Fiduciary rule litigation isn't over

By Editorial Staff *Thu, May 3, 2018*

AARP wants the entire panel of Fifth Circuit judges to review the ruling by the three-judge panel, which ruled 2 to 1 against the DOL fiduciary rule.

Even though the Trump Department of Labor hasn't contested the decision by the Fifth Circuit Court of Appeals to void the Obama administration's fiduciary rule (at the behest of financial services industry groups), the legal battle over the contentious rule isn't quite over.

AARP's legal team has **petitioned** the entire banc of more than a dozen judges in the Fifth Circuit to re-hear the case, which had been decided by the 2 to 1 vote of a three-judge panel. A **motion to dismiss** that petition was subsequently filed by the industry groups, including the American Council of Life Insurers and the Insured Retirement Institute.

In its petition, AARP's attorneys argued:

The panel majority's decision is grounded on a faulty foundation. Although it correctly invoked the understanding that Congress intended for the courts to look to the common law of trusts to define the responsibilities of a person once he becomes an ERISA fiduciary, it impermissibly redefined that understanding as addressing who is a fiduciary.

The Supreme Court has repeatedly rejected this approach. As the Court has acknowledged, Congress "defin[ed] 'fiduciary' not in terms of formal trusteeship but in functional terms of control and authority over the plan," see 29 U.S.C. § 1002(21)(A), "thus expanding the universe of persons subject to fiduciary duties."

Attorneys for the industry groups countered:

This Court should deny the Motion of AARP to Intervene and Motion to Intervene of the States of California, New York, and Oregon for numerous reasons. First, the Movants do not satisfy the standard for emergency relief. Second, they lack standing.

Third, the Motions are untimely and fail to satisfy the other standards for intervention on appeal. In short, Movants' improper, last-minute motions do not come close to justifying their unprecedented bid to intervene for purposes of filing a motion for rehearing en banc, itself an exceptional motion which this Court's rules firmly discourage—even when filed by a

long-standing party to the proceedings.

What's at stake here? Tens of billions of dollars in potential commissions for selling mutual funds and annuities to rollover IRA owners.

If the original DOL rule had been upheld by the Fifth Circuit, access by commission-paid investment advisors, brokers and agents to the trillions of dollars now held in brokerage-based rollover IRAs would have been curtailed.

Their "conflicted" sales—sales driven by their own business needs and goals—would have been subject to class-action litigation. Only intermediaries who pledged not to act in their own interest would have been allowed to recommend products to IRA clients.