SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of,

INDEPENDENT INSURANCE AGENTS AND BROKERS OF NEW YORK, INC., PROFESSIONAL INSURANCE AGENTS OF NEW YORK STATE, INC., TESTA BROTHERS, LTD., and GARY SLAVIN,

Petitioners,

For Judgment Pursuant to CPLR Article 78

-against-

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, and MARIA T. VULLO, in her official capacity as Superintendent of the New York State Department of Financial Services,

Respondents.

Index No.: ______________

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED ARTICLE 78 PETITION TO ANNUL THE AMENDMENTS TO REGULATION 187

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PRELIMINARY STATEMENT

Petitioners Independent Insurance Agents and Brokers of New York, Inc. ("Big I NY"), Professional Insurance Agents of New York State, Inc. ("PIANY"), Testa Brothers, Ltd. and Gary Slavin, bring this action to challenge the legality of the First Amendment of the New York State Department of Financial Services ("DFS"[1]), to 11 N.Y.C.R.R. § 224, New York State Insurance Regulation 187 (Suitability and Best Interests in Life Insurance and Annuity Transactions) (hereinafter the "Regulation" or the "Amendment").[2] The Regulation seeks to impose an unprecedented, sweeping "best interests" standard on agents and brokers alike, under which agents and brokers would have to act in the "best interests," i.e., as a fiduciary, of the insured/consumer in providing insurance-related services, contrary to the New York Insurance law and longstanding common law principles under which agents owe fiduciary duties only to their principal—the insurer—and agents and brokers enter into non-fiduciary, arms-length contracts with the insured for the purpose of completing a one-time transaction. Through this Regulation, DFS seeks to alter the very nature of the statutory and common law procurement relationships between an insurance broker and the customer, and an insurance agent and its carrier, in a drastic and detrimental way. The Regulation also obliterates the significant statutory and common law differences between an agent and a broker, and their mutually exclusive and disparate duties to the parties to whom they are owed.

1 Throughout this Memorandum, Respondents DFS and Maria T. Vullo, its Superintendent (the "Superintendent")—the driving force, in her official capacity, in promulgating the amendments to the subject regulation—are referred to interchangeably.

2 The text of the First Amendment to the Regulation, as codified, is attached as **Exhibit "1"** to the Verified Petition. The Affidavits of Petitioners Gary Slavin and Testa Brothers, Ltd., are attached as **Exhibits "2"** and **"3"**, respectively, to the Verified Petition. All citations herein to "Exhibit __" are to the exhibits to the Verified Petition. Petitioners Big I NY and PIANY are the two largest organizations in the State of New York representing and protecting the varied interests of licensed independent insurance agents and brokers. Big I NY and PIANY are not-for-profit corporations; they have thousands of members.

The Regulation simply cannot be squared with the statutory scheme and settled common law rules governing the life insurance industry, the procedural requirements of the State Administrative Procedures Act, the limits of DFS's statutory authority to engage in agency policymaking, or the requirement that agency regulations provide sufficient specificity and clarity to inform regulated entities and enforcement authorities of the conduct permitted and prohibited. And the Regulation will wreak havoc on the life insurance agents and brokers across New York State—leading many insurance agents or brokers to leave the market, impose additional fees, or reduce services to consumers—because the costs and risks of complying with the Regulation's "best interests" standard will be substantial. Thus, a regulation with a stated purpose of benefiting consumers will likely end up leading to increased consumer costs and a reduced market for life insurance products as a whole, which would be detrimental to consumers and the State of New York. At the same time, the DFS has not documented any concrete problems with the current system that the Regulation addresses, nor has it conducted any serious study or analysis of the costs and impacts of this new, heightened rule, contrary to the requirements of SAPA and Article 78's arbitrary and capricious standard.

Instead, according to DFS's own Assessment of the Public Comments to the First Amendment to 11 N.Y.C.R.R. § 224 (Insurance Regulation 187), the impetus for the Regulation was that the Superintendent was monitoring, and sought to mirror, so-called "Best Interests" standard regulations promulgated by the U.S. Department of Labor, ("DOL"), *et al.*, under the Fiduciary Duty Rule of April 8, 2016, as to the conduct of those involved in the procurement of life insurance and annuities. Despite an utter lack of findings by the Superintendent that there was a problem or issue in this State that required such amendments—and despite the fact that the federal regulation had already been invalidated by the time the Regulation was finalized, see

Chamber of Commerce of the United States of America v. United States Department of Labor, 885 F.3d 360 (5th Cir. 2018)—the Superintendent promulgated the Regulation, mirroring the now-voided federal "Best Interests" standard. DFS must be stopped before more businesses and consumers are harmed. The Regulation should meet the same fate as the federal standard.

The court should strike down the Regulation for each of the following independent reasons:

1. **The Regulation Conflicts with the Governing Statutory <u>Scheme and is Therefore Beyond DFS's Authority to Impose</u>**

    - The Regulation redefines insurance agents and insurance brokers as "Producers,"[3] and imposes a "best interests" standard on both of them directed at the consumer, obliterating the significant distinctions between agents and brokers set out in New York Insurance Law.

    - Worse still, the Regulation alters the duties owed by agents and brokers, including to whom they are owed, established in longstanding common law principles and rules and codified in the Insurance Law.

    - The Regulation, moreover, forces the Producer to act as a fiduciary to the customer in breach of an agent's duties to its carrier.

2. **<u>The Regulation Constitutes Improper Regulatory Policymaking</u>**

    - The Superintendent improperly acted as a super-legislature enacting public policy without the authority of the Legislature, in a space where the Legislature has considered acting and has, as of now, chosen not to legislate a "best interests" standard.

3. **<u>The Regulation Violates SAPA</u>**

    - The Regulation was not promulgated in accordance with the State Administrative Procedures Act. Most critically, there was no meaningful analysis or consideration of the potential costs of the Regulation on the public, brokers and/or agents, or the harm to small businesses.

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3 Petitioners understand that in the insurance industry the term "Producer" is used as a shorthand catch-all to refer to any non-wholesale insurance intermediary between the insured and the insurer. Petitioners do not object to that term in its informal industry vernacular. However, as used in the Regulation its meaning is in contravention to longstanding and accepted legal meanings and standards applicable to agents and brokers.

4. **The Regulation is Arbitrary & Capricious**

- DFS has promulgated an arbitrary and capricious regulation destined to harm consumers, without an understanding or study of the costs of the Regulation, without any record justification for the unprecedented new obligations imposed, and without considering the significant negative impacts of the Regulation on agents, brokers, consumers, or the public, including the litigation costs of parties battling over the application of this subjective new "best interests" standard.

5. **The Regulation is Unconstitutionally Vague**

- The Regulation is unclear as to whom agents and brokers owe duties, what duties are owed, and what constitutes a "recommendation" to consumers. As a result, agents and brokers are not on notice as to what conduct is required of them, and those charged with enforcement cannot make objective determinations as to whether conduct is violative of the Regulation.

6. **The Regulation Improperly Extends the Agent/Broker Relationship**

- The Regulation forces the agent/broker to continue to provide coverage advice to the consumer well after the contract is issued and thus after the legal relationship between them is terminated and the contractual relationship between the insured and the insurer is created.

For all of these reasons, the Regulation represents improper regulatory overreach and is arbitrary and capricious. It is inconsistent with governing law and the economic realities of the life insurance industry and is unconstitutional. This Court should declare the Regulation void and unenforceable in its entirety.

STATEMENT OF FACTS

A. The Life Insurance Industry Is Governed by A Comprehensive Statutory Scheme that Codifies the Stark Difference between Agents and Brokers

New York Insurance Law ("NYIL" or the "Insurance Law") provides for three types of insurance intermediaries (at Insurance Law §§ 2103, 2104 and 2107): insurance agents, insurance brokers, and insurance consultants. An "**Insurance Agent**" is the actual representative of the insurance company (a/k/a "Insurer" or "Carrier") who seeks to sell the product of this one company. It owes no duty to any third-party as its loyalty and legal duty, by common law, is based on its agent status, and by agency contract its duty is exclusively to the insurer. An "**Insurance Broker**" assists the policyholder or potential policyholder (a/k/a the "Insured") and owes a simple duty to the insured to procure the coverage requested or advise the insured coverage cannot be obtained. Murphy v. Kuhn, 90 N.Y.2d 266 (1997). An "**Insurance Consultant**" is a party independent of an authorized insurer who examines, appraises, reviews, or evaluates insurance policies for potential policyholders. Dep't of Fin. Servs., Gen. Counsel Op. (Feb. 8, 2007). A Consultant may not actually sell or provide insurance without an Agent or Broker license. Id.

