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DOL Seeks To Wrap Up Fiduciary Rule Battle In Texas

By **Abby Wargo**

Law360 (September 8, 2022, 5:08 PM EDT) -- The U.S. Department of Labor asked a Texas federal judge to toss a challenge to a 2020 rule critics say would unlawfully expand which retirement advisers qualify as fiduciaries with obligations under federal benefits law, arguing the regulations were a reasonable interpretation of federal benefits law.

The DOL **in a Wednesday memorandum** said the plaintiffs, a group of licensed independent insurance agents and the trade group Federation of Americans for Consumer Choice Inc., adopted "several extreme positions" to conflate a 2016 agency rule with a newer version from 2020 and that they distorted Fifth Circuit precedent.

"The plain language of these statutory and regulatory provisions supports the department's interpretation of investment advice fiduciaries as applied to rollover recommendations. Even if those provisions were ambiguous, the department's interpretation of its regulations would be subject to deference," the DOL said in a 74-page memorandum urging dismissal.

The insurance agents and the trade group **sued the agency in February** arguing a December 2020 DOL regulation advances the same policies that the Fifth Circuit invalidated in 2016. The complaint alleges the 2020 rule, which took effect in 2021, illegally expands the definition of an Employee Retirement Income Security Act fiduciary and explains how retirement advisers can avoid certain ERISA obligations when recommending rollovers.

The plaintiffs moved for summary judgment in July asking the court to vacate the new interpretation of the law, saying the rule allows the DOL to "rewrite and expand" the definition of a fiduciary in the same way the Fifth Circuit had ruled against.

On Wednesday, the DOL said the 2020 exemption is "far more modest" than the 2016 rule that the plaintiffs were comparing it to and the newer rule was deliberately structured to comply with the Fifth Circuit precedent and did not revive any of the elements invalidated by that ruling.

The agency also said the plaintiffs lacked standing to bring the lawsuit because they could not identify any tangible injuries they suffered due to the regulation.

"Plaintiffs proffer no more than conclusory (and carbon copy) affidavits averring that each of them is now subject to a new regulatory regime and has suffered harm as a result. These assertions and affidavits fall woefully short of demonstrating the required harms needed to establish a concrete and particularized injury-in-fact for standing purposes," the DOL said in Wednesday's memorandum.

Andrew G. Jubinsky of Figari & Davenport LLP, who is representing FACC, said they strongly believe the DOL's interpretation of who is considered a fiduciary runs contrary to Fifth Circuit precedent.

"The department's interpretation seeks to turn more financial professionals, including insurance agents and agencies selling annuities and other insurance products, into fiduciaries, thereby subjecting them to more onerous regulatory requirements and potential liability," Jubinsky told Law360. "This, in turn, will limit access by lower and middle income Americans to important retirement products and advice."
Representatives of the DOL did not respond to requests for comment Thursday.

The Federation of Americans for Consumer Choice Inc., John Lown, Lown Retirement Planning, David

Messing, Miles Financial Services Inc., Jon Bellman, Bellman Financial, Golden Age Insurance Group LLC, ProVision Brokerage LLC and V. Eric Couch are represented by Donald Colleluori and Andrew G. Jubinsky of Figari & Davenport LLP.

The U.S. Department of Labor and Labor Secretary Marty Walsh are represented by Alexander N. Ely and Galen N. Thorp of the U.S. Department of Justice.

The case is Federation of Americans for Consumer Choice Inc. et al. v. United States Department of Labor et al., case number 3:22-cv-00243, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Kellie Mejdrich. Editing by Roy LeBlanc.

Update: This story has been updated with comments from Jubinsky.
