# Back to the Future: *Santomenno* Illustrates High Stakes Should the DOL Propose a New Fiduciary Rule

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**Abstract:**

The latest appellate court decision addressing fiduciary status in an excessive fees case under ERISA (*Santomenno v. John Hancock Life Ins. Co. (U.S.A.)*, 3d Cir., 2014)[1] offers an intriguing preview of the U.S. Department of Labor's ("DOL" or "Department") proposed conflicts-of-interest (fiduciary) rule and the high stakes involved for all sides. This briefing paper focuses on the definition of investment advice within the overall opinion. After several years of litigation, on Sept. 26, 2014, the U.S. Court of Appeals for the Third Circuit affirmed a district court's decision to dismiss, holding that, among other things, John Hancock did not serve as a functional fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA") in selecting and maintaining investment options in two 401(k) plans.

In an amicus brief opposing dismissal, the DOL avoided discussion of the current five-part definition of an ERISA fiduciary providing investment advice under section 3(21)(A)(ii) of ERISA. The Department seeks to discard this longstanding test of fiduciary status in lieu of a greatly expanded definition through a rulemaking. The Third Circuit's facts-intensive analysis and an industry brief supporting dismissal also review the proposed and current investment advice definitions. The result is a glimpse into the brave new world facing benefits brokers should the current policy debate over the DOL's fiduciary advice rule move from the abstract to a new litmus test for service providers.

**Key words:**

DOL, ERISA, fiduciary, investment advice, John Hancock, monitoring, participants, plan fees, Santomenno, service providers

[1] *See Santomenno v. John Hancock Life Insurance Co.,* 3d Cir. No. 13-3467, Sept. 26, 2014, at http://caselaw.findlaw.com/us-3rd-circuit/1679077.html (hereinafter referred to as "*Santomenno,* No. 13-3467").



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The latest appellate court decision addressing fiduciary status under ERISA (*Santomenno v. John Hancock Life Ins. Co.*, 3d Cir, 2014) offers an intriguing preview of the Department of Labor's pending conflicts-of-interest rule, reinforcing the high stakes involved for all sides if, as expected, the rule is re-introduced for public comment in 2015.[2]

**I. Case Facts**

In the instant case, Danielle Santomenno and two others represented a putative class of plan participants in two small 401(k) plans before the U.S. District Court for the District of New Jersey. Participants alleged that John Hancock Life Insurance Company (U.S.A.) marketed investment platforms to "unsophisticated small to mid-size employee retirement programs," and charged excessive service fees in breach of its fiduciary duties.[3]

Among the numerous complaints alleging breach of fiduciary duty was that John Hancock provided investment advice under ERISA's definition of a functional fiduciary in section 3(21)(A)(ii) of ERISA. So-called 3(21) fiduciaries are often registered as investment advisers with the U.S. Securities and Exchange Commission ("SEC"), serving in various fiduciary capacities to plans as well as retail clients. In contrast, securities and insurance brokers typically offer 401(k) platforms with arms-length service agreements designed to avoid co-fiduciary status with plan sponsors.[4]

According to the facts in the case, John Hancock established what the insurance industry describes as a "Big Menu" of investment options from which plan trustees select a much smaller pool of investment options called the "Small Menu."[5] The plan menus in dispute were comprised mostly of proprietary funds. Santomenno's plan, for example, contained 29 investment options, of which 19 were John Hancock funds.[6]

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[2] A number of legal blogs offer excellent overviews of the 3d Circuit's full opinion. See, e.g., *Fiduciary Matters Blog* by Thomas E. Clark, at http://blog.fraplantools.com/john-hancock-dodges-erisa-class-action-analysis-bigger-picture/; and *ERISA in Brief*, by Pat DiCarlo, at http://www.alstonerisa.com/third-circuit-serves-up-big-win-for-retirement-plan-service-providers/.

[3] Participants' brief filed Oct. 22, 2010, in *Santomenno v. John Hancock Life Insurance Co*, D. N.J., No. 2:10-cv-01655 (hereinafter "Participants' Brief"), at 14.

[4] Eric S. Mattson, *Brief of Amicus Curiae,* American Council of Life Insurers Supporting Affirmance in Favor of Defendants (hereinafter "ACLI Brief"), filed Mar. 3, 2014, *See* e.g., ""Service providers have created business models that leave ultimate control over plan investments – and therefore fiduciary decision-making – in the hands of the responsible plan fiduciary," at 6.

