

Federal judge rejects NAFA's suit against DOL

By Editorial Staff Thu, Nov 10, 2016

'NAFA's own declarations leave little doubt that those engaged in the annuities business do not simply dispense products but, rather, provide individualized investment advice,' wrote U.S. District judge Randolph Moss in a 92-page opinion. NAFA said it would appeal.

The National Association of Fixed Annuities has lost its legal bid to reverse the Department of Labor's conflict of interest rule and its impact on the sale of fixed indexed annuities (FIAs). In light of the Republican election sweep this week, the outcome may be moot.

In a 92-page [opinion](#), U.S. District Judge Randolph Moss, District of Columbia, denied NAFA's request for a preliminary injunction against the rule and granted DOL Secretary Tom Perez' motion for a summary judgment in favor of the government.

In a [statement](#), NAFA said it would appeal the ruling to D.C. Circuit Court of Appeals. "We are obviously disappointed by the court's decision, but we have always assumed this case would get decided by a higher court and we are pleased the issues will get de novo review by the Circuit Court," said Chip Anderson, executive director of NAFA.

NAFA's attorneys asked for the injunction on several grounds:

- By broadening the definition of a fiduciary to someone who provides investment advice—as opposed to someone who provides investment advice “on a regular basis”—violated certain 1984 case law, *Chevron vs. National Resources Defense Council*.
- The DOL Department exceeded its authority in extending ERISA fiduciary duties —those governing advisors to 401(k) plans—to IRAs.
- The Best Interest Contract Exemption (BICE) “impermissibly creates a private cause of [legal] action” by allowing FIA owners to file class action suits as a recourse against FIA sellers (as opposed to settling disputes through arbitration).
- The BICE limiting compensation to a “reasonable” level is void for vagueness.
- The DOL's decision to move FIAs from PTE (Prohibited Transaction Exemption) 84-24 to the BIC Exemption was arbitrary and
- The DOL's Department's regulatory flexibility analysis was inadequate.

Judge Moss rejected the reasoning behind all of these positions, accusing NAFA at one point of “mixing apples and oranges.” He disagreed, for instance, with NAFA's contention that an agent or advisor can recommend the purchase of an annuity without providing financial advice.

"NAFA's own declarations leave little doubt that those engaged in the annuities business do not simply dispense products but, rather, provide individualized investment advice," the judge wrote.

NAFA represents the life insurance companies who manufacture indexed annuities and the large distributors of those products. According to its 2014 federal Form 990, it had one full-time employee, Kim O'Brien, and an annual budget of about \$1 million.

In recent years, indexed annuities have become the best-selling type of annuity, thanks to their guarantees against market loss, exposure (through equity options) to stock market risk, guaranteed lifetime withdrawal options, as well as the generally large sales incentives offered by manufacturers. FIAs were also the product-of-choice for the new private equity firms that entered the life insurance business after the 2008-2009 financial crisis.

But, in the final version of the conflict-of-interest, the DOL surprised the industry by categorizing FIAs, along with variable annuities, as complex products that required a higher degree of regulation than in the past.

The DOL's final rule said that intermediaries can't advise IRA owners to buy FIAs or VAs with tax-deferred money unless the intermediaries use the Best Interest Contract Exemption (BICE). To qualify for this new exemption, advisors or agents must sign a Best Interest Contract, pledging to act in the client's best interest and not their own. It also requires them, as fiduciaries, to accept only "reasonable" fees.

These new requirements threatened to reduce FIA sales by exerting downward pressure on incentives and raising the legal risks of selling FIAs as one-off product sales instead of within the context of a long-term comprehensive plan. After the final DOL rule was issued last April, NAFA sued the DOL.