

## 4 Takeaways For Benefits Attys After Judge Clears ESG Rule

By **Kellie Mejdrich**

Law360 (September 22, 2023, 9:03 PM EDT) -- A Texas federal judge's decision finding the U.S. Department of Labor's socially conscious investing rule didn't violate federal law represents a significant legal victory for the DOL at a time the agency's broader rulemaking efforts are under fire, attorneys say.

In granting the DOL a **summary judgment win** against a lawsuit from a coalition of 26 Republican attorneys general, U.S. District Judge Matthew J. Kacsmaryk held Thursday that a rule the **DOL finalized** in November 2022 did not violate the Employee Retirement Income Security Act or the Administrative Procedure Act. Republican attorneys general first sued the DOL in **January**, along with Texas-based sponsors of employee benefit plans and an ERISA plan participant.

"The department is pleased with the judge's decision upholding its rule as consistent with ERISA and the Administrative Procedure Act," said DOL spokesperson Edwin Nieves in an emailed statement to Law360 on Friday.

While the ruling wasn't entirely unexpected, attorneys said it was a notable decision for the DOL, particularly coming from Judge Kacsmaryk, who issued rulings striking down core Biden administration policies in the past. That includes **blocking FDA** approval for the abortion drug mifepristone in April 2023 and **invalidating the Biden administration's health care discrimination policies** under the Affordable Care Act in November 2022.

The DOL's socially conscious investing rule made clear that retirement plan managers can, but aren't required, to consider things such as climate change and social justice when choosing investments. The rule reversed Trump-era policies from 2020 that attorneys generally agreed were more restrictive on how retirement plans could assess environmental, social and governance, or ESG, factors, such as climate change, in their investment decisions.

"I don't think the ruling was controversial from an ERISA attorney's perspective," said John Schuch, an employer-side partner at Dechert LLP, adding that while the ruling was expected, "I do think it is a big victory for the Department of Labor in defending its rulemaking."

Here are four takeaways from the ruling.

### Setting Politics Aside

Attorneys highlighted how Judge Kacsmaryk's ruling made clear that a political dislike of ESG wasn't a sufficient basis for a legal attack.

In a section at the end of his 14-page order, where Judge Kacsmaryk said the 2022 rule "does not violate the APA," he added: "And while the court is not unsympathetic to plaintiffs' concerns over ESG investing trends, it need not condone ESG investing generally or ultimately agree with the rule to reach this conclusion."

That's an important aspect of the decision for attorneys because it cuts through what's been a political firestorm over both the Biden and Trump rules. That reached a flashpoint in Congress earlier this year, when the Republican-controlled U.S. House of Representatives **first passed** and then a **narrow majority** of the U.S. Senate cleared a resolution that aimed to kill the ESG regulations,

prompting Biden's **first presidential veto** in March. One Democrat in the House and two moderate Democrats in the Senate supported the resolution, along with nearly all congressional Republicans.

Michael Voves, chair of Dorsey & Whitney LLP's benefits and compensation group and head of the firm's executive compensation practice group, said Judge Kacsmaryk's ruling "was pretty clearly written to say that, you know, you can disagree with the rule, or not like it, or think it's bad policy. It doesn't mean that the DOL was outside the scope of its authority to enact the rule."

### **Trump, Biden Rules Basically the Same**

Another key takeaway for attorneys was Judge Kacsmaryk's finding that the 2022 rule "changes little in substance" from a 2020 rule **finalized during President Donald Trump's** administration, given that the disputes between Republicans and Democrats on the rule have communicated a completely different message.

Jason Levy, of counsel at Covington & Burling LLP, who represented former Obama administration Treasury official J. Mark Iwry, amicus in support of the DOL in the Texas case, said in an interview Friday "we were incredibly pleased with the outcome of this decision."

Levy, who is also representing Iwry in a related challenge in Wisconsin that's still pending, said Judge Kacsmaryk's decision "got the law right, by focusing on what is permissible in ESG considerations to maximize financial returns, recognizing that there's little in substance that's different between the two rules," Levy said.

That's something attorneys have been quick to point out throughout the debate on the ESG rules between Trump and Biden, with both rules purporting to do much more on ESG when first proposed. While Biden's rule did remove a categorical prohibition on allowing an ESG fund as a default alternative that Trump's rule had put in place, both rules said that ERISA plan fiduciaries could — but didn't have to — consider ESG when selecting plan investments. Judge Kacsmaryk also said in his opinion that beyond the rule, "for nearly three decades," the DOL had considered ERISA's obligations to allow the consideration of collateral, or nonfinancial, benefits when selecting competing investments.