[5] *Santomenno,* No. 13-3467, at 5.

[6] Participants' Brief, at 12.



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Plan trustees could select any option off the Big Menu, which included investments offered by other investment companies. And while John Hancock could and did replace options on the Big Menu and made fee adjustments, according to the Court the plan trustee had ultimate authority to reject or accept any changes after receiving notification.[7]

In order to encourage the use of its proprietary funds, John Hancock also offered what it called a Fiduciary Standards Warranty when a plan selected at least 19 proprietary funds for its Small Menu. The warranty reimbursed any plan for losses arising from claims challenging the prudence of the investments, including litigation costs. However, the warranty disclaimed any fiduciary obligations on John Hancock's part, or the suitability of the investment options to an individual participant.[8]

The promotional aspects of the warranty did not sit well with the DOL. In building a case for fiduciary status, DOL said in its brief that John Hancock functioned as an ERISA fiduciary by monitoring the Big and Small menus on a daily, monthly, quarterly and annual basis, thereby "recogniz[ing] that fund selection and monitoring is an important part of the due diligence process."[9] Related to John Hancock's fund selection and monitoring activity, the Department also was troubled by John Hancock's advertising of the fiduciary warranty program, a message expressing confidence "that [John Hancock's] investment selection and monitoring process meets the highest fiduciary standards." John Hancock's advertising also pledged to apply "the same standards that ERISA imposes on fiduciaries for satisfying their investment duties under ERISA's prudent man rule," according to the DOL brief.[10]

Plan participants were subject to three fees: an administrative maintenance charge, a sales and service fee, and 12b-1 fees charged by mutual funds.[11] Participants alleged that in addition to proprietary funds, John Hancock selected for its Big Menu only independent funds that paid it revenue-sharing fees.[12] Participants further alleged that the fees charged to the plan were excessive, and that John Hancock, acting as a fiduciary, failed to take steps to defray reasonable expenses in managing plan assets.[13]

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[7] *Santomenno,* No. 13-3467, at 7.

[8] *See* "Corrected Brief of the Secretary of Labor, Thomas E. Perez, as Amicus Curiae in Support of Plaintiffs-Appellants and Requesting Reversal" (Hereinafter "DOL Brief"), May 28, 2014, at 5.

[9] *Id*.

[10] *Id.*

[11] *Santomenno,* No. 13-3467 at 7.

[12] Plaintiffs Brief, at 11.

[13] *Id.* at 16.



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## II. Analysis

### A. Statutory Definition of a Fiduciary

Section 3(21)(A)(ii) of ERISA and the related rules examined here, both prospective and current, is the focus of this paper. The Department's interest in expanding the fiduciary definition to capture service providers has been controversial, given the significant liability that comes with fiduciary status under ERISA. The original DOL proposal, which was withdrawn in 2011 for further review, is expected to be re-introduced for public comment in 2015. Like the 2010 version, the new proposal is expected to greatly expand the number of benefits brokers (service providers) subject to a functional fiduciary definition. Although the Department may offer additional clarity in connection with the seller's exemption in a new rulemaking, it seems likely that it would continue to broaden the definition significantly by eliminating at least two of the five prongs currently used to determine fiduciary status. The DOL also has stated that much of its efforts will be focused on the economic benefits of the rule, given recent successful challenges in court by the financial services industry to other rulemakings on that basis.

ERISA's statutory provision is straightforward and direct, at least at first glance. Section 3(21)(A)(ii) states that a person is a plan fiduciary to the extent that

> (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so…

### B. Five-Part Test under Existing Rule

The five-part test that flows from this statutory provision, promulgated by the DOL in 1975, is nothing but complicated. It significantly narrows the plain language of section 3(21)(A)(ii) by requiring a functional fiduciary to meet all five prongs of the definition. The current regulatory definition, as summarized below, defines an ERISA fiduciary as a person who does not have discretionary authority over plan assets and who, for compensation

1. Renders advice as to the value of securities or other property;
2. On a regular basis;
3. Pursuant to a mutual agreement;
4. The advice serves as a primary basis for investment decisions; and
5. The advice is individualized based on participants' needs.

