

August 10, 2017

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## Fifth Circuit Oral Arguments – A New Hope for Fiduciary Rule Opponents?

The Department of Labor (“DOL”) has faced a series of legal challenges to the Fiduciary Rule - DOL’s regulation defining when someone acts as a fiduciary by providing investment advice under ERISA and/or the Code. To date, the DOL has prevailed in each of these cases, as district courts have granted summary judgment to the DOL upholding the Fiduciary Rule and related prohibited transaction exemptions. However, at oral argument in *Chamber of Commerce v. Acosta*, Case No. 17-10238 (5<sup>th</sup> Cir.) (“*Chamber of Commerce*”), the first of these cases to reach the appellate level, the U.S. Court of Appeals for the Fifth Circuit signaled that it may rule against the DOL. During the hour and seven minutes of oral arguments, one of the appellate judges, Judge Edith Jones, dominated the discussion. Judge Jones not only peppered both parties with questions that appeared to be largely based on the Chamber of Commerce’s briefs, but also raised a new argument about why the Fifth Circuit need not defer to the DOL’s analysis. Should Judge Jones and at least one of the other members of the panel side with the Chamber of Commerce, the Fiduciary Rule could be vacated.

The arguments in the Fifth Circuit focused on whether the DOL’s revised definition of “investment advice” is entitled to *Chevron* deference – a permissive standard of review where agency decisions are, in essence, to be affirmed unless they are arbitrary and capricious. Under the “major question doctrine” courts do not apply *Chevron* in circumstances where the case involves an issue of major economic or political significance or where the interpretation could effectuate a transformative expansion of an agency’s regulatory authority. To a lesser extent, the panel also focused on whether the DOL’s regulation of sales communications violates the First Amendment’s protection of speech.

The panel hearing *Chamber of Commerce* consisted of Chief Judge Carl E. Stewart, Judge Edith Brown Clement, and Judge Edith Jones. Judges Clement and Jones were both appointed by Republican Presidents, making this the first Fiduciary Rule case heard by a court predominantly made up of Republican appointees. While positions taken at oral argument are not necessarily indicative of the views of the judges, it appeared that at least one member of the panel is prepared to reject both of the DOL’s arguments. The other two panelists were more opaque.

Judge Jones dominated the discussion. In questioning consistently skeptical of the DOL’s arguments, she asked whether the DOL has the authority to redefine the term “fiduciary” in a manner that is inconsistent with its common law meaning. As an example, she asked, “If they can do that, then [the Department of Health and Human Services] could declare that the doctor-patient relationship is one of a fiduciary duty, right?” Additionally, she suggested that the “major question doctrine” may have been triggered through the DOL’s reordering of the IRA market. Judge Jones commented that, “The Department of Labor admits that it’s

trying to transform what was a pretty lenient treatment of IRAs . . . into an architecture of regulation.” One of the Chamber of Commerce’s challenges is that the Best Interest Contract Exemption conflicts with Supreme Court precedent stating that agencies cannot create causes of action. Judge Jones, in apparent agreement with the Chamber’s argument, rejected a defense put forward by the DOL’s attorney stating, “You are deliberately creating fiduciary duties.”

In addition to verbalizing arguments made by the Chamber of Commerce, Judge Jones independently raised a new argument. Specifically, she asked the following:

*“Has anyone parsed 4975, the structure of 4975 and the way in which exemptions are allowed? In particular I was looking at 4975 creates (c), identifies PTs, 4975 (d) identifies over 20 exemptions from the prohibited transactions rule. And in particular 4975(f)(8) talks about what I would interpret loosely flat fee advisory actions that are exempt from the prohibited transactions if they have an eligible arrangement. This is 4975(d)(17) where plan fiduciary advisors may receive advice or engage in sales and they may engage in fees. If you parse through that (d)(17) refers to (f)(8) which in turn refers to (e)(1)(b) which includes IRAs, but all three subsections of (d)(17) and (f)(8)(b) distinguish investment advice from sales.”*

*“The distinction [between selling activity and fiduciary advice] is recognized in the statute that the Labor Department is allegedly interpreting.”*

Judge Jones’s questions suggest that she will either join an opinion in favor of the Chamber of Commerce or separately dissent if the majority of the panel rules in the DOL’s favor.

