

Michael A. Valerio

Counsel

+1 202 239 3239

michael.valerio@alston.com

Washington, D.C. | The Atlantic Building, 950 F Street, NW | Washington, DC 20004-1404



Mike Valerio represents life and health insurance companies, ERISA plan fiduciaries, securities broker-dealers, and other financial services industry clients in high-stakes consumer and business litigation, arbitration, and regulatory enforcement matters. Mike also counsels industry clients on risk management and supervisory issues relating to retail sales, wholesale distribution, product development, and other business practices. Additionally, Mike represents the interests of trade associations and business groups in significant appellate litigation throughout the country, with a focus on ERISA fiduciary liability, employee benefits, and class certification issues.

Mike's national litigation and class action practice encompasses numerous areas, including the defense of ERISA, RICO, securities fraud, consumer fraud, unfair trade practices, and contract-based claims involving the marketing, sale, and administration of life and health insurance; fixed, indexed, and variable annuities; publicly traded and privately placed securities; and retirement plan products and services. Recently, Mike secured the dismissal of putative nationwide class actions against two different insurer clients alleging categorical denial of health benefits and associated violations of ERISA and the Mental Health Parity and Addiction Equity Act. Mike was also part of a legal team that sued the U.S. Department of Labor to enjoin and vacate a key aspect of the department's controversial 2016 investment advice fiduciary rule regime applicable to retirement account transactions.

Representative Experience

Life Insurance & Securities/Financial Services Industry

- Obtained a full dismissal at the pleading stage for an annuity issuer in a multimillion-dollar, multiple-defendant action involving alleged churning and other misconduct by an independent investment adviser and insurance broker. The appeal was withdrawn. *Minnick v. Wittman Capital Management*, No. A-17-763808-B (Nev. Dist. Ct.).
- Obtained, and defended on alternative grounds on appeal, a favorable summary judgment ruling of broad industry significance relating to the standard for tolling the statute of limitations on fraud, conversion, and negligence claims against a putative principal/issuing company based on alleged fraudulent concealment or continuing course of conduct by an independent financial adviser/insurance agent. *Carson v. Allianz Life Insurance Company of North America*, No. AC 39217 (Conn. App. Ct.), *cert. denied*, 207 A.3d 27 (Conn.).
- Represented a consortium of annuity marketing organizations in Administrative Procedure Act litigation against the U.S. Department of Labor (DOL) regarding new and amended ERISA- and Internal Revenue Code-prohibited transaction exemptions promulgated in 2016 as part of the new DOL fiduciary rule regulatory regime subsequently vacated through separate litigation. *Market Synergy Group Inc. v. U.S. Department of Labor*, No. 5:16-cv-04083 (D. Kan.).
- Counseled numerous insurance and financial services industry clients regarding compliance with, and risk management issues relating to, DOL fiduciary rule and associated prohibited transaction exemptions.