The Insurance Law separately defines insurance agents ("Agents") and insurance brokers ("Brokers"), including to whom they owed duties, consistent with this distinction. Specifically, NYIL Article 21 ("Agents, Brokers, Adjusters, Consultants and Intermediaries"), §2101 ("Definitions") defines an "Insurance Agent" as follows:

> **(a)** In this article, "**insurance agent**" means any authorized or acknowledged agent of an insurer, * * *, who acts as such in the solicitation of, negotiation for, or sale of, an insurance, * * * contract, **other than as a licensed insurance broker**, * * *;
> (*Emphasis added.*)[4]

Section 2101 separately defines an Insurance Broker as follows:

> **(c)** In this article, "**insurance broker**" means any person, firm, association or corporation who or which for any compensation, commission or other thing of value acts or aids in any manner in soliciting, negotiating or selling, any insurance or annuity contract or in placing risks or taking out insurance, **on behalf of an insured other than himself**, herself or itself or on behalf of any licensed insurance broker, * * *:
> (*Emphasis added.*)[5]

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4 There is at "(b)" the related definition of an Independent Insurance Agent, predicated on the definition in "(a)" and which only concerns the fact that this type of agent can also represent more than one Insurer at a time as an agent.

5 See also NYIL § 107, "Definitions of terms of general use in this chapter" and 11 N.Y.C.R.R § 34.1, "Section 34.1. Definitions."

From the definitions alone, it is clear that the New York State Legislature chose to not only treat Broker and Agent differently, but expressly set forth to whom each owed its duty: Insurance Agent to the Insurer and the Broker to the Insured. These are mutually exclusive of a fiduciary or "best interest" duty to consumers.

Agents and Brokers also have different application forms for licensing and different license requirements, according to the rules and regulations promulgated by DFS. An Insurance Agent must be licensed as such pursuant to NYIL§2103 "Insurance agents; licensing," while an Insurance Broker is licensed under NYIL§2104 "Insurance brokers; licensing." Neither an Insurance Agent nor an Insurance Broker can act as the other without the necessary, separate license.[6] Both Agents and Brokers are entitled to compensation.

B. DFS Formulates the First Amendment to Regulation 187 Based on the Now-Invalidated Department of Labor "Best Interests" Standard

In 2016, the U.S. Department of Labor (DOL) issued a rule which "expanded the federal definition of investment advice and required financial advisors to adhere to enhanced standards of conduct." **Exhibit "7,"** Revised Regulatory Impact Statement, p. 4. The rule "made the sale of certain insurance products . . . subject to a fiduciary standard." Id. When DFS initially promulgated the Proposed First Amendment to 11 N.Y.C.R.R. 224 (Insurance Regulation 187), it did so in order to apply that standard to the sale of life insurance in New York.[7]

6 An insurance consultant is separately licensed. Henry L. Fox Co., Inc. v. William Kaufman Organization, Ltd., 74 N.Y.2d 136, 140 (1989). In Wied v. New York Cent. Mut. Fire Ins. Co., 208 A.D.2d 1132, 1134 (3rd Dept. 1994), a plaintiff alleged that defendant insurance agent "held himself out to me and to the general public as a professional insurance consultant, skilled in ascertaining the insurance needs of his clients and making appropriate recommendations as to insurance coverage." (Internal quotation marks omitted.) In Wied, the plaintiff essentially attempted to turn a standard insurance agent into an insurance consultant. The Third Department slammed the door on that argument, ruling against the insured.

7 Prior to the changes made by the Department of Financial Services in the First Amendment, Regulation 187 applied exclusively to annuities, not life insurance products, and was entitled Suitability in Annuity Transactions.

The original Regulatory Impact Statement related to the Regulation was published in the New York Register on December 27, 2017. Within the Regulatory Impact Statement, the Superintendent acknowledged: "Insurers and insurance producers subject to this amendment likely will incur costs because of this amendment." **Exhibit "4,"** New York State Register, December 27, 2017, p. 39. However, rather than grapple with any calculations about the actual cost of the Regulation, DFS cited the DOL rule, which also imposed an industry-wide best interest standard for financial professionals, as a basis for the imposition of the "best interests" standard to life insurance agents and brokers in New York. See **Exhibit "4,"** New York State Register, December 27, 2017, p. 39.

Specifically, the Regulatory Impact Statement explained: "The United States Department of Labor ("DOL") has issued 29 C.F.R. 2510 (the "DOL Rule" [or the "Fiduciary Rule"]), which, in part, imposes a best interest standard of care so that all financial professionals who provide retirement planning and investment advice must act in the best interests of their clients." The Superintendent then concluded: "A uniform standard of care across all types of financial transactions, including both annuity and life insurance transactions, provides consistent consumer protection and a consistent regulatory framework to ensure fair treatment regardless of product choice. . . . The Department finds no acceptable justification for applying different standards of conduct based solely on the source of the funds." See **Exhibit "4,"** New York State Register, December 27, 2017, p. 39.

On March 15, 2018, the United States Court of Appeals for the Fifth Circuit struck down the DOL Rule. See Chamber of Commerce of the United States of America v. United States Department of Labor, 885 F.3d 360 (5th Cir. 2018) (attached as **Exhibit "9"**). The Fifth Circuit made a number of findings related to the rule and its contradiction with federal law. Without getting into all of the details of the 46-page majority decision, the Court held that the DOL Rule exceeded DOL's statutory authority and conflicted with federal law.

Among the evidence discussed in the decision that is relevant to the Regulation is the following:

1. "The Fiduciary Rule has already spawned significant market consequences, including the withdrawal of several major companies, including MetLife, AIG and Merrill Lynch from some segments of the brokerage and retirement investor market."

2. "[M]illions of IRA investors with small accounts prefer commission-based fees because they engage in few annual trading transactions. Yet these are the investors potentially deprived of all investment advice as a result of the Fiduciary Rule, because they cannot afford to pay account management fees, or brokerage and insurance firms cannot afford to service small accounts, given the regulatory burdens, from management fees alone."

3. "It is likely that many financial service providers will exit the market for retirement investors rather than accept the new regulatory regime."

4. "Throughout the financial services industry, thousands of brokers and insurance agents who deal with IRA investors must forgo commission-based transactions and move to fees for account management or accept the burdensome regulations and heightened lawsuit exposure required by the BICE contract provisions."

5. For its part, the DOL estimated that "compliance costs imposed on the regulated parties might amount to $31.5 billion over ten years with a 'primary estimate' of $16.1 billion."

Yet, despite the decision striking down the federal Fiduciary Rule, and the fact that the proposed amendment to Regulation 187 was explicitly based on the federal rule, the Superintendent decided to move forward with the Regulation.

In its May 16, 2018 Summary of Revised Regulatory Impact Statement, the Superintendent plowed ahead, stating that "[a]lthough delays and conflicting court decisions leave the [DOL] Rule's implementation uncertain, the Department believes that the best interest standard is an important consumer protection and intends to pursue this protection for NY consumers." **Exhibit "5,"** New York State Register, May 16, 2018, p. 17.

Various industry participants, including Petitioners here, submitted comment letters objecting to the proposed amendment to Insurance Regulation 187 and requesting that DFS withdraw the proposed amendment. Among other flaws, the comment letters highlighted that term life insurance is not an investment product and does not entail the risks or complexity of an investment product—thus undermining the purported need for a "best interest" standard; that the application of a "best interest" standard to term life insurance would exceed DFS's statutory authority and would represent impermissible agency policymaking; and that the proposed "best interest" standard would be arbitrary and capricious as applied to term life insurance.

C. DFS Promulgates the Challenged Amendment to Regulation 187

Despite the legal flaws and practical harms of the proposed "best interest" standard raised by industry participants, and notwithstanding the federal decision striking down the federal rule on which the proposed amendment to Regulation 187 was based, DFS plowed forward with the First Amendment to 11 N.Y.C.R.R. § 224 (Insurance Regulation 187). The Amendment, which is entitled "Suitability and Best Interests in Life Insurance and Annuity Transactions," was issued on July 17, 2018, and notice of its adoption was published in New York State's Register on August 1, 2018. **(Exhibit "6")**.

The Regulation combines insurance agents and brokers under one heading and treats all agents and brokers as a "Producer." See 11 N.Y.C.R.R. § 224.3 (c) ("*Insurance producer or producer means an insurance agent or insurance broker.*"). By its terms, the Regulation applies to "*any transaction or recommendation with respect to a proposed or in-force policy.*" 11 N.Y.C.R.R. § 224.1.

The Regulation creates a new, all-encompassing "Best Interest" standard of conduct for "Producers." As explained in the introduction to the Regulation:

> [The Regulation] clarifies the duties and obligations of producers when making recommendations to consumers with respect to policies delivered or issued for delivery in this state to help ensure that a transaction is in **<u>the best interest of the consumer</u>** and appropriately addresses the insurance needs and financial objectives of the consumer at the time of the transaction.

11 N.Y.C.R.R. § 224.0 (c). (*Emphasis added.*)

Specifically, in subpart (a) of § 224.4, it provides: "*In recommending a sales transaction to a consumer, the producer, or the insurer where no producer is involved, shall act in the best interest of the consumer.*" 11 N.Y.C.R.R. § 224.4 (a). There are similar provisions in Section 224.5 related to "in-force transactions": "Only the best interests of the consumer shall be considered in making the recommendation." 11 N.Y.C.R.R. §§ 224.4 (b)(1), 224.5 (b)(1).