According to the Court's recitation of the facts, participants argued that the plan agreements with John Hancock were evidence of mutual agreement with respect to an



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advisory arrangement.[14] However, the Court disagreed, reasoning that John Hancock did not render advice under the five-part test and that the contracts showed just the opposite: that John Hancock expressly disclaimed fiduciary status.[15]

It is true, the Court acknowledged, that ERISA precludes fiduciaries from contracting away their responsibilities. However, it added

> But this does not answer the question of whether John Hancock has taken on fiduciary status in the first place. Participants point only to the contracts themselves as support for the existence of a mutually assented-to advisory relationship between the parties, but the terms of the contracts belie their argument. This alone is enough to defeat Participants' argument and we need not proceed further.[16]

### C. Disclaimer Remedy

In similar fashion, the Court accorded more weight to the numerous disclaimers in John Hancock's fiduciary warranty program, which so troubled the DOL, than to any impression that the insurance company misrepresented its legal status. In the warranty plan, John Hancock stated that it was "not a fiduciary," according to the Court, and would not guarantee that any of its options was suitable to the needs of an individual.[17]

Further, the Court noted that, even if plan sponsors were incentivized by the fiduciary warranty's promise to indemnify the plan in a lawsuit, plan trustees still exercised final authority over what funds were included on the Small Menus. Additionally, the warranty offered a reminder that "[p]lan fiduciaries are still required to properly discharge their responsibilities in determining that John Hancock's investment process and fund lineup is appropriate for their plan."[18]

### D. *Chevron* Analysis

The Court also readily dispensed with the DOL's 2010 proposal. Participants had contended that the Department no longer stood by the current regulation because the

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[14] *Santomenno,* No. 13-3467, at 27.

[15] *Id*., at 28.

[16] *Id.*

[17] *Id.* at 6.

[18] *Id.* at 22.


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five-part test "engrafts additional requirements for establishing fiduciary status…that narrow the plain language" of the statutory definition.[19]

In doing so, participants took a swing for the fences by inviting the Court to ignore the DOL's current rule that, according to participants, was in conflict with the original legislative intent of Congress. "Congress has unambiguously expressed its intent that any party who renders investment advice for a fee is an ERISA fiduciary," asserted the participants.[20]

However, the Third Circuit was reluctant to break new ground by throwing out a longstanding rule governing industry conduct. "This is true insofar as that is what the statute says," the opinion stated, "but this observation tells us nothing about what the provision means."[21] To this point, relying on *Chevron* analysis -- a test established by the Supreme Court and used by the courts in determining whether an agency charged with carrying out a law has interpreted legislative intent properly – the Third Circuit found the participants argument deficient.

In instances where Congress has not spoken precisely to the issue at hand, a court must defer to a reasonable interpretation by the agency unless the rule is arbitrary, capricious "or manifestly contrary to the statute," the Third Circuit stated.[22]

In the instant case, "ERISA does not define 'investment advice,' nor does it provide a way to determine when such an advisory relationship has occurred," the Court said. "This is precisely the type of legislative gap-filling that we entrust to an agency's sound discretion."[23]

Irrespective of whether the proposed new definition was withdrawn or should be considered current agency guidance – a point of contention between the litigants -- the Court concluded that the DOL's 2010 proposal was immaterial to the case until formally

[19] *Id.* at 25.

[20] *Id.* at 27.

[21] *Id.*

[22] *Id.* at 26.

[23] *Id.*



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adopted as a rule.[24] "[A]nd unless and until it becomes law," the Third Circuit stated, "the current regulation remains binding."[25]

The ACLI brief also rejected participants' argument.

"This theory need not detain the Court for long," the ACLI said. "There is a good reason why the Department has not joined forces with Plaintiffs on this point: It is implausible."[26]

"To accept this theory," the ACLI said, "not only would the Court have to strike down a Department of Labor regulation that was promulgated nearly 40 years ago; it would also have to become the first Court of Appeals to hold that 'monitoring and advising the sponsor about the performance' of funds…in other words, providing data – is somehow a fiduciary act."[27]

**III. Implications for Future DOL Rulemaking**

Eric Mattson, co-author of the ACLI brief, in a press interview, applauded the circuit opinions dismissing excessive fee cases, emphasizing the plan industry's longstanding reliance on settled law.

"Service providers in general have not thought of themselves as being fiduciaries," he said. "They tend to provide important but ministerial services for 401(k) plans…. So for them, these cases are good developments because their worlds would have been turned upside down if it had come out the other way."