- Lead trial counsel in a lengthy Financial Industry Regulatory Authority (FINRA) arbitration alleging fraud, unsuitability, and due diligence failures resulting in underlying hedge fund losses within a private placement variable annuity offering; obtained judgment on all claims in favor of the broker-dealer client after the close of the claimant's case-in-chief.
- Obtained a complete dismissal for a private placement variable life insurance issuer in a multiple-defendant New York state court action alleging losses in underlying Madoff feeder fund investments. The appeal was withdrawn.
- Represented a variable annuity issuer in a California federal court action alleging violations of Securities Exchange Act Section 10(b)/Rule 10b-5 and state statutory and common law claims. The claims against the issuer were voluntarily dismissed following a successful motion to transfer venue.
- Advised and represented a major asset manager and fund complex regarding claims relating to losses in a securities lending collateral investment pool due to asset-backed securities and credit market exposure, resulting in substantial client recovery.
- Represented a retirement plan service provider and recordkeeper in separate ERISA 401(k)/403(b) plans and non-ERISA 457(b) state and local government plans nationwide class actions involving allegedly improper receipt of revenue sharing fees from mutual fund investment advisers and/or distributors whose funds were offered on the provider's investment platform with the latter action dismissed on SLUSA preemption grounds; the former action settled while motions for class certification and summary judgment were pending.
- Advised and represented an independent retirement plan consultant and investment adviser in multiple ERISA 401(k) excessive fee and imprudent investment class actions.
- Trial team member of a billion-dollar exposure nationwide annuity sales and marketing practices RICO and state unfair trade practices class action against a life insurer that settled favorably on the eve of trial after nine years of litigation.
- Represented a major mutual fund adviser in connection with subpoenas issued by plaintiffs in multiple excessive fee class actions brought under Section 36(b) of the Investment Company Act of 1940 against other fund advisers where the client had sub-advisory relationships.
- Represented a state life and health insurance guaranty association in a complex multiparty dispute relating to responsibility for a block of structured settlement annuity liabilities associated with the insolvency and liquidation of the Executive Life Insurance Company of New York.
- Obtained summary judgment for a life insurer on all claims and counterclaims and successfully argued for affirmance on appeal in a high-profile, multimillion-dollar life insurance rescission case following the murder of the insured.
- Represented a life insurer in Delaware Chancery and Superior Court litigation involving alleged fraud in the sale of a \$1 billion+ block of broad-based, corporate-owned life insurance (COLI) to a major national retailer.
- Represented a broker-dealer in FINRA arbitration involving the sale of funding vehicles for a 412(i) defined benefit retirement plan and advised the broker-dealer in the subsequent regulatory investigation.
- Advised and represented broker-dealers in FINRA investigation involving alleged market timing, excessive trading, and recordkeeping violations.
- Represented a broker-dealer in parallel SEC, FINRA, and state securities department investigations and related civil litigation involving a large-scale fraud and embezzlement scheme by a former registered representative.

- Represented a major accounting firm and audit partner in an SEC investigation involving alleged financial reporting irregularities by a publicly traded accounting firm client.
- Represented a publicly traded multilevel marketing company in federal securities fraud and state anti-pyramid and unfair trade practices class action litigation.

Health Care

- Obtained, for a health insurer and claims administrator client, the first full, pleading-stage dismissal in the U.S. among a series of putative nationwide class actions brought under ERISA and the Mental Health Parity and Addiction Equity Act of 2008 alleging the wrongful denial of plan participant claims for so-called wilderness therapy or outdoor behavioral health treatment programs.
- Secured a complete dismissal at the pleading stage of a putative nationwide ERISA and Parity Act class action brought against a health insurer and administrator client relating to a claimed systematic denial of residential mental health and outdoor behavioral health treatment. *H.H. v. Aetna Life Insurance Company*, No. 18-80773-CIV-MIDDLEBROOKS (S.D. Fla.).
- Advised and represented a health insurer and claims administrator in affirmative recovery litigation arising from fraud investigation involving large out-of-network laboratory services provider.
- Represented a health insurer in response to a state attorney general civil investigative demand regarding an antitrust investigation.
- Acted as special appellate counsel to primary and excess professional liability carriers in a coverage action relating to an insured managed care company's settlement of underlying ERISA and RICO class action litigation brought by health plan participants challenging the methodology for calculating out-of-network benefits.
- Resolved, via court-annexed mediation, a dispute between a client administrator and stop-loss carrier and the sponsor of a self-funded health plan regarding responsibility for outstanding claims under a terminated contract.
- Resolved, via private mediation following a partial grant of summary judgment in the court action, a multimillion-dollar contract dispute between an insurer client and a marketing firm associated with the client's exit from the long-term care insurance business.

Trade Association/Business Group Advocacy

- Principal author of an amicus curiae brief filed in the U.S. Supreme Court for a life insurance industry trade association in support of the defendant investment provider's certiorari petition regarding a key fiduciary liability issue for stable value and guaranteed investment contract providers to ERISA-governed defined contribution retirement plans. *Principal Life Insurance Company v. Roza*, No. 19-1462 (U.S.).
- Represented a trade association as amicus curiae in support of the defendant investment provider's motion for summary judgment before the district court and opposition to the plaintiff's subsequent appeal in an ERISA class action litigation challenging the provider's allegedly improper retention of general account investment earnings regarding guaranteed fixed-rate investment options offered in 401(k) plans. *Teets v. Great-West Life & Annuity Insurance Company*, No. 14-cv-2330-WJM-NYW 286 (D. Colo.), *aff'd*, No. 18-1019 (10th Cir.), *cert. denied*, No. 19-382 (U.S.).
- Represented a trade association as amicus curiae in support of affirmance of the district court's grant of the defendant 401(k) retirement plan service provider's motion to dismiss in ERISA class action litigation challenging allegedly excessive management fees charged by the provider. *McCaffree Financial Corporation v. Principal Life Insurance Company*, No. 15-1007 (8th Cir.).