In subpart (b), the Regulation seeks to define when a producer acts in the "*best interest*" of the customer. 11 N.Y.C.R.R. § 224.4 (b). Specifically, in attempting to comply with the Regulation, the insurance "Producer" (insurance agent or broker), or the insurer where no insurance producer is involved, acts in the best interest of the customer in a sales transaction when:

"(1) the producer's or insurer's recommendation to the customer is based on an evaluation of the relevant suitability information of the customer and reflects the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under the circumstances then prevailing. . .

(2) the sales transaction is suitable; and

(3) there is a reasonable basis to believe:

(i) the consumer has been reasonably informed of various features of the policy and potential consequences of the sales transaction, both favorable and unfavorable, such as the potential surrender period and surrender charge, any secondary guarantee period, equity-index features, availability of cash value, potential tax implications if the customer sells, modifies surrenders, lapses or annuitizes the policy, death benefit, mortality and expense fees, cost of insurance charges, investment advisory fees, policy exclusions or restrictions, potential charges for and features of riders, limitations on interest returns, guaranteed interest rates, insurance and investment components, market

> risk, any differences in features among fee-based and commission-based versions of the policy, and the manner in which the producer is compensated for the sale and servicing of the policy in accordance with Part 30 of this Title (Insurance Regulation 194) and Insurance Law section 2119;
>
> (ii) the consumer would benefit from certain features of the policy, such as tax-deferred growth of any cash values, annuitization, or death or living benefit;
>
> (iii) the particular policy as a whole, the underlying subaccounts to which funds are allocated at the time of the sales transaction, and riders and similar product enhancements, if any, are suitable for the particular consumer based on the consumer's suitability information; and
>
> (iv) in the case of a replacement of a policy, the replacement is suitable including taking into consideration whether:
>
> > (a) the consumer will incur a surrender charge, increased premium or fees, decreased coverage duration, decreased death benefit or income amount, adverse change in health rating, be subject to the commencement of a new surrender period, lose existing benefits (such as death, living or other contractual benefits), be subject to tax implications if the consumer surrenders or borrows from the policy, or be subject to increased fees, investment advisory fees, premium loads or charges for riders and similar product enhancements;
> >
> > (b) the consumer would benefit from policy enhancements and improvements, such as a decreased premium or fees, increased coverage duration, increased death benefit or income amount; and
> >
> > (c) the consumer has had another [annuity] policy replacement, in particular, a replacement within the preceding 36 months."

11 N.Y.C.R.R. § 224.4 (b).

Aside from all of that, the producer, or insurer where no producer is involved, is expected to "make reasonable efforts" to obtain the customer's "suitability information." 11 N.Y.C.R.R. § 224.4 (d). According to the Regulation, "suitability information" means "information that is reasonably appropriate to determine the suitability of a recommendation commensurate with the materiality of the transaction to a consumer's financial situation at the time of the recommendation and the complexity of the transaction recommended. . ." 11 N.Y.C.R.R. § 224.3 (g). Then, the Regulation proceeds to list "some or all" specified information that may be relevant to the consumer. 11 N.Y.C.R.R. § 224.3 (g). With respect to term life insurance, there are nine pieces of information with varying levels of specificity. 11 N.Y.C.R.R. § 224.3 (g) (1). With respect to all other policies, there are 14 different pieces of information. 11 N.Y.C.R.R. § 224.3 (g) (2). Some of the information is specific, including age and annual income, but the Regulation also lists various amorphous factors, such as "financial situation and needs," "financial time horizon, including the duration of existing liabilities and obligations," and "financial objective," to name a few. 11 N.Y.C.R.R. § 224.3 (g).

As set forth above, even with respect to so-called "in-force transactions," the "Producer" has certain obligations to the customer, even though it is not to be compensated for the same. In particular, an insurance agent or broker is deemed to act in the "best interest" of the customer only if:

> (1) the producer's or insurer's recommendation to the consumer reflects the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under the circumstances then prevailing. . . and
>
> (2) there is a reasonable basis to believe the consumer has been reasonably informed of the relevant features of the policy and potential consequences of the in-force transaction, both favorable and unfavorable.

11. N.Y.C.R.R. § 224.5 (b)

The consequences of the Regulation are severe. "A contravention of this Part shall be deemed to be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state and shall be deemed to be a trade practice constituting a determined violation, as defined in Insurance Law section 2402(c), except where such act or practice shall be a defined violation, as defined in Insurance Law section 2402(b), and in either such case shall be a violation of Insurance Law section 2403." 11 N.Y.C.R.R. § 224.8.[8]

DFS never actually identified a problem or issue on this subject in this State. Rather, DFS stated only this:

> The Department has monitored activity at the U.S. Department of Labor ("DOL"), the Certified Financial Planner Board of Standards ("CFP Board"), and the Securities and Exchange Commission ("SEC") all of whom have identified a need to bring a best interest standard of care to the financial services transactions...

Assessment of the Public Comments to the First Amendment to 11 N.Y.C.R.R. § 244 [sic] (Insurance Regulation 187), P. 2, ¶3, L. 4. **(Exhibit "8")**

LEGAL ARGUMENTS

POINT I

THE REGULATION IS INVALID BECAUSE IT IS INCONSISTENT WITH THE GOVERNING STATUTORY SCHEME AND LONGSTANDING COMMON LAW RULES

The Superintendent must comport any regulation with existing laws. Grodinsky v. City of Cortland 163 A.D.3d 1181 (3rd Dept. 2018). Any regulation promulgated in conflict and/or contravention to a law is thus beyond the authority of the Superintendent, rendering such regulation unenforceable and a nullity. Matter of Beer Garden v. New York State Liq. Auth., 79 N.Y.2d 266, 276 (1992); see also Sullivan Financial Group, Inc. v. Wrynn, 30 Misc.3d 366 (Sup. Ct Albany, 2010) *aff'd.*, 94 A.D.3d 90 (3rd Dept. 2012) (The Superintendent " 'can adopt regulations that go beyond the text of [the Insurance Law], provided they are not inconsistent with the statutory

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8 The Regulation further provides that "[t]he best interest standard set forth in this Part requires a producer, or insurer where no producer is involved, to adhere to a standard of conduct to be enforced by the superintendent but does not guarantee or warrant an outcome." 11 N.Y.C.R.R. § 224.0 (c). In actuality, however, it does "guaranty" an outcome: No matter what, the "Producer" will also be held liable for any lack or deficiency in coverage, turning the Producer into a guarantor of coverage in contravention to the Court of Appeals holding in Murphy v Kuhn, 90 N.Y.2d 266 (1997), as discussed below.

language or its underlying purposes' " * * * "However, if a regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight") (*internal citations omitted*). Nor can an agency override governing common law rules by regulatory fiat. See People ex rel. Cuomo v. First Am. Corp., 18 N.Y.3d 173, 179 (2011) (holding that power to preempt relevant common law lies with the legislature).

The statutory language and structure of the New York Insurance Law do not authorize DFS to impose a broad "best interest" or fiduciary standard under the guise of regulations to "implement" the intent of the legislature. See Jewish Home & Infirmary of Rochester, N.Y., Inc. v. Comm'r of N.Y. State Dep't of Health, 84 N.Y.2d 252, 262–63 (1994) (holding retroactive rate-making of Department of Health impermissible because "the statutory language and design do not support it"). Although DFS cites to a number of provisions for its purported statutory authority, none of them contemplate the application of a broad "best interest" standard to all sales and brokerage activity in the life-insurance industry. The provisions to which DFS cites only authorize the Superintendent to generally prescribe regulations, see N.Y. Fin. Servs. L. § 302, N.Y. Ins. L. ("NYIL") § 301; authorize the Superintendent to make inquiry of insurance producers and suspend their licenses for infractions, see NYIL §§ 308, 2110; and prohibit insurance producers from making misstatements, competing unfairly or deceptively, and discriminating, see id. §§ 2123, 2401-2409 (art. 24), 4224, 4226.

Rather, the statutory scheme actually precludes implementing a broad "best interest" standard through DFS Regulation. In all the provisions DFS cites, only one minor subsection expressly mentions a "best interest" standard. N.Y. Insurance Law § 2110(a)(15) states that the Superintendent can revoke a license if "while acting as a public adjuster, the licensee has failed to act on behalf and in the best interests of the insured when negotiating for or effecting the settlement of an insurance claim for such insured or otherwise acting as a public adjuster. . ." Because the statute expressly imposes a best interest standard in this limited circumstance, the best interest standard necessarily *does not* apply to every other circumstance pursuant to the maxim *expressio unius est exclusio alterius*. Indeed, courts in this state have not hesitated to strike down regulations promulgated by DFS or its predecessor, the New York Insurance Department, for similar reasons. See Mazgulski v. Lewis, 118 Misc.2d 600, 606–07 (Sup. Ct. N.Y. Co. 1982) (addressing *expressio unius* argument and annulling regulation promulgated by Superintendent of the New York State Insurance Department because "the Superintendent has forged a new policy not reasonably to be implied from the statutes and in contradistinction to the history of these statutes"), *aff'd.*, 96 A.D.2d 1154 (1st Dept. 1983), *aff'd.*, 63 N.Y.2d 992 (1984).

