

FACC Campaign Welcomes 5th Circuit Mandate

----- Encourages NAIC to Step Back from Best Interest

After weeks of nervous “where-is-it” speculation, the 5th Circuit Court of Appeals finally issued its mandate vacating the Labor Department’s fiduciary rule. It is a tremendous victory for the financial services industry and for those who believe more government regulation is not always the answer. But one must ask whether this will be a short-lived victory if the fiduciary rule is simply replaced with a “best interest” regulation.

While some might read the Fifth Circuit decision merely as a rebuke to the Labor Department, the FACC Campaign believes the Fifth Circuit decision stands for a larger proposition. The Court made clear that agents who sell products are not fiduciaries and should not be held to fiduciary standards. To do otherwise is contrary to decades of common law as well as highly evolved statutory and regulatory decision-making.

The Fifth Circuit saw through the fallacy of the Labor Department’s presumption that it could simply deem insurance agents and securities brokers (who are sellers of products) to be equivalent to investment advisers. The decision blasted the Labor Department for ignoring the longstanding distinction between an agent and adviser, only the latter of which is a fiduciary based on a unique position of trust and confidence, for whom standards of prudence and loyalty apply under ERISA.

In rendering its decision, the Court rejected the paternalism of the DOL, rejected the agency’s arbitrary exercise of power, and rejected the idea that regulators could just turn anybody into a fiduciary. Now that the Fifth Circuit has spoken, one wonders whether the financial services industry, along with regulators, will heed this message or simply chalk off the decision as a narrow admonishment aimed at the Labor Department. That would be greatly disappointing and a missed opportunity to redirect regulatory energies in a way that truly helps consumers.

From our perspective at the FACC Campaign, “best interest” proposals being considered by the SEC and NAIC are essentially a reincarnation of the DOL rule that embody the same precepts of prudence and loyalty that were rejected by the Fifth Circuit as applied to insurance and securities brokerage sales. With no disrespect intended towards authors of these “best interest” proposals, best interest is a fiduciary concept, and many have admitted best interest is just another means by which to impose fiduciary standards and duties on agents, even if not



called such. This is exactly what the Fifth Circuit decision finds at odds with Congressional intent, common law, and (albeit unstated) common sense.

Nobody, least of all the FACC Campaign, is saying agents should have no duties or standards. But those duties and standards must be sensible and fit industry practices to avoid creating artificial, unrealistic, and potentially disastrous effects.

Indeed, insurance agents have critical duties that include, among others, the duty to provide accurate information, the duty to provide full disclosure, and the duty to ensure recommendations are suitable and meet client's needs and objectives. But agents are not fiduciaries and should not be saddled with fiduciary obligations that will only beget confusion and litigation, and in the end destroy the vitality of the fixed insurance industry and deprive consumers of high quality fixed insurance products.

It would be a shame to squander this gift from the Fifth Circuit, this clear-eyed opinion that finally sees through the malignancy of the DOL rule. The FACC Campaign urges industry and regulators to take full account of the meaning of the Fifth Circuit decision by not rushing to adopt a best interest standard that potentially eviscerates the Court's thoughtful (and courageous) holding.

Instead, the FACC Campaign hopes regulators will start afresh and look for ways to improve disclosure and transparency without creating artificial standards of care or unrealistic duties that blur real distinctions in the financial services marketplace - which in the end will only suppress competition, unleash rampant litigation, and ultimately hurt consumers.

If regulators do that, the holding of the Fifth Circuit will not be in vain, and real victory will be achieved.

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