On 5th Anniversary of FPA's Win on 'Merrill Rule,' Fight Continues

By **James J. Green** | March 30, 2012 at 12:38 PM

Lawsuit whose victory surprised and delighted many changed the conversation in Washington while industry still awaits shape of a final fiduciary rule.

On March 30, 2007, the U.S. Court of Appeals for the D.C. Circuit did something memorable in the world of professional investment advice: it vacated SEC Rule 202(a)(11)-1, which everyone (except the SEC) called the "Merrill Rule." Writing in the pages of Investment Advisor's May 2007 issue, Melanie Waddell wrote, "As many have proclaimed, the FPA's victory is an outstanding win for the financial planning profession." But as Melanie (then as now the Washington bureau chief for IA and now AdvisorOne) presciently predicted, "more legal maneuvering may be on the way."

The ruling struck down the SEC rule first proposed in 1999 that exempted brokers from being regulated as investment advisors (under the Investment Advisers Act of 1940) in fee-based brokerage accounts.

In an interview on the anniversary of the court ruling, Duane Thompson (left) said that "the more things change the more they're the same: we, meaning the industry, are still debating the same issue five years later." At the time, Thompson was a managing director for government relations for the Financial Planning Association, which sued the SEC not once but twice (in July 2004 before the SEC formally adopted the rule in 2005, and then again in 2005) in its ultimately successful attempt to overturn the Merrill rule. Thompson left FPA in 2009 and now has his own consulting firm, Potomac Strategies, and is a senior policy analyst for Fi360.

Thompson says financial planners and FPA members continue to bring up the suit with him. "There was a lot of frustration" among planners, he recalled, over not getting the SEC to "listen to the financial planner's viewpoint, not just Wall Street's." He says that while the successful suit led to much in the way of positive feelings "at least on the financial planner side, it also exacerbated and polarized feelings" between the broker-dealer and the investment advisor communities.

Recalling some uncertainty at the FPA over the wisdom of suing the SEC, Thompson says "it was a major decision" for FPA's board "to come to grips with the idea." Then as now, the FPA was composed primarily of "small-businesspeople," and among such people, " a lawsuit is the last thing you want to do." By contrast, in the securities industry and among some other associations, filing suits "is a standard tool in the quiver of many associations; the AMA has an arm for litigation; the Chamber of Commerce has one," and just this week, lawyers for the National Federation of Independent Businesses (NFIB) spoke against the Patient Protection and Affordable Care Act, aka Obamacare, before the Supreme Court.

Thompson argues that filing suit against the SEC, while risky, was also a "perfect forum" for a group like the FPA, which was "always outgunned in terms of lobbying and resources" but in court had, as other advocacy groups have, a "level playing field." He also commends the work of the FPA's chief lawyer in the case, Merril Hersh, who he said "did a brilliant job" by forcing the court to look at the intent of Congress when it passed the Advisers Act.

He'd like to think the lawsuit had some influence in how financial reform since then has been framed, particularly on the fiduciary issue. "That hasn't resulted in a level playing field" yet, he said, but it "moved the debate further down the road."

When asked if he thought the SEC is now more responsive to the financial planning community, the veteran of politics inside the beltway said, "I think they are more wary." But he is heartened by the coalition of advisor and consumer groups that have kept up pressure on the SEC and Congress to do right by clients, naming in particular the Consumer Federation of America, the Investment Advisers Association and NAPFA, but also the CFP Board and AARP.

One day before the anniversary, in fact, a coalition including all those groups plus Fund Democracy provided the SEC with a "roadmap" for resolving the debate about how to create a fiduciary rule.

The debate has shifted, Thompson concluded. "The Financial Services Institute was on the fence, but now FINRA, SIFMA and FSI—everybody but the insurance industry" has voiced support for "some kind of fiduciary standard; the debate has moved well beyond whether the suitability standard is appropriate."