Other structural aspects of the New York Insurance Law further underscore that the Regulation is impermissibly inconsistent with the governing statutory scheme. The New York Insurance law prescribes the standard of care for various discrete situations, such as investments made by life insurers, see N.Y. Ins. Law § 1405(c)[9], or the fiduciary duty owed to policy owners by life settlement brokers, see id. § 7813(*l*),[10] but it does not provide for a best-interest standard of care by producers who sell life insurance. See Jewish Home, 84 N.Y.2d at 262–63; cf. Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another. . . it is presumed that Congress acts intentionally and purposely. . ."). The New York Insurance Law also has an entire section dedicated to "Unfair

[9] N.Y. Ins. Law § 1405(c) states that directors and officers of life insurers "shall perform their duties in good faith and with that degree of care that an ordinarily prudent individual in a like position would use under similar circumstances."

[10] N.Y. Ins. Law 7813(l) states: "The life settlement broker shall represent only the owner and owes a fiduciary duty to the owner, including a duty to act according to the owner's instructions and in the best interest of the owner."

Methods of Competition and Unfair and Deceptive Acts and Practices," but a "best interest" or fiduciary standard is not imposed there, either. See N.Y. Insurance Law §§ 2401-2409 (Article 24).[11]

The Regulation is also inconsistent with the governing statutory scheme because its application of the same fiduciary standard to all producers—both agents and brokers—vitiates the statutory distinction between the two. As set out in Insurance Law § 2101, an "insurance broker" "solicit[s], negotiat[es] or sell[s]" insurance, "**on behalf of an insured** other than himself, herself or itself or **on behalf of any licensed insurance broker**, * * *" (emphasis added). In contrast, an "insurance agent" is the "**agent of an insurer**, * * *, who acts as such in the solicitation of, negotiation for, or sale of, an insurance, * * * contract, other than as a licensed insurance broker, * * *" (*emphasis added.*) This statutory distinction between a broker—who acts on behalf of, but not as an agent of, the *consumer/insured*—and an agent, who acts as the *agent* of the *insurer*, is consistent with longstanding common law rules under which an insurance broker has a narrow and simple duty to its customer: procure the coverage requested or advise the customer that the coverage cannot be placed. Murphy v. Kuhn, 90 N.Y.2d 266 (1997); Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 7 N.Y.3d 152 (2006). That is it; nothing more. At common law, an insurance broker is not a fiduciary, and owes no fiduciary duty. Paull v. First UNUM Life Ins. Co., 295 A.D.2d 982, 984 (4th Dept. 2002); see also Goshen v. The Mutual Life Ins. Co. of New York, 1997 WL 710669 (Sup. Ct. N.Y. Co. 1997), *aff'd.*, 259 A.D.2d 360 (1st Dept. 1999), *aff'd as mod. sub nom.*, Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330 (1999). There is "no fiduciary relationship between an insurance broker and its customer." Murphy, 90 N.Y.2d 273.

[11] Notably, the Fifth Circuit recently annulled a U.S. Department of Labor Rule (DOL)—the same rule that DFS cited in support of Regulation 187—because the DOL rule "graft[ed] novel and extensive duties and liabilities otherwise subject only to [lesser] penalties." Chamber of Commerce v. U.S. Dep't of Labor, 885 F.3d 360, 384 (5th Cir. 2018).

In contrast, an agent owes a higher duty to its principal, Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409 (2001), namely "a duty of loyalty and an obligation to act in the best interests of the principal," Dubbs v. Stribling & Associates, 96 N.Y.2d 337 (2001), as well as an "implied good faith obligation [to] use his best efforts to promote the principal's product." Griffin & Evans Cosmetic Mktg. v. Madeleine Mono, Ltd., 73 A.D.2d 957 (2nd Dept. 1980), *citing* Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Pub. Co., 30 N.Y.2d 34 (1972). An agent's "duty is single, and he cannot serve two masters with antagonistic interests." Rabinowitz v. Kaiser-Frazer Corp., 111 N.Y.S.2d 539 (Sup.Ct. Kings Co. 1952); Matter of Harbeck, 142 Misc. 57 (Sur. Ct. Kings Co. 1931) ("It is an axiom both of fact and ethics that a man cannot serve two masters.") And because an agent "cannot serve two masters," the "use of his fiduciary position to gain a benefit for a third person constitutes an act of disloyalty." Matter of Rothko, 84 Misc.2d 830 (Sur. Ct. N.Y. Co. 1975).

The Regulation obliterates the differences between an actual insurance agent and an insurance broker, and puts insurance agents in the untenable position of serving two masters. *First*, by forcing the insurance agent to owe a duty to the consumer, the applicant, for example when no such duty is owed. This is in direct conflict with the definition of an "Insurance Agent" under New York Insurance Law, which limits the duty of the agent to its principal—the insurer. *Second*, in compelling the broker to affirmatively act in the "Best Interests" of the consumer, the Regulation forces the broker to act as a fiduciary towards the consumer, in violation of the longstanding rule of Murphy v. Kuhn, 90 N.Y.2d 266, 273 (1997), that there is "no fiduciary relationship between an insurance broker and its customer." *Third*, by requiring that the Agent owe duties to the applicant, the Regulation forces the Agent to necessarily breach its fiduciary duty to the insurer, which requires undivided loyalty.[12]

Longstanding New York case law further confirms that there is no fiduciary standard in the insurance law and that the Superintendent has overstepped its authority in trying to implement one. "[T]he general rule [is] that the relationship between the parties to a contract of insurance is strictly contractual in nature" and "[n]o special relationship of trust or confidence arises out of an insurance contract between the insured and the insurer" because "the relationship is legal rather than equitable." Batas v. Prudential Ins. Co. of Am., 281 A.D.2d 260, 264 (1st Dept. 2001); accord Goshen v. Mut. Life Ins. Co. of N.Y., 1997 WL 710669, at *8 (Sup. Ct. N.Y. Co. 1997) ("[I]n general, a contract of insurance does not otherwise create a fiduciary relationship between the parties."), *aff'd.*, 259 A.D.2d 360 (1st Dept. 1999), *aff'd as mod. sub nom.*, Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330 (1999); New York Hotel Trades Council v. Prudential Ins. Co. of America, 144 N.Y.S.2d 303, 308 (Sup. Ct. N.Y. Co. 1955) ("Except as required by statute, insurance companies deal with insureds at arm's length. No relationship involving trust or confidence is present."), *aff'd.*, 1 A.D.2d 952 (1st Dept. 1956). The Superintendent cites no recent change in the insurance law—nor could it—indicating that it has newfound powers to upset the decades-long rule that insurance law is generally not governed by a fiduciary standard.

In Murphy, the Court of Appeals warned about the dire consequences of expanding the duties of agents and brokers to fiduciary status, or shifting the ultimate responsibility of who should be responsible for insurance procurement from the insured to the broker. The court worried that doing so would make brokers guarantors and invite detrimental, costly litigation:

12 The Regulation also places the agent in a position where it is acting as an unlicensed insurance broker subject to discipline by the Superintendent for violating NYIL § 2102 ("Acting without a license"), since it is effectively providing insurance services to the insured.

> Insurance agents or brokers are not personal financial counselors and risk managers, approaching guarantor status (see, id.). Insureds are in a better position to know their personal assets and abilities to protect themselves more so than general insurance agents or brokers, unless the latter are informed and asked to advise and act (id.). Furthermore, permitting insureds to add such parties to the liability chain might well open flood gates to even more complicated and undesirable litigation.

Murphy v. Kuhn, 90 N.Y.2d 266, 273 (1997). The Regulation attempts to enact by agency fiat an unworkable, heightened standard that is a finger-in-the-eye of the Murphy court and its careful, circumscribed wisdom.

The legislative history of proposed and actual changes to the New York Insurance Law also demonstrate that the Regulation should be nullified as inconsistent with the law. In 1997, an amendment to the Insurance Law was enacted that "include[d] landmark consumer protections to ensure that purchasers of life insurance receive accurate information on the cost and benefits of an insurance policy or annuity before a policy is purchased" and "contain[ed] provisions to increase the Insurance Department's authority to curtail improper sales practices such as 'churning' and 'twisting' which helped an agent to receive higher commissions, but were of no benefit to the consumer." L. 1997 c. 616. This language is similar to DFS's justification for amending the Regulation: "a regulation is needed to prevent insurers and producers from recommending a transaction that is properly disclosed and determined to be suitable for a consumer, but that is otherwise not in the best interest of that consumer and is designed to maximize compensation to the sellers." **Exhibit "5,"** New York State Register, May 16, 2018. But nothing in the 1997 amendment provided for a best interest standard, a fiduciary standard, or required producers to ignore their own commissions when making recommendations; rather, the bill (among other things) amended New York Insurance Law § 4228 to merely *cap* agent/broker commissions on transactions. The Superintendent therefore had no basis to go beyond the authority of the

Legislature to impose a "best interests" standard or to mandate that a producer cannot consider his commissions when making a recommendation, when the Legislature addressed these very issues and decided not to take those actions.

