
WilmerHale Team Obtains Fifth Circuit Victory in High-Profile Fiduciary Rule Case

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A team of WilmerHale litigators recently achieved a major victory when the US Court of Appeals for the Fifth Circuit vacated the US Department of Labor's (DOL) highly controversial Fiduciary Rule, giving opponents of the regulations embodied by the rule their first victory after several previously unsuccessful lawsuits.

The firm's clients—the American Council of Life Insurers, the National Association of Insurance and Financial Advisors (NAIFA), and six Texas-based NAIFA affiliates—were among several plaintiffs in one of the most significant cases involving the financial services and insurance sectors in years.

At stake, the firm's lawyers argued, was nothing less than retirement investors' access to information about important annuity products which provide a guaranteed lifetime income, and the availability of annuity products themselves.

Access to such insurance products is vital at a time when many Americans worry about outliving their retirement savings. But the potential penalties and legal liabilities created by the new rule raised the possibility of those products becoming increasingly unavailable.

The Fiduciary Rule is actually seven rules adopted by the DOL in April 2016 in an effort, the agency has said, to protect consumers by reducing the potential for conflicts of interest among financial service providers. The rule greatly expanded the pool of those selling certain retirement savings products who could be called an “investment advice fiduciary” under the Employee Retirement Income Security Act of 1974.

The approach prior to the DOL's new rule defined as fiduciaries financial and insurance professionals who “regularly” provide advice to clients who, in turn, relied on that advice as the “primary basis” for their investment decisions. Such fiduciaries were long subject to rules barring them from transactions in which they received commissions paid by third parties. They were also prohibited from steering clients to products whose sale would result in higher compensation for the sellers.

The new rule, however, defined fiduciaries much more broadly. No longer was it necessary to have the kind of sustained relationship of “trust” and “confidence” with a client that the previous rule required. Stockbrokers and insurance salespeople involved in one-time transactions with clients came under the 2016 rule, meaning they were now barred from receiving their industry’s traditional commissions and brokerage fees.

Financial services professionals could get exemptions from the prohibited-transactions rule. But that would require them to enter contracts with clients that then made those professionals liable to lawsuits, potentially in class actions brought in state and federal courts around the country.

In June 2016, WilmerHale’s clients and financial services and insurance industry groups sued to challenge the rule under the Administrative Procedure Act in the Northern District of Texas. Among the grounds for vacating the rule, WilmerHale lawyers, along with lawyers for other plaintiffs, argued that the rule’s definition of “investment advice” fiduciary conflicted with the Employee Retirement Income Security Act (known as ERISA) by jettisoning the common-law requirement of a relationship of trust and confidence. The litigation team also argued that the rule impermissibly authorized private lawsuits where Congress did not. The district court rejected those and other arguments, ruling in the government’s favor. WilmerHale’s clients and the other plaintiff groups appealed.

On March 15, the Fifth Circuit [reversed the lower court ruling and vacated the rule](#). In particular, the Fifth Circuit agreed with the plaintiffs that the rule conflicts with the text of ERISA by expanding the scope of “fiduciary” to encompass relationships beyond those of trust and confidence. The court also found that the rule improperly erases the different standards and remedies Congress created under Title I of ERISA (applicable to employer-sponsored plans) and Title II of ERISA (applicable to IRAs). Given those defects, the court did not find it necessary to reach several other grounds for vacating the rule.

“We are gratified that the Fifth Circuit agreed with us that the rule is not only deeply flawed in several ways, but also violates the intent of Congress as expressed in ERISA,” says Partner [David Ogden](#) who, along with Partner [Kelly Dunbar](#), led the WilmerHale team.

In addition to Ogden and Dunbar, the team included Counsel [Ari Holtzblatt](#), Senior Associate [Kevin Lamb](#) and former Counsel Jessica Leinwand. Partner [Andrea Robinson](#) provided invaluable assistance throughout the litigation.