While Chief Judge Stewart asked a number of questions, he probed equally at the DOL and the Chamber. Judge Clement made only one comment and asked only one question during the hour long argument. First, she stated that she is “befuddled how this whole hornets’ nest was created.” She then asked the Chamber of Commerce if a one-time sale could make someone a fiduciary. The Chamber’s attorney responded “yes.” Judge Stewart asked if that response would be accurate in all cases, such as if a customer walked in, carried a product up to the cashier, and then said I want to buy this. The Chamber’s attorney acknowledged that under that fact pattern, a salesman would not be a fiduciary, but he went on to explain that while people might buy some products that way, they don’t buy annuities without an interaction with a sales person. Given the relative lack of comments from either Judge Stewart or Judge Clement, it is difficult to predict how the Fifth Circuit will rule.

### **Timing**

At the end of the arguments, Chief Judge Stewart requested that both sides submit by August 9, 2017 letter briefs of no more than 10 pages discussing the new argument (italicized above) raised by Judge Jones. He expressed frustration with both parties for the number of briefs that had been submitted along with their inability to draft concise briefs. He indicated that the panel is aware of the need for a quick decision.

According to the Fifth Circuit’s website, it aims to publish decisions within 60 days from oral argument. For *Chamber of Commerce*, this would mean the court would aim to have its decision out by the end of September. We would not be surprised however if the decision were published as early as the first week of September, as that is typically when circuit court clerks are replaced. Given the complexity of this case, the judges might prefer not to hand it off to a new set of clerks.

### **Potential Outcomes**

Should the DOL prevail, we would expect the Chamber of Commerce to either request an *en banc* rehearing before the full Fifth Circuit or to file a petition for *certiorari* with the Supreme Court. While that is happening, the DOL would likely continue implementing the Fiduciary Rule. At that point, barring a victory for the Chamber in an *en banc* rehearing or at the Supreme Court, the RFI process and the Presidential Memorandum will be the only viable paths to changing the Fiduciary Rule and related exemptions. Under this scenario, the scope of potential changes is likely relatively narrow, and the rule likely here to stay.

Should the Chamber of Commerce prevail, the fate of the Fiduciary Rule is uncertain. For example, the Fifth Circuit could:

- Vacate the entire Fiduciary Rule, reversing amendments to existing exemptions and eliminating new exemptions created in connection with the rule;
- Vacate only a portion of the Fiduciary Rule (e.g., as applied to IRAs or the changes to PTE 84-24); or
- Hold that some portion of the district court's reasoning was flawed and direct the district court to reevaluate the cross-motions for summary judgment in light of the circuit court's direction. A remand could be accompanied by an injunction staying the Fiduciary Rule pending resolution of the case or the rule could continue in effect while the case is on remand.

Under any of these scenarios, the DOL would face some difficult decisions. If the new political leadership at the DOL would like to see the Fiduciary Rule stopped, one option would be to not appeal an adverse ruling and to stop defending the rule in other jurisdictions in light of the Fifth Circuit's decision. If the decision of the district court is vacated and the case is sent back to the district court without an injunction, the DOL could use the authority granted by Section 705 of the Administrative Procedures Act to temporarily suspend the Fiduciary Rule until the case is resolved. In either of these situations, the DOL would likely be in a position where it would be more willing to agree to more substantive changes to the Fiduciary Rule than those suggested in its recent RFI. Alternatively, if political leadership and the Department of Justice are fearful of the precedent that the defeat of the Fiduciary Rule could set, the DOL could appeal the Fifth Circuit's decision to the full *en banc* court or to the Supreme Court.

If the DOL loses, there will be considerable legal uncertainty surrounding the Fiduciary Rule for at least the remainder of the year. We will continue to provide updates as the Fiduciary Rule litigation progresses.