Finally, the Legislature *did* recently try to address the issue of non-fiduciaries advising consumers. A bill in the New York State Senate sought to require that non-fiduciary advisors disclose to clients that they are not fiduciaries of the clients. See N.Y. Legis. Assemb. A2464A Reg. Sess. 2017-2018 (2017); N.Y. Legis. Assemb. A6933 Reg. Sess. 2015-2016 (2015). This bill failed to pass. Because "the Legislature has so far been unable to reach agreement on the goals and methods that should govern" this field, Boreali v. Axelrod, 71 N.Y.2d 1, 13 (1987), DFS's attempt to do so through the Amendment was paradigmatic agency overreach. The Superintendent cannot override the Legislature's consideration of the issue by imposing a newfound fiduciary standard on insurance producers that was not authorized by the Legislature.

For all these reasons, the Superintendent has exceeded its authority in promulgating the Regulation, and the Regulation is invalid and must be annulled.

POINT II

THE SUPERINTENDENT EXCEEDED ITS AUTHORITY BY USURPING LEGISLATIVE POWER AND PREROGATIVES

The actions of the Superintendent are purely legislative in that the Superintendent, *sua sponte* and without a legislative mandate, engaged in social and public policy engineering exclusively reserved to legislative bodies and the courts, i.e. legislating the duties an insurance broker and/or agent owes and to whom.

To determine whether an administrative body has usurped the legislative function, the Court uses the "Boreali Test," Boreali, 71 N.Y.2d at 11. As most recently explained by the Court of Appeals, the Boreali Test requires this Court to consider four factors:

> whether (1) the agency did more than balanc[e] costs and benefits according to preexisting guidelines, but instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and (4) the agency used special expertise or competence in the field to develop the challenged regulation…

Matter of LeadingAge N.Y., Inc. v. Shah 2018 N.Y. Slip Op. 06965 (October 18, 2018).

The Court of Appeals further made clear in LeadingAge, that the Boreali Test is more art than science: "We have explained that these are not 'criteria that should be rigidly applied in every case' but rather 'overlapping, closely related factors' that, viewed together, may signal that an agency has exceeded its authority." Id. at 5.

The Court of Appeals in LeadingAge struck down a Department of Health ("DOH") regulation attempting to regulate executive compensation for those in the health industry working for companies that get state money, since, like here, the DOH violated the separation of powers by exceeding its power and authority by acting as a legislative body. The Court noted that:

> The principle requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies. 'Agencies, as creatures of the Legislature, act pursuant to specific grants of authority conferred by their creator'. Thus, a legislature may enact a general statute that reflects its policy choice and grants authority to an executive agency to adopt and enforce regulations that expand upon the statutory text by filling in details consistent with that enabling legislation. If an agency promulgates a rule beyond the power it was granted by the legislature, it usurps the legislative role and violates the doctrine of separation of powers.
>
> * * *
>
> To be sure, a broad grant of authority is not a license to resolve – under the guise of regulation – matters of social or public policy reserved to legislative bodies. If an agency promulgates a rule

> beyond the power it was granted by the legislature, it usurps the legislative role and violates the doctrine of separation of powers.

Matter of LeadingAge N.Y., Inc. v. Shah, 2018 N.Y. Slip Op. 06965 (October 18, 2018). (*Internal citations omitted*).

Under Boreali and LeadingAge, the Regulation is *de facto* improper legislative policymaking because the Superintendent did more than merely enact a discrete, narrow and focused regulation to address compensation-related conflicts of interest between a broker/agent and the insured. Instead, the Superintendent enacted a broad and sweeping Regulation negating the common law and statutes that govern the duties insurance agents and brokers owe, which have guided consumers and brokers/agent for decades.

As to the specifics of the Boreali Test, where "the agency . . . has not been authorized to structure its decision making in a 'cost-benefit' model" or "been given any legislative guidelines at all for determining how the competing concerns . . . are to be weighed," the agency may not perform a cost-benefit analysis. Boreali, 71 N.Y.2d at 12. Here, the Legislature provided no such guidance. Nevertheless, the agency ("Superintendent" here) made improper value judgments entailing difficult and complex choices between broad policy goals. For instance, in the agency's response to public comments, it admitted to engaging in an unauthorized cost-benefit analysis, stating: "[e]ven if industry commenters' high compliance cost estimates were true, the benefits of the proposal far outweigh the overestimated costs," and "this reduced income is not a 'cost' of the rule and, in any event, is equal to or more than offset by the benefit to consumers who will no longer be indirectly paying the commissions through policies with excessive premiums." As made clear in Boreali, the "[s]triking [of] the proper balance" among competing policy interests, as here, "is a uniquely legislative function." Id.

As to the second Boreali factor, the DFS clearly "wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance" rather than "merely fill[ing] in the details of broad legislation describing the over-all policies to be implemented." Id. at 13. There is simply no evidence that the Legislature intended for the DFS to implement a new standard of care regulating the sale of life insurance and annuities, nor has it ever authorized an industry-wide standard of care regulating life insurance and annuity brokers or agents. The DFS's development of a "comprehensive set of rules" was thus impermissible.

The Regulation also plainly falls within the third Boreali factor because the agency "acted in an area in which the Legislature had repeatedly tried—and failed—to reach agreement." Id. Since 2015, the New York State Assembly has considered—and failed to pass—a bill to regulate the behavior of non-fiduciary advisors.[13] Tellingly, though, it has successfully regulated the insurance industry in other ways, including through its 1997 amendment to the Insurance Law.[14] Because the Legislature has been unable to come to a resolution about how to regulate non-fiduciaries and has not imposed an industry-wide standard of care, the agency is certainly not permitted to usurp the legislature's power and regulate in its absence.

Finally, the agency has overstepped its authority because "no special expertise or technical competence in the [agency's] field . . . was involved in the development of the . . . regulations." Id.at 13-14. Although the agency claimed in its response to public comments that it "maintains unique expertise related to comprehensive insurance markets and products," it failed to use this alleged expertise in promulgating the Regulation. It is clear that any lay person could determine that it is prudent to act in a consumer's best interest and that imposing a standard of care requires

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[13] See N.Y. Legis. Assemb. A2464A Reg. Sess. 2017-2018 (2017).

[14] Notably, the Legislature did not impose an industry-wide standard of care at that time.

no technical competence. Nor does the agency have any special expertise regarding the desires or needs of consumers.

To paraphrase the Court of Appeals, *the connection between any recognized legislative aims as to procurement duties and the regulatory means is simply too attenuated.* Because all four factors of the Boreali test are met here and the Regulation is not even tangentially related to any permissible power or authority that the Superintendent possesses, the agency's improper legislative policymaking must be deemed invalid and unenforceable.

POINT III

THE REGULATION VIOLATES THE STATE ADMINISTRATIVE PROCEDURES ACT

The Regulation must also be annulled because DFS failed to comply with the State Administrative Procedure Act ("SAPA") in multiple ways in promulgating it. First, DFS did not provide the statutorily required "best estimate" of the cost of the Regulation. Instead, DFS's own analysis contained evolving regulatory impact statements (and summaries) as well as its response to comments reveal that DFS has no idea what the cost of implementing the Regulation will be. It also failed to fulfill its statutory duty to explain why the sweeping regulation exceeds the minimum standards already set forth by the federal government. Finally, DFS did not consider appropriate ways to minimize the adverse economic impact of the Regulation, instead relying on conjecture and assumptions rather than evidence to support the alleged need for the Regulation. Specifically, DFS did not meaningfully consider the adverse impact on small business, and ignored the obvious indirect costs of the Regulation.

A. Lack of Best Estimate

SAPA § 202-a (3) requires that the Regulatory Impact Statement contain the following information:

> c) Costs. A statement detailing the projected costs of the rule, which shall indicate:
>
> (i) the costs for the implementation of, and continuing compliance with, the rule to regulated persons;
>
> (ii) the costs of implementation of, and continued administration of, the rule to the agency and to the state and its local governments; and
>
> (iii) the information, including the source or sources of such information, and methodology upon which the cost analysis is based; or
>
> (iv) where an agency finds that it cannot fully provide a statement of such costs, a statement setting forth its best estimate, which shall indicate the information and methodology upon which such best estimate is based and the reason or reasons why a complete cost statement cannot be provided." (*Emphasis added.*)

Here, the Regulatory Impact Statement in its various iterations reflects a hodgepodge of information, but it lacks the statutorily required best estimate of costs to regulated persons. Rather, it is quite clear that DFS did not consider the implementation, compliance, and associated potential costs of the Regulation in any meaningful way and merely attempted to improperly "boot strap" itself to a federal regulatory change that was ultimately struck down by the United States Court of Appeals for the Fifth Circuit in Chamber of Commerce of the United States of America v. United States Department of Labor, 885 F.3d 360 (5th Cir. 2018).

