

Thrivent Financial v. Perez: Update on Lawsuits Challenging U.S. Department of Labor's Fiduciary Rule

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In this update on the litigation challenging the U.S. **Department of Labor's** new fiduciary rule, we note that there has been a sixth lawsuit filed and oral arguments in two other cases.

Thrivent Financial for Lutherans, a Christian fraternal benefit society that provides insurance and financial services to its members, filed a sixth lawsuit challenging the fiduciary rule on September 29, 2016 in the U.S. District Court for the District of Minnesota (captioned *Thrivent Financial for Lutherans v. Perez et al.*, Case No. 0:16-cv-03289). The *Thrivent* suit challenges the rule's "best interest contract exemption" ("BICE"), which requires the resolution of disputes in federal court rather than allowing for alternative dispute resolution methods. Thrivent takes issue with this requirement because it believes that its arbitration system is essential to the fraternal nature of the relationship between Thrivent and its members. Thrivent claims that the DOL has exceeded its statutory authority under the Administrative Procedures Act because nothing in ERISA indicates Congress intended to require an exclusive judicial remedy, and Congress has supported arbitration agreements as a preferred means of resolving disputes through the Federal Arbitration Act.

In the litigation pending in the U.S. District Court for the District of Columbia, *The National Association for Fixed Annuities v. Thomas E. Perez et al.*, Case No. 16-cv-1035, the court held a hearing on August 25, 2016 to address the National Association for Fixed Annuities' motion for a preliminary injunction and for summary judgment, and the DOL's cross-motion for summary judgment. Much of the argument was devoted to the new rule's creation of a private right of action for violations of the BICE. Judge Moss has not yet issued a ruling on those motions. A summary of the parties' arguments from their briefs appears here.

In the litigation pending in the U.S. District of Kansas, *Market Synergy Group, Inc. v. U.S. Dept. of Labor, et al.*, Case No. 16-cv-4083, the court held oral argument on September 2, 2016. Market Synergy argued that the DOL failed to prove the current state-based regulation of fixed-indexed annuities ("FIAs") was broken, and that the judge should "hit the pause" button on including them in the DOL's rule. Following the hearing, the parties filed supplementary briefs focused on the DOL's failure to give notice and receive public comments on the inclusion of FIAs in the BICE. Market Synergy wrote that "[b]ecause the Department never indicated that it might view [fixed indexed

annuities] as dissimilar from other fixed annuities or discussed [fixed indexed annuities] in its notice, *nobody* submitted a comment on that issue.” The DOL argued that any oversight in its rulemaking was “harmless error” because the DOL considered all public comments and the public was not prejudiced by the notice failure. The court has not yet rendered a decision.

Oral argument is scheduled for November 17, 2016 in lawsuits filed in the Northern District of Texas and consolidated under *Chamber of Commerce of the U.S., et al., v. Perez, et al.*, Case No. 16-cv-1476-M. As previously reported here, the Chamber of Commerce and its co-plaintiffs argue that the new rule unlawfully creates a private right of action, that the rule violates the First Amendment as applied to truthful commercial speech, and that the DOL exceeded its statutory authority and acted arbitrarily and capriciously in imposing fiduciary obligations on non-fiduciary speech and disfavoring annuities. They also argue that the rulemaking process was inadequate.

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