The DOL's decision not to join participants' argument on this issue is interesting, since its basis for the 2010 rulemaking was to update an outdated regulation.[28] Certainly it could have made that point, but the Department knew it was an irrelevant argument. Moreover, it had to balance legal arguments with policy concerns, its rhetoric outside of the courts

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[24] Citing precedent from *Littriello v. United States,* 484 F.3d 372,379 (6th Cir. 2007), "Plainly, an agency does not lose its entitlement to *Chevron* deference merely because it subsequently proposes a different approach in its regulations." *Id.*

[25] *Id.*, at 25.

[26] ACLI Brief, at 17.

[27] *Id*.

[28] The DOL's 2010 Proposing Release noted that the current regulation has not been updated since 1975. "Since that time, however," according to the Release, "the retirement plan community has changed significantly, with a shift from defined benefit plans to defined contribution plans." *Federal Register*, Vol. 75, No. 204, Oct. 22, 2010, at 65265.



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promising to consider industry concerns in a new rulemaking. A defense of the 2010 rule would have contradicted this pledge.[29]

If the DOL appeared caught between a rock and a hard place by not defending the utility of its proposed rule, the lessons drawn from *Santomenno* will no doubt strengthen its resolve that changes are needed to the old fiduciary definition. This sentiment of the Department to push forward with change – whether by rule or in court battles – was echoed by another ERISA attorney. Fred Reish, a partner in Drinker Biddle & Reath, said *Santomenno* and other recent excessive fee cases "may very well add fuel to the fire," giving the DOL further incentive to expand the fiduciary definition.

### A. Comparing Fact Patterns under *Santomenno* and DOL Release

Indeed, it almost seems as if the DOL had *Santomenno* in mind when it drafted the seller's exemption in 2010. Ironically, the lawsuit was filed in district court on the same day that the fiduciary rule proposal was published in the *Federal Register,*[30] but nearly identical fact patterns outlined in the DOL's Proposing Release and *Santomenno* reinforces the point that the proposal targeted a common industry practice.

Granted, the 2010 Proposing Release did not use the terms "Big" and "Small Menus," but it did reference the Department's intent to "address certain common practices" that reflect the business model used in *Santomenno*.[31]

"Service providers such as recordkeepers and third party administrators sometimes make available a menu of investments from which a plan fiduciary selects a more limited menu," the Proposing Release noted. "The provider may simply offer a 'platform'…or [it] may select, or assist the plan fiduciary in selecting the investments that will be available under the plan."[32]

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[29] *See, e.g.,* DOL comments to the press following withdrawal of the 2010 Rule. "We're not finished" with the rule, DOL Assistant Secretary Phyllis Borzi said. "When people see the reproposal, reasonable people with open minds will say [DOL] listened, that [DOL] addressed the legitimate issues that were raised in the long comment process." Melanie Waddell, "Borzi: DOL to Offer New Version of Fiduciary Rule in 'Several Months,'" *Investment Advisor Magazine,* Dec. 7, 2012. Available at http://www.thinkadvisor.com/2012/12/07/borzi-dol-to-offer-new-version-of-fiduciary-rule-i.

[30] *Federal Register*, Vol. 75, No. 204, Oct. 22, 2010, at 65268.

[31] *Id.*

[32] *Id.*



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"The service provider also sometimes retains the ability to later make changes to the plan's investment menu, subject to advance approval by the plan fiduciary," according to the Proposing Release.[33]

In some instances, according to the Release, both parties understand the conflicts, while in others the plan fiduciary "is relying on the provider's impartial expertise in selecting an investment menu."[34]

**B. Fiduciary Disclaimer vs. Descriptive Disclosure**

By injecting a new wrinkle into use of boilerplate disclaimers, the 2010 seller's exemption went further by requiring the service provider to disclose that it was not providing impartial advice. The use of disclaimers by John Hancock was a key basis in the decision of the Third Circuit to throw out the case. As such, the Department is obviously seeking other ways to manage conflicts of interest in the relationship than mere disclaimers, or at least to strengthen participants' legal arguments, and DOL amicus briefs supporting them, in court. The new points of contention in court presumably would shift from the simple question of whether disclaimers were provided to the more complex inquiry of whether disclosures were properly made and if the plan fiduciary was able to make an informed decision.

After the pummeling the Department took in *Santomenno,* it would seem unlikely that the agency would be inclined to backtrack and water down the exemption language. If it drafts stronger disclosure language, expect industry complaints to increase proportionately and perhaps exponentially.