The original Regulatory Impact Statement related to the Regulation was published in the New York Register on December 27, 2017. Within the Regulatory Impact Statement, the Superintendent acknowledged: "Insurers and insurance producers subject to this amendment likely will incur costs because of this amendment." **Exhibit "4,"** New York State Register, December 27, 2017, p. 39. However, there was no discussion of what those specific costs would be, as required by SAPA. Instead, the Superintendent claimed "the standards and procedures required by this amendment for recommendations to consumers with respect to life insurance are substantially similar to the standards and procedures already in place for annuities. **Exhibit "4,"** New York State Register, December 27, 2017, p. 39. Accordingly, "any costs incurred by producers and insurers subject to this amendment that currently sell annuities shall be minimal because they will already have in place for annuities the required supervisory system and training procedures to comply with this amendment. Where the costs to implement this amendment may vary by the size and business of the insurer and producer, and thus difficult to estimate, the Department does not anticipate the costs to be significant." **Exhibit "4,"** New York State Register, December 27, 2017, p. 40.

The Regulatory Impact Statement therefore demonstrates that DFS improperly assumed—without citing any supporting evidence—that the costs to implement the Regulation will be minimal because insurers who provide annuities already have certain processes in place for the sale of those products. But the Superintendent wrongly conflated life insurance and annuities without considering either the drastic differences between those products or that certain life insurance providers might not offer annuities and therefore would not have such processes in place. Further, DFS vaguely claimed without meaningful explanation that to the extent that any costs associated with implementing the Regulation exist, they are "difficult to estimate." Contrary to the explicit requirements of SAPA, DFS did not provide "a statement setting forth its best estimate, which shall indicate the information and methodology upon which such best estimate is based and the reason or reasons why a complete cost statement cannot be provided." NY SAPA § 202-a (3)(c)(iv).

Indeed, rather than grapple with any calculations about the actual cost of the Regulation, DFS instead cited to the similar rule promulgated by the Department of Labor, which also imposed an industry-wide best interest standard for financial professionals. See **Exhibit "4,"** New York

State Register, December 27, 2017, p. 39.[15] DFS thus seemed to suggest that because financial professionals were already required to implement a best interest standard due to the DOL regulation, insurance providers in New York would not incur any new costs to implement the DFS Regulation.

However, the original Regulatory Impact Statement incorrectly assumed that all insurers and producers affected by the Regulation were also required to comply with the DOL Rule. In reality, as noted in the affidavit of Stephen Testa in particular, the federal and state rules apply to different transactions and would not have applied to everyone. As cited above, the DOL Rule did not extend to life insurance sales and would have only applied to annuity transactions in which (1) the producer received a commission, (2) the funding came from a tax qualified source, and (3) the product was either a variable annuity or an equity indexed annuity. And yet again, DFS failed to provide a best estimate as to the expense to those who had no obligation to comply with the federal Fiduciary Rule, such as those insurance agent or brokers who only sold life insurance policies, and not federally regulated annuities, such as Stephen Testa. Thus, as far back as December 2017, it is quite clear that DFS did not properly consider the expenses and DFS failed to comply with SAPA.

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[15] The Regulatory Impact Statement explained: "The United States Department of Labor ("DOL") has issued 29 C.F.R. 2510 (the "DOL Rule" [or the "Fiduciary Rule"]), which, in part, imposes a best interest standard of care so that all financial professionals who provide retirement planning and investment advice must act in the best interests of their clients." The Superintendent then concluded: "A uniform standard of care across all types of financial transactions, including both annuity and life insurance transactions, provides consistent consumer protection and a consistent regulatory framework to ensure fair treatment regardless of product choice. . . The Department finds no acceptable justification for applying different standards of conduct based solely on the source of the funds." See **Exhibit "4,"** NYS Register, December 27, 2017, p. 39. Furthermore, DFS explained: "[t]he rule has the potential to partially duplicate the DOL Rule in that both rules impose a best interest standard of care and a recordkeeping requirement where the insurance producer is receiving a commission from the annuity transaction; the annuity's funding comes from a tax qualified source; and the annuity is either a variable annuity or an equity indexed annuity. This amendment, however, applies to all life insurance and annuity transactions in New York State, regardless of the source of funds or the manner of compensation. Since the best interest standard of care and recordkeeping requirement in the regulation are consistent with the DOL rule, there is no conflict." See **Exhibit "4,"** NYS Register, December 27, 2017, p. 40.

The Superintendent's focus on the DOL Rule should have instead reinforced to DFS the importance of providing a thorough review and analysis of the Regulation's costs. On February 3, 2017, lingering questions and concerns regarding the costs and benefits of the Fiduciary Rule led the President to direct the Department of Labor to examine the rule and "prepare an updated economic and legal analysis." The memorandum issued by the President to the Secretary of Labor directed the DOL to consider, among other items, the following:

> "(i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;
>
> (ii) Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and
>
> (iii) Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services."

Exhibit "10."

The United States Court of Appeals for the Fifth Circuit decision striking down the DOL Rule highlighted the detrimental costs of a "best interest" rule in the insurance context. As noted above, among the findings discussed in that decision relevant to the Regulation, the court found that:

1. "The Fiduciary Rule has already spawned significant market consequences, including the withdrawal of several major companies, including MetLife, AIG and Merrill Lynch from some segments of the brokerage and retirement investor market."

2. "[M]illions of IRA investors with small accounts prefer commission-based fees because they engage in few annual trading transactions. Yet these are the investors potentially deprived of all investment advice as a result of the Fiduciary Rule, because they cannot afford to pay account management fees, or brokerage and

> insurance firms cannot afford to service small accounts, given the regulatory burdens, form management fees alone."

3. "It is likely that many financial service providers will exit the market for retirement investors rather than accept the new regulatory regime."

4. "Throughout the financial services industry, thousands of brokers and insurance agents who deal with IRA investors must forgo commission-based transactions and move to fees for account management or accept the burdensome regulations and heightened lawsuit exposure required by the BICE contract provisions."

5. For its part, the DOL estimated that "compliance costs imposed on the regulated parties might amount to $31.5 billion over ten years with a 'primary estimate' of $16.1 billion."

<u>See</u> **Exhibit "9."** If the Superintendent had engaged in a similar inquiry as required by the SAPA, it might have reached the same result. The affidavits of Gary Slavin and Stephen Testa suggest the same. <u>See</u> **Exhibits "2" and "3."**

Despite the clear flaws with the federal Fiduciary Rule set out in the Fifth Circuit's decision, including that it would increase costs to consumers and lead to the withdrawal of providers from the marketplace, the Superintendent decided to move forward with adoption of the Amendment. In fact, in its May 16, 2018 Summary of Revised Regulatory Impact Statement, DFS conceded that: "Insurers and insurance producers subject to this amendment likely will incur costs because of this amendment." **Exhibit "5,"** New York State Register, May 16, 2018, p. 17.

The cost section of the summary further provides the following:

> However, the amendment takes a principle-based approach to compliance with the requirements of the regulation, which is expected to greatly minimize costs by allowing the leveraging of existing systems and procedures. While the costs to implement this amendment may vary by size and business, and thus difficult to estimate, the Department does not anticipate the costs to be significant. Some producers have indicated implementing a best interest standard regardless of what happens with the Rule. The

> Department believes that cost savings will result where the same standards apply across product types.
>
> Insurers and producers in NY have different business models and are at different levels of readiness for compliance with the [DOL] Rule. The amendment is consistent with the core requirements of the [DOL] Rule but significantly less onerous in terms of supervision and compliance requirements. Firms that already comply with the [DOL] Rule have minimal additional costs to comply with the amendment. The benefits of the regulation are expected to be substantial. The elimination of conflicted recommendations to consumers is expected to yield great cost savings to consumers.
>
> **Exhibit "5,"** New York State Register, May 16, 2018, p. 17.

Essentially, in plain English, the Superintendent has no idea how much it will cost insurers and producers to comply with the Regulation but claimed it should be less "onerous" than the federal Fiduciary Rule. It further claimed there would only be minimal "additional" costs while failing to appreciate that in light of the end of the Fiduciary Rule, all costs borne by insurers and producers will be derived solely from the Regulation. Further, as mentioned previously, DFS failed to consider the costs to those who had no obligation to comply with the DOL Rule.

By the time of its second Summary of Revised Regulatory Impact Statement, published in the August 1, 2018 New York Register, the Superintendent claimed: "[r]egardless of the fate of the [DOL] rule, the Department believes that the best interest standard is an important consumer protection and intends to pursue this protection for New York consumers as to the [life insurance] and annuity products under its purview." **Exhibit "6,"** New York State Register, August 1, 2018, p. 20; see also, **Exhibit "7,"** Revised Regulatory Impact Statement, p. 4.

With respect to costs, DFS was dismissive of the estimates of others, and failed to provide any cost estimate of its own. See **Exhibit "7,"** Revised Regulatory Impact Statement, p. 7-13. For example, in its Assessment of Public Comments, DFS stated: "To address the comment that the Costs section of the RIS [Regulatory Impact Statement] should include studies that directly address the cost of the proposal, the commenter has asked the Department to measure the immeasurable." **Exhibit "8,"** Assessment of Public Comments, p. 26 (*emphasis added*). DFS further claimed "the Department strongly believes that preventing consumer harm far outweighs any administrative costs imposed by the Regulation." **Exhibit "8,"** Assessment of Public Comments, p. 26 (*emphasis added*). Sadly, it is this rhetoric without substance that plagues the Regulation and confirms DFS's failure to provide a "best estimate" of the costs as required. Specifically, DFS has failed to provide any real estimate of the cost of the Regulation, including the costs of compliance with an impossible standard of care that will be a treasure trove for the litigious, or the market consequences that will be adverse to consumers in the New York insurance marketplace, which are addressed in the affidavits of Gary Slavin and Stephen Testa.

