The DOL Should Challenge the Fifth Circuit's Opinion

By Kerry Pechter *Wed, May 1, 2024*

When insurance agents encourage IRA owners or rollover candidates to buy fixed indexed annuities, are they like EMTs, who save lives without having to be MDs or carry malpractice insurance? Or are they more like EMTs who dare to attempt open-heart surgery on people with chest pains?

Back in 2018, the Fifth Circuit U.S. Court of Appeals sided with the American Council of Life Insurers (ACLI) and the U.S. Chamber of Commerce to quash the Department of Labor's proposed "fiduciary rule," which could have hindered the sales of annuities to IRA owners.

Last week, the DOL issued a new but similar rule. Why would the DOL ignore a powerful precedent and seek a rematch?

DOL may believe that the **Fifth Circuit ruling** was flawed. As I read it, the text of the 2018 opinion didn't reflect a strong understanding of the annuity business. It ignored well-reasoned opinions in favor of the rule by two other federal judges. It was also handed down in a circuit where many judges are said to be prejudiced toward business interests and against regulations.

The DOL rule, then and now, charged that insurance agents should be held to the same ethical standards as, say registered investment advisers, when trying to persuade older investors to buy annuities with their IRA savings. That would be as counterproductive, the Fifth Circuit majority seemed to believe, as requiring emergency medical technicians (EMTs) to be doctors and carry malpractice insurance.

Oddly, the Fifth Circuit majority didn't seem aware of the truism that annuities are "sold, not bought." On the one hand, it's true that a few self-educated individuals actively study and buy annuities on their own. But not many. Most people need to be persuaded to buy an annuity. The Fifth Circuit opinion said that "sales" and "advice" are distinct. But the judges didn't seem to understand that annuity sales frequently require persuasion, which is arguably more aggressive than advice.

The opinion that buried the earlier fiduciary rule also didn't acknowledge the similarity

between some of today's top-selling deferred annuities and investments. Nor did that opinion reflect an understanding that many financial professionals have both insurance and investment licenses. The majority just didn't seem to know much about this business.

Why focus on FIAs?

The majority seemed shocked that the DOL singled out fixed indexed annuities for oversight. But the two judges conceded nothing about the complexity or opacity of those products, the high commissions that insurers offer agents to sell them, or the pressure needed to close a six-figure annuity sale.

The judges in the majority didn't seem to know that most investment advisers, let alone agents, don't know much about retirement income planning. They lack the specialized training required to help middle-class people orchestrate their qualified and unqualified savings, Social Security benefits, and real estate wealth into lifelong retirement income. Large, out-of-context, one-off product sales are not what retirees need.

When insurance agents encourage IRA owners or rollover candidates to liquidate tens or hundreds of thousands of dollars in stock and bond assets to buy an FIA that could be at least partly illiquid for up to 10 years, they're arguably more like EMTs who perform open-heart surgery on people with chest pains.

Differences of opinion

Although two judges voided the DOL rule in 2018, two other judges wrote in favor of it. Their opinions are worth reading. A federal judge in Northern Texas had ruled in favor of the DOL rule in 2017; his ruling was overturned by the Fifth Circuit. The chief judge in the Fifth Circuit, Carl E. Stewart, in his **dissent**, rejected the plaintiffs' accusations that the DOL acted arbitrarily and capriciously, that DOL was usurping Congress, or that the DOL was trespassing on the turf of state insurance commissions in trying to regulate insurance. From Judge Stewart's perspective, the DOL was doing its job.

Opinionated opinions

A number of articles and individuals have suggested that the Fifth Circuit of the federal court system, with its several one-judge jurisdictions and many recent Trump appointees, is a venue where business interests have a high probability of getting their cases before sympathetic judges.

Articles in two publications suggested that the Fifth Circuit has been politicized to some extent. "The real upshot of what the judges [in the Fifth Circuit] are doing is deregulation," said Stephen Vladeck, a professor at the University of Texas law school, in a **story** by legal journalist Jeffrey Toobin in the *New York Review of Books*.

"The Fifth Circuit and other conservative judges have resurrected or invented a series of doctrines—from nondelegation in the 1930s to 'major questions' in the 2020s—in an attempt to cripple the administrative state," Toobin wrote.

Of the 16 active Fifth Circuit judges, five were appointed by Donald Trump. "[These judges] have begun to shift an already right-leaning court toward a more monolithic brand of conservatism. These are judges…whose views are less hidden and whose outcomes are easier to predict," said a 2018 *Texas Tribune* **story** based on interviews with legal experts and Fifth Circuit lawyers. "You know what you're getting if you bring your case here."

Other federal judges are concerned about this. In March 2024, the U.S. Judicial Conference, the 26-member policy-making body for the federal courts, adopted a new rule aimed at "curtailing 'judge shopping' by state attorneys general, activists and others who challenge government policies in courthouses where one or two sympathetic judges hear most cases," according to **Reuters**.

The majority opinion sounded opinionated. Sardonically, the judges twice put quotes around the term "conflicts of interest." The quotes implied that such conflicts exist only in the imaginations of regulators. They reflected a lack of acquaintance with the incentives in financial services that run counter to the interests of consumers.

The financial literacy of the average American has been shown by many surveys to be low. Yet when the judges wrote that "individual investors, *according to DOL*, lack the sophistication and understanding of the financial marketplace possessed by investment professionals who manage ERISA employer- sponsored plans," they suggested that only the DOL thinks so. That's not the case. [Emphasis added.]

In arguing that the DOL bureaucrats were trespassing on the turf of Congress or state insurance commissioners, the majority conjured the hobgoblin of "deep state" Washingtonians. Their opinion also echoed the conservative tenet that regulations are pointless, because they only criminalize the law-abiding, raise the cost of doing business, and do nothing to deter the scofflaws.

After losing at the Fifth Circuit, DOL attorneys chose not to appeal the defeat to the whole

16-judge panel of the Fifth Circuit. The likeliest reason is that Trump administration was happy with the decision to vacate the fiduciary rule. Moreover, Trump's second Secretary of Labor, Eugene Scalia (son of the late Supreme Court Justice Antonin Scalia), had been the lead attorney for the plaintiffs in the Fifth Circuit appeal. The younger Scalia did not try to undo his own victory.