The effectiveness of descriptive disclaimers in managing conflicts, however, remains to be seen. Under a 2005 SEC rule permitting non-fiduciary stockbrokers to offer fee-based advisory programs, a boilerplate disclosure of conflicts and fiduciary status was required in opening new accounts. It stated

> Your account is a brokerage account and not an advisory account. Our interests may not always be the same as yours. Please ask us questions to make sure you understand your rights and our obligations to you, including the extent of our obligations to disclose conflicts of interest and to act in your best interest. We are paid both by you and, sometimes, by people who compensate us based on what you buy. Therefore, our profits, and our salespersons' compensation, may vary by product and over time.'[35]

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[33] *Id.*

[34] *Id.*

[35] *See* §275.202(a)(11)–1(a)(ii), *Certain broker-dealers*.



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The effectiveness of the disclosure template will never be known. The brokerage programs continued to grow and thrive with some 1 million accounts and $300 billion in assets until a 2007 decision by the U.S. Circuit Court of Appeals for the District of Columbia ("DC Court of Appeals"), relying on *Chevron* analysis, vacated the rule, based on a finding that the SEC acted in an arbitrary and capricious manner when interpreting legislative intent.[36]

In promulgating the final rule, however, feedback from four consumer focus groups failed to offer a winning formula when they reviewed sample disclosure language drafted by the SEC. Specific areas of confusion were cited, such as use of the phrase "may differ," puzzlement over the meaning of "your rights and our duties," and uncertainty over the meaning of the term "fiduciary," among others.[37]

Assistant Secretary Phyllis Borzi, who is leading the effort on the DOL's fiduciary makeover, in March 2014 announced that feedback was being sought from small business owners regarding disclosure of service provider fees under Rule 408(b)(2). One wonders if the Department has solicited feedback on the seller's exemption language as well.

**C. Will Five-Part Fiduciary Test Stay at Three?**

Whether the Department will stay with the streamlined three-part functional test of a fiduciary under the 2010 proposal is unknown, but the *Santomenno* experience suggests it will continue to seek a more streamlined definition. That would mean it would remove the two prongs from the old rule as it did in 2010, i.e. remove the requirements that: 1) advice is provided on a regular basis; and 2) the advice must serve as the primary basis for investment decisions. The first was problematic for the Department, which cited the example of a fiduciary retaining a person to provide advice on a real estate investment and never have a reason to use that person again. Yet, according to the Department, the advice may be critical to the portfolio.

In the second instance, the Department acknowledged the difficulty of proving in an investigation that one person is the primary advice-giver, citing the example of a complex investment decision involving consultation with a team having different areas of expertise who work together in order to reach a prudent investment decision.

The Third Circuit apparently did not feel compelled to look at more than one prong of the five-part test in throwing out the participants' case. In this instance, it examined the

[36] *See Financial Planning Association v. SEC,* 482 F.3d 481 (D.C. Cir. 2007).

[37] *See* Siegel & Gale, LLC, Report to the Securities and Exchange Commission, March 10, 2005, at 8.



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'pursuant to mutual agreement' prong before concluding that it need not proceed further with its analysis. Here the Court made the point that investment advisory services were not part of the service agreement, therefore there was no mutual agreement or understanding that such services would be rendered. However, the Third Circuit could have used other prongs of the five-part definition to reject participants' argument, the 'primary basis for investment decisions,' as noted earlier, being one of the hardest to prove. The ease with which the judge dismissed this argument without further review suggests the DOL will be even more likely to get rid of old regulatory barnacles than it was previously.

**D. Considering a Rule Challenge in Court**

In terms of an administrative rule challenge, the DOL would be tasked with defending several critical points in defeating arguments that it acted 1) contrary to legislative intent, or 2) in an arbitrary or capricious manner.

With regard to the first point, given the Third Circuit's earlier defense of the current definition of a person providing investment advice under section 3(21)(A)(ii), it would seem *Chevron* analysis would work in the DOL's favor in reshaping the definition as it had proposed in 2010. Notwithstanding a court's deference to agency discretion in interpreting the law, the plan industry would undoubtedly refine its arguments as necessary in order for a court to reach a finding that the action was arbitrary and capricious.

For one thing, the Third Circuit's comments over the absence of an ERISA definition for 'investment advice' suggests the plan industry would parse through the meaning of the term in section 3(21)(A)(ii) and use that one of their arguments for vacating the rule.

It also seems possible that the plan industry would, like participants, take a swing for the fences at least once, in challenging a new fiduciary definition. Recently there have been rumblings in the industry that the Dodd-Frank reform act should apply, even though ERISA was not a topic of interest for Congress during the 2008 financial crisis.