Regardless of whether it rightly analogized the DOL Rule and the Regulation, DFS failed to make any estimate of the cost either before the federal rule was struck down or after. Indeed, DFS simply ignored that the DOL itself estimated that the costs of its Fiduciary Rule might approach $31.5 billion over ten years. See Chamber of Commerce of the United States of America v. United States Department of Labor, 885 F.3d 360 (5th Cir. 2018). It is reasonable to infer the costs of the Regulation, without any comparable counterpart, will be much higher now that the Fiduciary Rule is not applicable.

SAPA is designed to prevent such over-zealous support of a bad idea, and DFS violates it without any concerns whatsoever. "The Legislature, recognizing that not all future costs can be specified, amended [SAPA] § 202–a in 1990 to state that where a full cost estimate cannot be given, the agency must provide a 'best estimate.'" Matter of Medical Socy. Of State of N.Y. v. Levin, 185 Misc.2d 536, 545 (Sup. Ct. N.Y. Co. 2000), *aff'd.*, 280 A.D.2d 309 (1st Dept. 2001). "Construction of the State Administrative Procedure Act (SAPA), as of any statute, should be to aid in effecting the legislative purpose . . . which, as concerns the SAPA, is to ensure that regulators will adopt rules 'for the purely practical purpose of attempting to make a legislative program work.'" (Citations omitted.) Matter of Medical Socy. Of State of N.Y. v. Levin, 280 A.D.2d at 310. Further, "costs to regulated persons that are virtually certain to be incurred immediately upon implementation of the regulations are not 'speculative.'" Id. Here, DFS acknowledges costs, but fails to make any "best estimate" as to what those costs will be. The failure to properly consider and provide an estimate of the substantial costs is improper and violates SAPA's explicit statutory mandate. Accordingly, the Regulation must be annulled.

B. Lack of Explanation as to Why the Regulation Exceeds Federal Standards

Aside from the failure to provide a best estimate, DFS failed in its statutory duty under SAPA to explain why the Regulation exceeds federal standards. SAPA § 202-a(3)(h) requires that DFS had to provide: "A statement identifying whether the rule exceeds any minimum standards of the federal government for the same or similar subject areas and, if so, an explanation of why the rule exceeds such standards." However, there is no explanation as to why New York needed to exceed federal standards. Instead, DFS merely stated:

> Following the court's vacating of the DOL rule that applies a fiduciary duty to certain retirement funded transactions, the federal government is not appealing the decision and has let the rule die. An SEC proposed rule regarding suitability, applicable to variable products, has not been promulgated. The regulation would not be inconsistent with the SEC proposed rules but rather extend the protections afforded under the rules.

Exhibit "6," New York State Register, August 1, 2018, p. 14-15.

DFS had an obligation to explain why it decided to fundamentally change the law in the State of New York and engage in rulemaking that exceeded federal standards. Rather than do so, it acknowledged that the Regulation "extends the protections under the rules." **Exhibit "6,"** New York State Register, August 1, 2018, p. 15. Federal rules, like New York's prior rules and laws, have focused upon disclosure to consumers. But insurance contracts are already supposed to be drafted in a manner that they are understandable to the normal person. Nevertheless, DFS plans to take a paternalistic approach to provide unnecessary "consumer protection" where none is required. Therefore, the Regulation should be annulled for this violation of SAPA as well.

C. Failure to Properly Consider the Impact on Small Businesses

SAPA requires that:

> In developing a rule, the agency shall consider utilizing approaches that will accomplish the objectives of applicable statutes while minimizing any adverse economic impact of the rule on small businesses and local governments.

SAPA § 202-b. The economic impact of the Regulation far exceeds the costs discussed by DFS in their regulatory filings. Gary Slavin and Stephen Testa have described numerous ways that the Regulation will impact small business, including increased costs of compliance which would double the time an insurance provider must dedicate to a single customer. Mr. Slavin and Mr. Testa also noted that small businesses who do not sell enough life insurance to justify the additional time and expense associated with sales of the products may elect to remove themselves entirely from the market, as well as the indirect costs of litigation associated with an impossible standard for businesses to meet in order to avoid scrutiny in the sale of a life insurance product. See **Exhibits "2" and "3."**

In sum, DFS fails to understand that it is unreasonable to expect an insurance Agent or Broker, particularly in a small business where Agents and Brokers may have limited resources or support, to distinguish between thousands of insurance products in an attempt to determine what specific product is in the "best interest" of the consumer. In reality, the consumer is the only one who can select the coverage that best suits his or her needs. The "best interest" standard will thus lead customers to constantly second-guess Brokers and Agents, likely resulting in a determination that some other product should have been purchased. This will open the floodgates of costly litigation which small businesses may be unwilling or unable to bear. The Regulation violates SAPA for this reason as well and must be annulled.[16]

POINT IV

THE REGULATION MUST BE ANNULLED BECAUSE IT IS UNREASONABLE, ARBITRARY & CAPRICIOUS, AND LACKS A RATIONAL BASIS

An administrative regulation will only be upheld as valid if it has a rational basis, that is, if it is not unreasonable, arbitrary, or capricious. Grossman v. Baumgartner, 17 N.Y.2d 345, 349 (1966); Levine v. Whalen, 39 N.Y.2d 510 (1976). Administrative rules are scrutinized for genuine reasonableness and rationality in the specific context. New York State Ass'n of Counties v. Axelrod, 78 N.Y.2d 158, 166 (1992) (*internal citations omitted*).

In order to stand, the regulation must have "adequate record support or correlation to the reasons" underlying the promulgation. Ass'n of Counties, 78 N.Y.2d at 167. This requires "a rational, documented, empirical determination," and not merely unsubstantiated "theory and assumption" arrived without "empirical documentation, assessment and evaluation." Id. at 167-68. Absent an "adequate predicate" in the administrative record, the Regulation must be annulled. Matter of Jewish Memorial Hosp. v. Whalen, 47 N.Y.2d 331, 336 (1979) (invalidating a regulation adjusting formulas for Blue Cross reimbursements by attributing ten percent of the salaries of hospital interns and residents to "educational costs").

While perhaps motivated by a desire to do what is best, the comments by the Superintendent reveal a disregard of costs and the well-established rights of insurance agents and

[16] In addition, as explained below, and in the affidavits by Gary Slavin and Stephen Testa, the Regulation is vague, and it is unclear how regulated parties will be able to comply with it. See SAPA § 201 (in drafting a regulation, an administrative agency "shall strive to ensure that, to the maximum extent practical, its rules, regulations and related documents are written in a clear and coherent manner, using words with common and everyday meanings").

brokers (as well as consumers) alike. In response to requests for studies that directly addressed the costs of the proposal, the Superintendent claims to be asked "to measure the immeasurable." The Superintendent further claims, "the Department strongly believes that preventing consumer harm far outweighs <u>any</u> administrative costs imposed by the Regulation." (*Emphasis added.*) It is this kind of rhetoric without substance that plagues the Regulation and reflects a complete misunderstanding of the impact of market forces. There is no factual predicate in the record for the Regulation.

As Gary Slavin and Stephen Testa have explained, the costs of the Regulation are substantial. If an insurance agent or broker is required to act in the "best interests" of the insured, and risks liability for failing to provide advice sufficient to meet that bar, many insurance agents or brokers will leave the market or will insist upon additional consulting fees. Thus, a regulation with a stated purpose of creating a benefit to consumers would likely lead to increased costs to consumers for such insurance and might ultimately reduce the market for life insurance products as a whole, which would be detrimental to consumers and the State of New York in general.

Without a full understanding or study of the costs of the Regulation, the Superintendent has promulgated an arbitrary regulation destined to harm consumers. In addition to the direct costs that are likely to be borne by consumers due to increased costs and fees charged by agents and brokers, there will be significant indirect litigation costs borne by both consumers and other market participants. Litigation will be used to determine the contours of the heightened, subjective "best interests" standard, and as a matter of economics agents and brokers will inevitably pass the costs of such litigation to consumers.

Further, with independent agents and brokers dropping out of the industry and fees increasing, it is expected that many people who should have life insurance to protect their families will not consider the benefits of such insurance, and might not be able to afford it. Due to the substantial consulting fees necessary to secure the services of a certified financial planner, the Regulation would likely result in fewer sales and ultimately harm those that the Department of Financial Services claims the Regulation was designed to protect.

As a practical matter, the Regulation will benefit only the litigious. Indeed, the logical results of the Regulation are to benefit only those who are wealthy and unsophisticated. On the other hand, the prudent, knowledgeable consumer who understands the products without the need for any advice is likely to lose the ability to shop around for the best coverage at the best rates because he or she will likely have to pay consulting fees for each quote.