Nevin Adams, an ERISA attorney and former chief content officer for the American Retirement Association, a nonprofit retirement industry trade group, also pointed to the court's conclusion about the similarity of the two rules.

"From a practical standpoint, if you believe that the financial interests of the participants are the only thing that you should be taking into account as a fiduciary, then you've got to be happy with where we are," Adams said.

### **Thorough Chevron Analysis**

Attorneys were also quick to take note of Judge Kacsmaryk's fairly straightforward analysis on agency deference, pointing to the test established by the U.S. Supreme Court in its 1984 landmark [Chevron USA Inc. v. Natural Resources Defense Council Inc.](#) decision.

In that case, the high court held that if Congress hasn't directly "spoken to the precise question at issue," courts must defer to a federal agency's interpretation of the law. Attorneys said they were watching for how Judge Kacsmaryk's ruling elaborated on Chevron deference given that conservative groups have pushed to rein in agency rulemaking power in the absence of congressional intent.

Attorneys said the Chevron analysis was important because it backed the DOL's rulemaking as a legitimate way to regulate on an issue where Congress hasn't specifically legislated. Under Trump, concerns that ERISA fiduciaries might be making politically motivated investment decisions resulted in the 2020 rule, which imposed certain restrictions on ESG, which Biden then relaxed.

"What the court's saying is, those views are both within sort of the range of reason under a Chevron analysis," said Andrew Oringer, partner and general counsel at the Wagner Law Group.

Joanne Roskey, a member of Miller & Chevalier Chtd. who spent more than a decade working for the

DOL in its Office of the Solicitor and as chief of the Employee Benefits Security Administration's health investigations division, said she was also looking out for the court's analysis on Chevron.

"But I think the court was pretty conservative in its analysis. ... I don't think this raises any significant appellate issues on the Chevron doctrine," Roskey said, adding "It didn't really take any kind of novel approach, or make any novel statements with respect to the application of Chevron."

Dorsey & Whitney's Voves said he was also looking out for the Chevron analysis in the decision, given that "there's rumors that the Supreme Court may well overturn that standard of review."

"That would be interesting to see if there's an opportunity for this case to be brought again and analyzed under a more strict standard of review," Voves said, adding: "To be honest, even then, I'm not sure that this judge would change his mind."

## Legal Challenges Ahead for DOL

Attorneys are most immediately looking to a similar case in **Wisconsin** filed by ERISA-regulated retirement plan participants who similarly allege that the rule violates federal benefits law and the APA.

A motion for a preliminary injunction from the plaintiffs in that case is pending, with Chief U.S. District Judge Pamela Pepper in April granting the DOL an extension on answering the complaint until after the injunction motion is decided. On Friday, the DOL also filed a notice of supplemental authority in the Wisconsin case noting Judge Kacsmayk's decision.

The Wisconsin case is one of several legal challenges the DOL is facing when it comes to its regulatory interpretations on ERISA, though attorneys point out how the ESG disputes in Texas and Wisconsin are much more narrow than other challenges the agency is facing or could soon face.

For example, in a different Texas challenge against a Trump-era investment advice rule, a federal magistrate judge **recommended in June** that the court vacate guidance on how ERISA applies to rollover transactions. That decision has yet to become final, and the DOL filed a brief objecting to the magistrate judge's report in August.

All the controversy casts a shadow over the DOL's **soon-to-be released investment duties regulation**, which the DOL sent to a White House office for final review earlier in September.

Still, attorneys caution that the victory on the ESG rule isn't necessarily connected — or expected to have a major impact on — the bigger fiduciary fights ahead for the DOL.

"I don't think it's going to have any significant impact on that rulemaking, or subsequent legal challenges that will come with a new fiduciary rule," said Roskey, at Miller & Chevalier. But she agreed it was a significant victory for the DOL at a time the agency is under greater public scrutiny.

"I think it goes to show that there was a lot of hype and rhetoric around the rule and the lawsuit when it got filed, and the judge was able to see through that, and address the issues on the merits, as they were presented. ... I'm sure DOL is very happy with it," Roskey said.

--Editing by Bruce Goldman and Nick Petruncio.