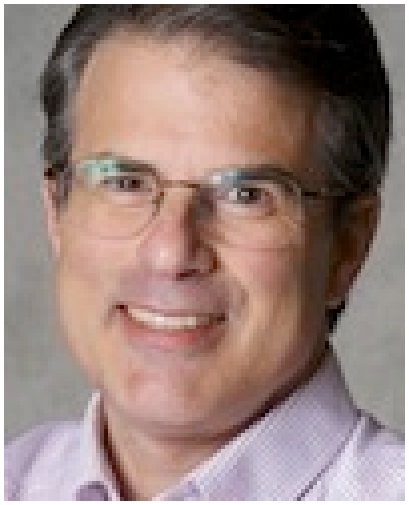
Hold the Parade

By Kerry Pechter *Thu, Mar 22, 2018*

Annuity industry advocates say that this week's Fifth District Court of Appeals ruling has nullified the DOL fiduciary rule. Others disagree. I question Judge Jones' understanding of how the industry works.



The indexed and variable annuity industries celebrated this week when a federal appeals panel in the Fifth District **ruled** that the Obama administration's Department of Labor overstepped its authority by applying the standard of conduct for retirement plan fiduciaries to people who sell annuities to IRA owners (especially rollover IRA owners).

The annuity industry certainly needed some good news this week.

LIMRA Secure Retirement Institute and Wink's Sales & Market Report both released figures showing that, despite a demographic tailwind and a strong economy, sales of indexed and variable annuities are at their lowest levels in years—thanks to depressed interest rates and regulatory uncertainty.

In the Fifth District, Circuit Judge Edith H. Jones effectively rejected the Obama Administration's end-around gambit. The Obama DOL in 2010 through 2016 knew that it couldn't use the conventional legislative route to fix a perceived problem—conflicts of interest created by payments from manufacturers of annuities to financial advisors who sell their annuities to rollover IRA clients. A hostile Congress blocked the way.

So the Obama administration attempted to change DOL regulations instead and create the now-famous fiduciary rule. Things turned especially ugly when, with little or no warning, the final version of the rule made it harder to sell indexed annuities. (Indeed, indexed annuity sales fell year-over-year in 2017 for the first time in a decade.) Suits by the American Council of Life Insurers (ACLI), the National Association of Insurance and Financial Advisors (NAIFA) and others soon followed.

In the conservative Fifth District federal appeals court, based in New Orleans, Judge Jones reversed district court rulings and said the DOL overstepped its bounds by creating the new

rule. (In her opinion, she seemed to mock the DOL's legal arguments as well, but maybe I imagined that.)

If Jones' ruling goes unchallenged, and if other circuits yield to its authority, then manufacturers and distributors of indexed and variable annuities have defused a time-bomb. The plaintiff's lawsuits that the fiduciary rule was bound to trigger might have inflicted even more damage on the existing annuity distribution model than fiduciary class action lawsuits inflicted on the model for distributing mutual funds through 401(k) plans a few years ago.

But will the Fifth District ruling become the law of the land? We asked the legal experts. There's no consensus regarding what happens next.

The ACLI, a plaintiff in the Fifth District case, said this week that the Jones ruling is the last word on the fiduciary rule.

"The effect of the ruling is to vacate the rule, and that's a nationwide *vacatur*," said a spokesperson for the ACLI, quoting ACLI attorney David Ogden of the firm Wilmer Hale. "The function of an APA [Administrative Procedures Act] *vacatur* is to take the rule and invalidate it. It's not a circuit-specific ruling, but a national ruling."

ERISA expert Marcia Wagner, of the Boston-based Wagner Law Group, wasn't so sure. "There is a 'circuit split,' which means this will likely go to the Supreme Court," she told *RIJ*, using the term of art that refers to fundamental disagreements between two federal appellate courts. "The Fifth Circuit speaks only for the fifth circuit even if it is attempting to speak for more. The circuit courts are notoriously independent of each other."

Micah Hauptmann of the liberal Consumer Federation of America, told *RIJ*, "I think both [Ogden and Wagner] are wrong. First, the Fifth Circuit could rehear it ***en banc*** **[**before the entire panel of judges]; second, there's still a case pending before the DC Circuit. If that court issues an opinion upholding the rule, that would create a clear split, and then it's possible that the Supreme Court could take it up. I know ACLI would like this rule to go away everywhere and for all time, but it's not a done deal yet."

Chris Caruso, the attorney, portfolio manager and journalist, said this in a broadcast email: "The ruling is of limited jurisdiction and doesn't impact what the Tenth Circuit said two days earlier or the Massachusetts case against Scottrade [now TD Ameritrade]."

Caruso was hopeful that a productive resolution is forthcoming. "[The Jones ruling] also makes it easier for the DOL to justify amending the Rule—a process which it is currently

reviewing. It will also embolden the Securities & Exchange Commission to go ahead with their plans to establish a fiduciary standard and it encourages the DOL to work with the SEC on this."

Andrew Holly of the Minneapolis firm of Dorsey & Whitney, which represents financial services firms, said in an email:

"The Circuit Courts of Appeals are divided over the legality of the rule itself—creating even greater confusion. Because of this confusion, it is very likely that either the Supreme Court (or the entire Fifth Circuit) will examine this issue to determine whether the rule is consistent with the DOL's authority. Of course, all of this is moot if the DOL decides to revise or eliminate the entire rule."

Attorneys at Drinker Biddle also weighed in this week with an email **bulletin**. "A number of commentators have suggested the DOL will not ask for a rehearing by the Fifth Circuit, or seek permission to appeal to the Supreme Court, and will let the Fiduciary Rule die," the bulletin said.

"We believe there is a fair chance that the DOL will seek to have the decision overruled even as it continues its regulatory process to review and likely amend the rule."

Here at *RIJ*, we don't think Judge Jones understood exactly how the annuity business works today.

The judge seemed to equate the transparent and trivial commissions that users of discount brokerage trading platforms pay with something quite different: the undisclosed four- or five-figure commissions that insurance companies pay to intermediaries on the sale of B-share annuities or indexed annuities.

Jones also seemed unaware that insurance agents and investment advisors at brokerages can and do position themselves as trusted advisors. Indeed, certain advisor groups have defended commissions on the grounds that they help cover the costs of financial advice over the long-term for middle-class clients who can't afford a fee-based advisor. If you count district court decisions and the dissenting opinion of the Fifth District's own chief judge, Jones' view is in the minority.

So, even the legal experts don't know exactly what will happen next. But who could have guessed that in 2018 the annuity regulatory environment would be even more volatile than the equities markets?