fees and charges to be imposed, the plan could not thereafter claim the Principal's assessment of those contracted for charges was an ERISA breach of fiduciary duty.

Since plaintiffs have had more success asserting these "excessive fee" claims under the Investment Company Act of 1940, one would expect that there would be fewer of these claims brought under ERISA. That has not been the case. Plaintiffs have continued to bring these types of claims under ERISA in different forms, most recently in Colorado and Connecticut federal courts. Of course, the proposed DOL fiduciary rule, if adopted, could cause excessive fee claims under ERISA to be more common.