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Life and Annuity Series: Class Certified in an ERISA "Unreasonable Compensation" Case

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The Colorado federal court concluded last summer, in *Teets v. Great-West Life & Ann. Ins. Co.*, that an insurer could be subject to ERISA liability for receiving unreasonable compensation in connection with a stable value fund, and that the fund was not exempt from ERISA as a "guaranteed benefit policy."

That case is back in the news again. In a recent opinion, the court certified a broad class of investors on the claim that Great-West violated ERISA either by "setting the credited rate [for the fund] with its own profitability in mind rather than the best interests of the Fund participants," or by "reap[ing] unreasonable compensation" from the credited rate. The court rejected Great-West's argument that individualized issues would predominate because its costs and profits for the fund varied among participants. According to the court, the predominant common issues were whether Great-West "set the credited interest rate with its own fiscal bottom line in mind," and whether it should have to disgorge an "entire pot" of unreasonable compensation. Moreover, the "various accounting inputs needed to evaluate" Great-West's profit could be calculated on a class-wide basis, including the gross returns it earned on the find, the credited rate that it paid out from those earnings, and the estimated cost of administering the fund.

Great-West also argued that its profits varied because each plan received a different "pricing credit" (i.e. a discount on Great-West's plan administrator fees) in return for selecting the fund on its platform. The court disagreed that this pricing credit was a "cost" attributable to the fund that reduced profitability. Instead, the court characterized the credit as a "wager" that Great-West believes it can make money on the assets contributed to the fund. Thus, the credit could not be properly considered in deciding ERISA liability for unreasonable compensation. Great-West further argued that individualized issues would arise because trustees had received oral explanations regarding Great-West's profits on the fund, and some had arguably consented. These were not valid defenses under ERISA, according to the court. The "actions of the plan trustees in this context could not bind the plan participants," Great-West could not insulate itself from liability in this way, and Great-West's violations were effectively "per se" prohibited transactions for which "trustee consent [is] legally irrelevant.”In short, the court rejected a number of class certification defenses regarding individualized issues, and suggested that predominant common issues exists in an “unreasonable compensation” case under ERISA so long as the insurer is alleged to have emphasized its own profitability when it set its compensation, and the plaintiffs are seeking disgorgement of those profits rather than just damages. Moreover, the court concluded that other benefits received by the class, and the consent of the plan trustees to any compensation arrangements, could uniformly be disregarded when considering whether the insurer's compensation was unreasonable.

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