FACT SHEET: A SECOND DISTRICT COURT UPHOLDS THE DOL'S FIDUCIARY RULE

The Decision in *Market Synergy Group, Inc. v. Department of Labor, No. 16-4083 (D. Kan.)*

Background. On April 8, 2016, the Department of Labor ("DOL") issued a rule requiring all financial advisers to put the best interests of their clients ahead of their own financial interests when they provide advice for retirement accounts. The new rule will save Americans billions of dollars annually that brokers, insurance companies, and other financial firms have been receiving from investment recommendations that pay lucrative fees and commissions but yield poor returns for clients. The final rule was issued after an extraordinarily thorough and thoughtful rulemaking process at the DOL, and it fulfills the letter and spirit of the federal law that Congress passed in 1974 ("ERISA") to ensure that retirement savings are protected by the highest standards of loyalty and care.

The attacks on the rule. The financial adviser industry, including insurance companies and agents, launched an all-out war on the rule, attempting to derail it at every step: during the rulemaking process, through numerous bills in Congress, in media campaigns, and most recently, in a series of six lawsuits. On June 8, 2016, the Market Synergy Group, Inc. ("MSG"), an insurance agency that develops and markets fixed indexed annuities ("FIAs"), filed a three-count complaint in the U.S. District Court for the District of Kansas challenging DOL's decision in the final rule to apply heightened protections to the sale of FIAs where commission-based compensation is involved. MSG sought a preliminary injunction preventing the DOL from implementing and enforcing those provisions pending a final determination of its claims. Better Markets and other members of the "Save Our Retirement" coalition filed amicus briefs in defense of the rule. The Court heard oral argument on September 21, 2016.

The Court's decision. On Monday, November 28, 2016, Judge Daniel D. Crabtree issued a 63-page memorandum opinion firmly rejecting all of MSG's claims. The Court carefully examined the claims in turn, applied well-established principles governing injunctive relief and judicial review of agency rules, and held against MSG on every count. The court framed its decision in terms of the four elements that a plaintiff seeking a preliminary injunction must show: (1) substantial likelihood of success on the merits, (2) irreparable injury if the injunction is denied; (3) a threatened injury that outweighs the injury the defendant will suffer under the injunction; and (4) lack of adversity to the public interest. The decision marks the second judicial rejection of legal challenges to the rule. *See* Fact Sheet on *NAFA v. Perez.* The court ruled as follows:

1. MSG is not likely to succeed on the merits.

A. DOL gave sufficient notice regarding the possible treatment of FIAs under the Best Interest Contract exemption ("BIC").

(1) In its release explaining the proposed rule, DOL provided fair notice that it was considering removing FIAs from coverage under PTE 84-24 and placing them under the more protective BIC. In fact, the DOL requested comment on the issue, and other interested parties actually addressed it in their comment letters. As a legal matter, the final rule was a "logical outgrowth" of the proposed rule.

(2) Further, any failure to give notice to the plaintiff was harmless, since other commenters made all of the points that the plaintiff claims it would have submitted to the DOL had it received the notice it claimed was due.

B. The decision to place FIAs under the BIC was not arbitrary and capricious.

(1) The record supports DOL's determination that FIAs warrant more stringent regulation given the complexity, risks, and conflicts of interest they present. The DOL concluded that as a result of these product features, retirement investors are especially dependent on sound advice that is untainted by conflicts of interest. Even if the record contained evidence to the contrary, the court was bound under the Administrative Procedure Act to defer to the DOL's decision, since courts may not displace an agency's choice between two "fairly conflicting views."

(2) The DOL amply considered whether state insurance regulation, in combination with FIA 84-24, provided sufficient protections; it reasonably concluded that it did not, given the major changes in the retirement landscape in recent decades.

C. The DOL considered the economic impact the final rule would have on independent insurance agent distribution channels.

(1) The record shows that the DOL considered the possible impact of the rule, including the costs it would impose and the adaptations it would require among insurance companies, independent agents, and independent marketing organizations. DOL provided a number of options that those in the distribution channel could pursue to continue operating under the rule. In any event, although the rule might change the way the insurance distribution network operates, the DOL is under no duty to guarantee that a particular plaintiff and its members will do well under the rule. And to the extent the cost analysis had gaps, it was due to a lack of data and the industry's decision not to provide that information in response to the DOL's requests.

(2) The DOL also weighed the substantial benefits that the rule would provide for consumers, and it struck a reasonable balance, concluding that the need to protect consumers outweighed the costs and concerns of industry. In light of data from the United Kingdom assessing the impact of a recent and outright ban on adviser commissions, the DOL also concluded that the rule would be unlikely to harm consumers by restricting their access to investment advice.

2. Plaintiff has not shown the requisite threat of irreparable harm.

A. Plaintiff's predictions of profound harm, including loss of customers and revenue, are speculative, and do not satisfy the requirement that a plaintiff seeking a preliminary injunction demonstrate a "significant risk" of irreparable harm that cannot be compensated by monetary damages.

B. Where, as here, the predicted harm is indirect and hinges largely on how third parties, e.g. insurance companies, will react to a new rule, irreparable harm is especially difficult to demonstrate. The speculation is even more tenuous given that the DOL has created several options under the rule that make it workable for the FIA industry.

3. Plaintiff cannot satisfy the balance of harms or public interest tests.

A. An injunction would create confusion and delay, to the detriment of the DOL and its effort to protect retirement savers. And an injunction would produce a public harm that outweighs any harm the plaintiff may sustain.