Section 913 of Dodd-Frank provides the SEC with authority to adopt a uniform fiduciary standard for broker-dealers and investment advisers. Significantly, any definition would, according to one provision in the law, permit brokers or dealers to receive "compensation based on commission…[in] the sale of securities." Such a transaction would not, in and of itself, be considered a violation. Nor would the sale of proprietary or other limited range of products by a broker or dealer be considered a *per se* violation.[38]

[38] Dodd-Frank reform act, Sec. 913(k)(1) and (2).


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Given the absence of any references in Section 913 to ERISA, using this section to buttress the industry's argument that the new rule would ban commissions, would appear to be a Hail Mary pass.

That said, the industry appears to be pushing all the levers that it can. Since the introduction of the rule in the fall of 2010, industry lobbyists have been active on the legislative front, actively courting Members of Congress to sign petitions urging the DOL to take a go-slow approach. Legislation also passed the House in 2013 that would have required the SEC to adopt a fiduciary rule before the DOL could move forward, potentially killing the Department's initiative.[39] With the clock ticking down to the two-minute warning (in rulemaking terms at the DOL, two years is a fair analogy) time is running out for the Obama Administration.

The economic cost of a new rule, however, is where the DOL and its opponents will no doubt focus much of their attention in the rulemaking process and any potential administrative challenge. The strategy of challenging rules based on flawed economy analyses has been used with great success by industry groups fighting several SEC rules in recent years. The D.C. Circuit found on several occasions, in reviewing different securities law rules, that the SEC's economic analyses were insufficient, thereby leading to a finding of arbitrary and capricious under the federal Administrative Procedure Act.

While the DOL's 2010 Proposing Release offered estimates on the cost to industry, it did little in the way of offering data demonstrating its benefits, other than general commentary. The DOL did refer to congressional testimony by the Government Accountability Office noting a connection between pension consultants with undisclosed conflicts and lower returns for their clients' plans of approximately 130 basis points. More recently the DOL expressed interest in a 2012 study by Texas Tech demonstrating little difference in broker-dealer populations and services offered between states with common-law fiduciary standards and those lower market conduct standards.[40] Assistant Secretary Borzi has promised on numerous occasions that the economic data would be robust in the next go-round.

**IV. Conclusion**

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[39] *See* "H.R. 2374, The Retail Investor Protection Act," U.S. House, 113th Congress (introduced 6/4/2013).

[40] Michael S. Finke and Thomas Patrick Langdon, "The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice, March 10, 2012, at http://papers.ssrn.com/sol3/results.cfm?RequestTimeout=50000000.


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The *Santomenno* decision, viewed strictly from a legal perspective, was not surprising to most observers. It would have been shocking had the Third Circuit found John Hancock to be a functional fiduciary, notwithstanding the Department's arguments that the insurance company acted as such. Instead, the decision largely followed other opinions of the Third and Seventh Circuits in excessive fee cases (see *Hecker v. Deere & Co.* (556 F.3d 575, 583 (7th Cir. 2009), *Leimkuehler v. American United Life Ins. Co.* (713 F.3d 905 (7th Cir. 2013) and *Renfro v. Unisys Corp.* (671 F.3d 314 (3d Cir. 2011).

Nonetheless, each case reviewed at the appellate level raises tensions in the plan industry, given the financial stakes. One news report aptly described service providers as "breathing sighs of relief" after the *Santomenno* decision. A blog headline described the decision as a "big win" for retirement plan service providers.

In reviewing the ongoing battle, one that some would consider an unusually tortured history of rulemaking, even by Washington standards, leaving an agency with additional legal bruises in the courts the DOL is left facing a hostile Republican majority controlling both houses of Congress in the 114th Congress. It would seem the Department, still expressing strong support for an updated rule, will move forward with a new proposal in early 2015. Expect a newer and expansive fiduciary definition, as before, a lot of economic data supporting benefits for plan participants,[41] and a more prophylactic seller's exemption, thanks in part to *Santomenno* and other excessive fee cases.

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[41] *See,* e.g., Jason Furman and Betsey Stevenson, *Draft Conflict of Interest Rule for Retirement Savings,* The White House, Jan. 13, 2015. "The memo lays out the evidence that…the current regulatory environment creates perverse incentives that ultimately cost savers billions of dollars a year," at 1.



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