State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: April 29, 2021 530047

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In the Matter of INDEPENDENT INSURANCE AGENTS AND BROKERS OF NEW YORK, INC., et al.,

Appellants,
et al.,
Petitioners,

v

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES et al.,

Respondents.

(And Another Related Proceeding.)

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OPINION AND ORDER

Calendar Date: March 10, 2021

Before: Egan Jr., J.P., Aarons, Pritzker, Reynolds Fitzgerald and Colangelo, JJ.

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Keidel, Weldon & Cunningham, LLP, White Plains (Howard S. Kronberg of counsel), for appellants.

Letitia James, Attorney General, Albany (Sarah L. Rosenbluth of counsel), for respondents.

Holwell Shuster & Goldberg LLP, New York City (Vincent Levy of counsel), for The Chamber of Commerce of the United States of America, amicus curiae.

AARP Foundation, Washington, DC (Ali Naini of counsel), for AARP and another, amici curiae.

Egan Jr., J.P.

Appeal from a judgment of the Supreme Court (Zwack, J.), entered August 7, 2020 in Albany County, which dismissed petitioners' applications, in a proceeding pursuant to CPLR article 78 and a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, to review an amendment to a regulation promulgated by respondents.

In December 2017, respondent Department of Financial Services (hereinafter DFS) proposed an amendment to Insurance Regulation No. 187 (hereinafter the amendment) titled "Suitability and Best Interests in Life Insurance and Annuity Transactions." The amendment was promulgated to address concerns with respect to the growing complexities involved with life insurance and annuity products, the corresponding need for consumers to increasingly rely on the advice of professionals in order to comprehend the widening market of products available and to mitigate abuses with respect to the compensation of agents and brokers (hereinafter collectively referred to as producers [see 11 NYCRR 224.3 (c)]) who have incentive to manipulate consumers into purchasing financial products that result in higher commissions but ultimately fail to meet their needs.[1] The amendment introduced a new standard of care applicable when producers make "recommendations" (see 11 NYCRR 224.3 [e]) to consumers with respect to life insurance and annuity transactions. The amendment requires insurers, including fraternal benefit societies, to implement standards and procedures to address, and producers to consider, "the best interest of the consumer" when making recommendations involving life insurance and annuity products to ensure that the insurance needs and financial objectives of the consumer are addressed at the time of the transaction (11 NYCRR 224.0; see 11 NYCRR 224.1, 224.4; 224.5). The amendment, which applies to both proposed transactions and in-force policies (see 11 NYCRR 224.1), sets forth numerous requirements with which an insurer and/or

[1] Insurance Regulation No. 187 was initially promulgated on an emergency basis in 2010, with a final regulation being issued in 2013; however, at that time, the regulation only applied to annuities (see 11 NYCRR former 224.0).

producer must comply in order for a recommendation to meet the best interest of the consumer standard.[2] The initial draft of the proposed amendment was subject to a period of public comment, following which DFS published a revised proposal in May 2018. Following a second period of public comment, the final amendment was published in the State Register on August 1, 2018.[3]

In November 2018, petitioners Independent Insurance Agents and Brokers of New York, Inc., Professional Insurance Agents of New York State, Inc., Testa Brothers, Ltd, and Gary Slavin (hereinafter collectively referred to as the Independent petitioners) commenced a CPLR article 78 petition in Albany County challenging the amendment, alleging, among other things, that DFS exceeded its authority in promulgating the amendment, that the promulgation of the amendment violated the State Administrative Procedure Act, that the amendment lacked a rational basis, was arbitrary and capricious and otherwise unconstitutionally vague. That same day, petitioner National Association of Insurance and Financial Advisors – New York

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[2] Broadly speaking, in making a recommendation, an insurer or producer must, among other things, compile and evaluate the relevant suitability information of the consumer, disclose to the consumer all relevant suitability considerations and product information and weigh factors, such as the benefits of the policy, price of the policy and financial strength of the insurer, such that he or she has a reasonable basis to believe that the transaction is suitable (see 11 NYCRR 224.4 [a]-[k]; 224.6 [a]). The amendment also requires the insurer to, among other things, establish and maintain a system of supervision intended to ensure producers' compliance with the amendment, including implementing procedures for the collection of a consumer's suitability information (see 11 NYCRR 224.3 [g]; 224.6 [b] [1] [i]) and the "documentation and disclosure of the basis for any recommendation" made to a consumer (11 NYCRR 224.6 [b] [1]). The insurer also is responsible for ensuring that producers are trained to make the recommendation (see 11 NYCRR 224.6 [e]).

[3] The amendment took effect in August 2019 with respect to annuities and in February 2020 with respect to life insurance.

State, Inc. (hereinafter NAIFA) commenced a combined CPLR article 78 proceeding and declaratory judgment action in New York County seeking similar relief.[4] NAIFA thereafter filed an amended petition adding an additional petitioner (hereinafter the NAIFA petition). The Independent petitioners moved to consolidate the two matters and, while this motion was pending, respondents answered the NAIFA petition and sought dismissal of same on the merits. Supreme Court granted the Independent petitioners' motion[5] and respondents answered the petition of the Independent petitioners, asserting the same grounds for dismissal as set forth in response to the NAIFA petition.

