New York Appeals Court: Controversial "Best Interest" Rule Is Unconstitutional

On May 6th, 2021, a New York appellate court unanimously ruled that a troubling regulation governing the manner in which insurance producers offer annuities and life insurance is "unconstitutionally vague." The legal challenge was spearheaded by Big I New York, with financial assistance from the national Big "I", and is a major victory for independent insurance agents in the Empire State and across the country.

The five-judge panel took aim at Regulation 187, a rule revised by the New York State Department of Financial Services (NYSDFS) in 2018 that ambiguously required agents to act in the "best interest" of consumers when recommending annuities and life insurance products. Although the measure may have been well-intentioned, the flaw with the "best interest" standard is that it is nebulous and subjective and did not specify what actions or compliance measures are required and what behavior is prohibited.

The court found that the vague nature of the rule's standard of care makes it unconstitutional. The judges noted that the regulation utilizes "subjective terms," "fails to provide sufficient concrete, practical guidance for producers," and "provide[s] insufficient guidance with respect to how producers must conduct themselves in order to comply." They also highlighted the "ambiguities" and "lack of clear standards" in Regulation 187 and concluded that the failure to clearly and objectively articulate the rules of the road placed agents in an untenable position and provided regulators with "virtually unfettered discretion."

The decision made in May 2021 is likely to have implications and repercussions beyond New York. The National Association of Insurance Commissioners (NAIC) recently revised its Suitability in Annuity Transactions Model Regulation, and that proposal recommends the establishment of a similar "best interest" standard of care for insurance producers who recommend annuities to consumers. Numerous states have already adopted or are currently considering this proposal, and the model law's standard of care has the same inherent problems with uncertainty and vagueness that were cited by the New York court. The NAIC model's adoption and its potentially disturbing impact on the agent community and consumers was the focus of a News and Views article last year.

The opinion issued in Independent Insurance Agents and Brokers of New York v. New York State Department of Financial Services overturns an August 2020 lower court decision. NYSDFS now has the right to appeal to the state's highest court, and it is unclear at this time how the regulator will respond.

Despite the significant controversy associated with Regulation 187 in its revised form, Big I New York was the only group that appealed the lower court's ruling. Other agent and industry groups opted either not to pursue a legal challenge or filed suit and backed down after the initial loss. Many of these same associations are even actively pursuing the adoption of the NAIC model and establishment of the nebulous "best interest" standard in other jurisdictions.

This hard-fought appellate court victory is just the latest example of how the Big "I" is the voice of independent agents. Advocacy on behalf of members is the central mission of our association at both the national and state levels, and those efforts sometimes extend to legal battles. No one relishes the need to challenge regulators in court, but this effort was the necessary and appropriate response to an ambiguous rule and administrative overreach.

The national Big "I" has been a proud financial supporter of this critically important effort through both stages of the litigation. The Agents Advocacy Fund, which has been developed through the contributions of member businesses and state associations, enables the Big "I" to assist legal challenges that are critical to the entire independent agency system.