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Loper Bright Doesn't Sink ESG Rule, Texas Judge Says

By **Rae Ann Varona**

Law360 (February 14, 2025, 11:25 PM EST) -- A Texas federal judge again upheld a Biden-era rule allowing retirement fiduciaries to consider issues like climate change and social justice when choosing investments, ruling that the rule was still valid despite the U.S. Supreme Court doing away with a decades-long approach to interpreting statutes.

U.S. District Judge Matthew J. Kacsmaryk on Friday granted the U.S. Department of Labor a second summary judgment win against a coalition of Republican-led states challenging the final rule and said the rule was not contrary to the Employee Retirement Income Security Act because fiduciaries — faced with choosing between investment options — must still abide by their duties owed to beneficiaries and the beneficiaries' financial interests.

The states had **argued** in a bid for summary judgment that ERISA's duty of loyalty was a "categorical prophylactic that bars collateral considerations." But Judge Kacsmaryk said that the states' interpretation of the federal law "would demand arbitrary randomness to choose between such investment options."

Their interpretation "embodies the wooden textualism that courts should endeavor to avoid," he said.

Adding that ERISA "does not require such capriciousness," Judge Kacsmaryk ruled that a fiduciary acts "in full accord with his ERISA duty of loyalty when he chooses between investment options that all are valid options because they each maximize the beneficiaries' financial benefits."

The 2022 Biden-era rule, as Judge Kacsmaryk put it, neutralized a 2020 rule under President Donald Trump's first presidency that barred ERISA fiduciaries from considering nonpecuniary factors in investment decisions.

The 2022 **rule** — titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" rule — among other changes, made it so fiduciaries of retirement plans regulated by ERISA can consider environmental, social, and governance, or ESG, factors when selecting retirement plan investments and exercising shareholder rights such as proxy voting.

In January 2023, a coalition of 25 Republican states sued the DOL to kill the ESG rule, asserting that the rule conflicted with ERISA's "clear command that fiduciaries act with the sole motive of promoting the financial interests of plan participants and their beneficiaries."

The states said that the rule unlawfully allowed fiduciaries to consider and promote "nonpecuniary benefits" when making investment decisions. The rule made it easier for fiduciaries to "act with mixed motives," while making it harder for beneficiaries to "police such conduct," the states asserted.

Judge Kacsmaryk **upheld** the ESG rule in September 2023, prompting the states to appeal to the Fifth Circuit. The Fifth Circuit **remanded** back to the district court in July for the limited purpose of reconsidering the rule in light of U.S. Supreme Court rulings it said "upended" the legal landscape by reversing the so-called Chevron doctrine that courts had for decades used to interpret ambiguous laws through a two-step framework that included deferring to an agency's interpretation if Congress hadn't directly "spoken to the precise question at issue."

A 6-3 majority of justices **reversed** the doctrine in June when ruling in Loper Bright Enterprises v.

Raimondo that the Chevron deference improperly prioritized the executive branch's legal interpretations over the judicial branch's.

Judge Kacsmaryk said Friday that the Loper Bright standard now simply instructs courts to follow the "[Administrative Procedure Act's] basic textual command" and use "all relevant interpretive tools" to find the "best" reading of a statute.

What Loper Bright does not do, is "disturb how courts evaluate a rule under the APA's arbitrary and capricious standard," according to his decision.

In again upholding the ESG rule, Judge Kacsmaryk looked at ERISA's text and ruled that the rule's "tiebreaking" provision didn't violate ERISA because it never allows fiduciaries to stray from exclusively achieving financial benefits for beneficiaries alone.

He said that the states would "stretch the text of ERISA to mean a fiduciary can consider nothing but financial factors on the beneficiaries' behalf."

"That is not correct," Judge Kacsmaryk wrote.

Rather, ERISA defines whose interest the fiduciary is required to protect and what the fiduciary's purpose is, he said.

"It says nothing of what they may consider," he said.

The states had also tried to lean on ERISA's drafting history to nix the rule, arguing that Congress had considered several proposals to allow fiduciaries to engage in "social investing" but didn't include the language in ERISA's final text.

Judge Kacsmaryk said that the states were correct that outright social investing wasn't allowed under ERISA.

"But as explained, that is not what the 2022 Rule permits," he wrote. "It permits, in full accord with the fiduciary's duties, a fiduciary to look to collateral factors to break a tie when investment options would equally serve the plan, and prudence would disallow investing in both."

Counsel for the states did not immediately respond to requests for comment late Friday or could not immediately be reached. The U.S. Department of Justice, which represents the DOL, did not immediately respond to a request for comment.

The Department of Labor is represented by Cassandra M. Snyder of the U.S. Department of Justice.

The states are represented by their respective attorneys general.

The case is State of Utah, et al. v. Vince Micone, et al., case number 2:23-cv-00016, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Sarah Jarvis, Kellie Mejdrich, Hailey Konnath, Juan-Carlos Rodriguez and Madeline Lyskawa. Editing by Emily Kokoll.
