

Texas judge deals DOL another setback on rollover regulation



A Texas judge gave plaintiffs a partial summary judgment last week in a lawsuit against the investment advice rule.

By [John Hilton](#)

A second federal court dealt a blow last week to the Department of Labor's ongoing bid to extend fiduciary status to more rollover transactions.

U.S. Magistrate Judge Rebecca Rutherford recommended against the DOL's broad interpretation of the "five-part test" to determine what constitutes investment advice. Dating to 1975, the five-part test is utilized to determine fiduciary status under the Employee Retirement Income Security Act of 1974.

Rutherford issued her recommendation in a 75-page "findings, conclusions, and recommendations" in response to a suit filed in February 2022 by the Federation of Americans for Consumer Choice.

"Based on ERISA's text and purpose, coupled with the common law understandings of fiduciary relationships, the Court should find the DOL's new interpretation of the five-part test narrowly conflicts with ERISA and the DOL's own regulations," the judge wrote. "In view of this conflict, the Court should conclude that the DOL exceeded its statutory authority in promulgating the new interpretation and that the new interpretation is an arbitrary and capricious interpretation."

The judge also recommended denial of motions for summary judgment by both the DOL and FACC.

"We are pleased to see the magistrate judge has recommended District Judge Kinkeade vacate portions of DOL's overreaching reinterpretation of the five-part test to the extent it combines IRAs with employer ERISA plans to determine who is a fiduciary," said Kim O'Brien, CEO of FACC.

O'Brien declined further comment "until we have completed our review and decide on next steps."

Second loss in court

The recommendation is the second loss in court by the DOL this year. In February, Judge Virginia M. Hernandez Covington sided with the American Securities Association in striking down a portion of guidance the DOL issued in 2021 that expanded the definition of a retirement plan fiduciary.

The judge ruled that a portion of the department's frequently-asked-questions guidance [illegally widened its regulatory lane](#), and failed to comply with the agency's own regulations.

Rutherford cited the Florida court decision in her recommendation. Both ASA and FACC sued just days after the Trump administration's investment advice rule took effect in February 2022.

Included in the rule was a new prohibited transaction exemption allowing advisors to provide conflicted advice for commissions; and a reinstatement of the five-part test to determine what constitutes investment advice.

The DOL initially appealed the Florida ASA decision, then withdrew its appeal in May. Meanwhile, the agency is pursuing a fiduciary rule rewrite that it has said it will unveil next month. Some analysts [doubt the DOL can produce the rule that quickly](#).

Concern for rollover decisions

The DOL is [most concerned about rollovers](#), or retirement plan decisions involving retirement dollars.

When recipients retire and the money is "rolled" out of those plans, many advisors earn a commission. Regulators consider that a conflict of interest and want to expand the definition of fiduciary. One of the five-part test prongs is whether the advisor and client are in an "ongoing relationship."

In order to satisfy that prong, the DOL claims a one-time rollover contains the expectation of future advice rendered.

Judge Covington reminded the DOL with her decision that the agency does not have jurisdiction over Individual Retirement Plans (IRAs). The DOL has enforcement authority over workplace retirement plans.

Rutherford acknowledged the DOL concerns on rollover transactions, but said it must be done lawfully. She referenced a 2018 appeals court ruling tossing out an Obama administration fiduciary rule effort.

"While the Court may view the DOL's new interpretation as part of the agency's well-intentioned efforts to update its regulations to ensure that fiduciary advice providers adhere to stringent standards designed to ensure that investment recommendations by financial institutions and professionals reflect the best interests of plan and IRA investors, the Court must also recognize that other similar agency efforts have not held up well under judicial scrutiny."

Senior Editor John Hilton covered business and other beats in more than 20 years of daily journalism. John may be reached at john.hilton@innfeedback.com. Follow him on Twitter @INNJohnH.

© Entire contents copyright 2023 by InsuranceNewsNet.com Inc. All rights reserved. No part of this article may be reprinted without the expressed written consent from InsuranceNewsNet.com.