- Represented trade associations, business, and employer groups as amici curiae through an en banc appeal of the district court's profit disgorgement award against the claim administrator and group insurer in ERISA disability benefits litigation. *Rochow v. Life Insurance Company of North America*, No. 12–2074 (6th Cir.).
- Represented a trade association as amicus curiae through an appeal of the district court's fiduciary liability ruling and classwide monetary award against a group life insurer in ERISA litigation challenging the insurer's use of retained asset accounts (RAAs) to pay life insurance benefits. *Merrimon v. UNUM Life Insurance Company of America*, Nos. 13–2128 13–2168 (1st Cir.).
- Represented a trade association as amicus curiae in an affirmance of the district court's grant of the defendant group life insurer's motion for summary judgment in ERISA class action litigation challenging the insurer's use of RAAs to pay life insurance benefits. *Edmonson v. Lincoln National Life Insurance Company*, No. 12–1581 (3rd Cir.).
- Represented a trade association as amicus curiae in an affirmance of the district court's grant of the defendant 401(k) retirement plan service provider's motion for summary judgment in ERISA class action litigation challenging the provider's receipt and retention of mutual fund revenue sharing fees. *Leimkuehler v. American United Life Insurance Company*, Nos. 12–1081, 12–1213, 12–2536 (7th Cir.).
- Represented a trade association as amicus curiae in the defendant 401(k) retirement plan service provider's interlocutory appeal of the district court's order certifying a nationwide plan trustee class under Federal Rule of Civil Procedure 23(b)(2) in ERISA class action litigation challenging the provider's receipt and retention of mutual fund revenue sharing fees. *Nationwide Life Insurance Company v. Haddock*, No. 10-4237 (2nd Cir.).
- Represented a trade association and business and employer group as amici curiae in an appeal vacating the district court's judgment in favor of the plaintiff's qui tam relator in civil False Claims Act litigation challenging certain private disability insurance industry practices relating to the insureds' applications for Social Security disability insurance benefits. *United States ex relatione Loughren v. UNUM Group*, No. 09-1606 (1st Cir.).

Publications & Presentations

Publications

- "Fiduciary Liability," *Handbook on ERISA Litigation, Fourth Edition*, Wolters Kluwer, 2016-2020 Supplement.
- "High Court's Amgen Ruling Reaffirms Heightened Pleading Standard for ERISA Stock-Drop Suits," *Washington Legal Foundation*, Vol. 24, No. 2, March 2016.
- "SCOTUS v. the Ninth Circuit on Failure to Enforce ERISA Stock-Drop Pleading Standard," *ABA Section of Litigation*, February 2016.
- "Life Insurer Prevails in First Circuit Appeal in ERISA Class Action Challenging Retained Asset Accounts," *ABA Tort Trial & Insurance Practice*, October 2014.
- "What Fifth Third Bancorp v. Dudenhoefter May Mean for ERISA Stock-Drop Litigation," *ABA Section of Litigation*, August 2014.

Presentations

- "Key Regulatory & Risk Management Issues to Watch in the Retirement Product Market," Insured Retirement Institute (IRI), webinar, February 6, 2019.
- "The Hottest Litigation Topics – A Year in Review," IRI Action 18 Conference, Washington, D.C., May 10, 2018.

- “Update on ERISA Retirement Plan Litigation – Including Impact of the DOL Rule,” Insured Retirement Institute (IRI), webinar, January 17, 2018.

Professional & Community Engagement

- American Bar Association – Litigation Section (Securities Litigation Committee); Tort Trial & Insurance Practice Section
- Clemency Project 2014
- Simsbury Land Trust
- Volunteer Youth Baseball and Basketball Coach

Education

- The Catholic University of America (J.D., 1993)
- Johns Hopkins University (B.A., 1990)

Admitted to Practice

- Connecticut
- District of Columbia
- Maryland

Related Services

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