On August 7, 2020, Supreme Court issued a judgment dismissing both petitions on the merits. Supreme Court determined that DFS complied with the State Administrative Procedure Act in promulgating the amendment, that it did not unlawfully usurp legislative authority when it did so and that the amendment was not arbitrary and capricious, irrational or unconstitutionally vague. Two of the Independent petitioners – Independent Insurance Agents of New York, an industry trade association, and Testa Brothers, one of its members (hereinafter collectively referred to as petitioners) – appeal.

Petitioners contend that the amendment violates their due process rights as it is unconstitutionally vague. We agree. As relevant here, "[t]he void-for-vagueness doctrine employs a

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[4] NAIFA also sought the imposition of a permanent injunction prohibiting respondents from enforcing the amendment.

[5] Although Supreme Court purported to grant petitioners' motion to consolidate, the two proceedings maintained a separate existence, with the court directing that "the existing scheduling order of [the NAIFA proceedings] . . . will not be disturbed" and provided two separate deadlines for respondents to file answers to each petition. The plain language of the order, therefore, indicates Supreme Court's intent to join the proceedings for purposes of judicial economy and scheduling, as opposed to a full consolidation into one single proceeding (see Matter of Consolidated Edison Co. of N.Y., Inc. v New York State Bd. of Real Prop. Servs., 176 AD3d 1433, 1436 [2019]).

rough idea of fairness, and applies to regulations as well as to statutes" (Matter of Gurnsey v Sampson, 151 AD3d 1928, 1929 [2017], [internal quotation marks and citations omitted], lv denied 30 NY3d 906 [2017]). A two-part test applies in evaluating a vagueness challenge. First, a court must determine whether the regulation is "sufficiently definite so that individuals of ordinary intelligence are not forced to guess at the meaning of [regulatory] terms" (Matter of Kaur v New York State Urban Dev. Corp., 15 NY3d 235, 256 [2010] [internal quotation marks and citation omitted], cert denied 562 US 1108 [2010]; see People v Stuart, 100 NY2d 412, 420 [2003]), and have fair notice of the conduct that is prohibited (see People v Nelson, 69 NY2d 302, 307 [1987]; Matter of Turner v Municipal Code Violations Bur. of City of Rochester, 122 AD3d 1376, 1377-1378 [2014]). Second, the court must determine whether the regulation provides "clear standards for enforcement so as to avoid resolution on an ad hoc and subjective basis" (People v Stephens, 28 NY3d 307, 312 [2019] [internal quotation marks and citations omitted]; see People v Illardo, 48 NY2d 408, 413-414 [1979]; Matter of Turner v Municipal Code Violations Bur. of City of Rochester, 122 AD3d at 1378).

Here, while the consumer protection goals underlying promulgation of the amendment are laudable, as written, the amendment fails to provide sufficient concrete, practical guidance for producers to know whether their conduct, on a day-to-day basis, comports with the amendment's corresponding requirements for making recommendations and compiling and evaluating the relevant suitability information of the consumer (see 11 NYCRR part 224; Matter of Turner v Municipal Code Violations Bur. of City of Rochester, 122 AD3d at 1377-1378). Although the amendment provides certain examples of what a recommendation does not include (i.e., "general factual information to consumers, such as advertisements, marketing materials, general education information" and "use of . . . interactive tool[s]" (11 NYCRR 224.3 [e] [2]), the remaining definitional language is so broad that it is difficult to discern what statements producers could potentially make that would not be reasonably interpreted by the consumer to constitute advice regarding a potential sales transaction and

therefore fall within the purview of the amendment (see 11 NYCRR 224.3 [e] [1], [2]).

Additionally, once a recommendation is deemed to have been made, the guidelines with respect to the suitability information that producers must obtain from the consumer and the suitability considerations that must necessarily be disclosed are inadequate to the extent that they rely upon subjective terms that lack long-recognized and accepted meanings and provide insufficient guidance with respect to how producers must conduct themselves in order to comply with the amendment (see 11 NYCRR 224.3 [g]; Matter of Turner v Municipal Code Violations Bur. of City of Rochester, 122 AD3d at 1377-1378; compare Matter of New York State Land Tit. Assn., Inc. v New York State Dept. of Fin. Servs., 178 AD3d 611, 611-612 [2019]). Respondents concede that, in an effort to mitigate the costs of implementation, they intentionally did not mandate a particular format or system nor prescribe specific forms that producers must use to demonstrate compliance with the amendment. However, given the resulting ambiguities in the language employed, coupled with its lack of clear standards for how these provisions will ultimately be enforced, respondents have "virtually unfettered discretion" in determining whether a violation has occurred (Matter of Turner v Municipal Code Violations Bur. of City of Rochester, 122 AD3d at 1378 [internal quotation marks and citations omitted]; see Bakery Salvage Corp. v City of Buffalo, 175 AD2d 608, 609-610 [1991]). The amendment, therefore, fails both prongs of the test and, accordingly, we find it to be unconstitutionally vague. In light of our holding, petitioners' remaining contentions have been rendered academic.

Aarons, Pritzker, Reynolds Fitzgerald and Colangelo, JJ., concur.

ORDERED that the judgment is reversed, on the law, without costs, petitions granted and it is declared that Insurance Regulation No. 187, as amended, is unconstitutional.

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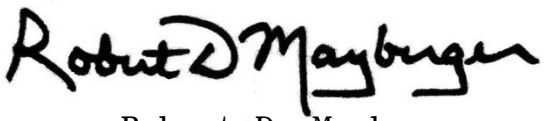

Robert D. Mayberger
Clerk of the Court