By creating the Regulation without factual predicate and without fully considering, the potential cost, the Superintendent has created an arbitrary and capricious regulation that is destined to be manipulated by the unscrupulous, to the detriment of consumers. The Regulation must be annulled.

POINT V

THE REGULATION IS UNCONSTITUTIONALLY VAGUE AS KEY TERMS AND STANDARD OF CONDUCT ARE INDEFINITE AND SUBJECTIVE

The core term of the Regulation, "Best Interests," is indefinite, ambiguous, and incapable, as a matter of law, of satisfying the test for constitutional vagueness.

> In addressing vagueness challenges, courts have developed a two-part test ... [F]irst[,] ... the court must determine whether the statute in question is sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." Second, the court must determine whether the enactment provides officials with clear standards for enforcement.

Matter of Turner v. Municipal Code Violations Bur. of City of Rochester, 122 A.D.3d 1376, 1378 (4th Dept. 2014) (*internal citations omitted*). A regulation fails the first prong where "the ordinance gives ordinary people virtually no guidance on how to conduct themselves in order to comply with it, and the language used in the ordinance makes it 'difficult for a citizen to comprehend' the precise conduct that is prohibited." Id. at 1378 (citing People v. Nelson 69 N.Y.2d 302 (1987)). It fails the second prong where "the vague language of the ordinance does not provide clear standards for enforcement and, thus, a determination 'whether the ordinance has been violated 'leaves virtually unfettered discretion in the hands of' the [code enforcement officer].'" Id. If the regulation fails either part of the test—vagueness from the perspective of the person whose conduct is affected by the regulation and from the perspective of the officials who must determine whether or not a person is in compliance—it is unconstitutional. Id.

Several parts of the Regulation are unconstitutionally vague. Not only does the Regulation not provide objective clarity but, to the contrary, creates chaos and uncertainty where none existed as the changes contradict New York Insurance Law on (1) who and what an Insurance Broker and an Insurance Agent are; (2) to whom they owe and do not owe duties; and (3) most importantly, what duties are owed. We discuss each instance of unconstitutional vagueness in turn.

A. Whose "Best Interests"?

The Regulation requires the "Producer"—defined to include both agents and brokers—to act in the best interests of the *consumer*, but it is not clear who the consumer is in many circumstances.

Unlike the simple nature of a property or liability policy where the applicant is seeking insurance for itself as the Named Insured, a life insurance policy has multiple parties. There is the ***(1)*** Applicant, the ***(2)*** Insured, ***(3)*** the Owner and the ***(4)*** Beneficiary. Under current law, the "applicant" is the customer and that is the person to whom the procurement duty is owed. Under the Regulation, however, it is not clear whose "best interests" must be considered. Since the life insurance policy is for the ultimate interests of the beneficiary, is it the "Best Interests" of the beneficiary which is being covered by the amendments? Or is it the "Owner" who, at issuance, controls the policy and has complete decision-making power even over the insured? Or is it the applicant who initiated the procurement?

Suppose a young husband, (the sole breadwinner), with a wife, (beneficiary), and 1-year old child wants a $100,000 20-year term policy to provide for his family in case of his death. If that is all he wants and all he wants to pay for, then one could say that is his "*Best Interests.*" But such a small policy will never support his wife and child for more than a brief time. Thus, such a policy appears not to be in the long-term "Best Interests" of the beneficiary. What then? Or suppose the Owner of the policy wants to change the beneficiary, which it can. Certainly, the procurement of that policy would not be in the "Best Interests" of the current beneficiary or in the "Best Interests" of the person that applied for the policy.

In sum, under the Regulation, the "Producer" does not know whose interests to consider. If the Producer is an Agent, does it prioritize its principal (the insurer) or the consumer? Assuming it is the "consumer," who is that? Is it the applicant, the Owner of a policy, the beneficiary (revocable or irrevocable), or non-technical beneficiaries, like children (who will ultimately benefit from the policy)? The person of ordinary intelligence cannot possibly answer these questions with any certainty. The Regulation is silent on these important ambiguities and is therefore unconstitutionally vague.

B. What are "Best Interests"?

At its core, the concept of an insurance "Producer" always having to act in the "Best Interests" of the consumer creates a subjective standard as to what "Best Interests" means. Suppose an Applicant can afford a life insurance policy for his family, the beneficiary, with much higher limits, but does not want to spend the money on the commensurate higher premiums. What then are the "Best Interests" to which the Regulation is referring?

While the Regulation provides "examples" of factors that can be considered in assessing the "Best Interests," examples are not "criteria," which would be required for the "Best Interests" standard to satisfy the 2-pronged vagueness test. The fact that the Regulation provides ambiguous examples in lieu of defined criteria is fatally vague.

C. The Term "Recommendation" is Unconstitutionally Vague

The Regulation's definition of "recommendation" is unconstitutionally vague. According to the Regulation, a "recommendation" means "one or more statements or acts by a producer, or by an insurer where no producer is involved, to a consumer that: (1) reasonably may be interpreted by a consumer to be advice and results in a consumer entering into a transaction in accordance with that advice; or (2) is intended by the producer, or an insurer where no producer is involved, to result in a consumer entering into or refraining from entering a transaction. . . ." 11 N.Y.C.R.R. § 224.3 (e). The definition provides certain specific exclusions from the definition of "recommendation," such as "general factual information" and "an interactive tool." *Id.* This definition fails both prongs of the vagueness standard articulated in Turner.

First, the Regulation itself contains words and phrases such as "may be interpreted by a consumer," which is a codification of an improperly subjective standard.

Second, no individual of ordinary intelligence would have the ability to know whether the specific pieces of information supplied to the customer are a "recommendation" as defined by the Regulation. For example, if an insurance agent or broker were to investigate multiple different coverage options for a customer, and the agent or broker concludes that it would be appropriate to provide a proposal for a quote for only one of those products, under the subject Regulation, the same would very likely be considered a "recommendation." It is difficult to imagine any possible offer of insurance by the insurance agent or broker that could not be "reasonably interpreted" as "advice." From the customer's perspective, one can infer the assertion that it would make no sense to propose a possible insurance policy if it is not being recommended by the insurance agent or broker. This would occur regardless of whether the insurance agent or broker intends to recommend any specific product because the relevant inquiry would begin and end with the consumer according to the Regulation.

Similarly, a "recommendation" occurs whenever a statement or act of the insurance agent or insurance broker is intended to result in a consumer entering into or refraining from entering into a transaction. It is difficult to imagine any documentary material sent to a potential customer that would not be intended to secure a sale or transaction regardless of the exclusions for undefined "marketing materials" or "general factual information." Thus, every action or document provided by the agent or broker to the customer has the potential of being considered a "recommendation" within the meaning of the Regulation.

Third, the Regulation improperly provides the Superintendent with unfettered discretion to determine what constitutes a "recommendation' within the meaning of the Regulation without meaningful guidance and standards for the determination of the application of the Regulation. See Matter of Nicholas v. Kahn, 47 N.Y.2d 24 (1979). Since the Regulation is designed to address consumer complaints, it provides the Superintendent a license to conclude virtually any insurance proposal to be a "recommendation," whereby placing an insurance agent or insurance broker subject to administrative action if it does not provide some "recommendation" to the customer as to the product to purchase. 11 N.Y.C.R.R. § 224.8.

D. <u>The Required Suitability Information that Must be Compiled is Vague</u>

Furthermore, if a "producer" falls within the Regulation, it is not clear what information must be compiled to make the appropriate assessment. According to the Regulation, "suitability information" means "information that is reasonably appropriate to determine the suitability of a recommendation commensurate with the materiality of the transaction to a consumer's financial situation at the time of the recommendation and the complexity of the transaction recommended . . ." 11 N.Y.C.R.R. § 224.3 (g). Then, it proceeds to list "some or all" specified information that may be relevant to the consumer. 11 N.Y.C.R.R. § 224.3 (g). With respect to term life insurance, there are nine pieces of information with varying levels of specificity. 11 N.Y.C.R.R. § 224.3 (g) (1). With respect to all other policies, there are 14 different pieces of information. 11 N.Y.C.R.R. § 224.3 (g) (2). There is specific information like age and annual income, but the regulation also lists various amorphous factors as well, such as "financial situation and needs," "financial time horizon, including the duration of existing liabilities and obligations" and "financial objective" to just name a few. 11 N.Y.C.R.R. § 224.3 (g). Since none of these terms are defined or have concrete common or ordinary meanings, it is impossible for the "producer" to know whether he/she compiled the necessary information to comply with the Regulation. The Regulation should be annulled for this reason as well.[17]

[17] The Regulation compels compliance with the onerous requirements of the "suitability analysis" regardless of whether an agent or broker wants to provide advice or not because some consumer (or the Superintendent) may claim that he/she is providing advice. In other words, those who do not want to provide any recommendations may be compelled to do so for fear of running afoul of the Regulation. Thus, the Regulation not only denies Due Process, it further denies the "Producers'" First Amendment rights under the United States Constitution by compelling the "Producer" speak, …to make a recommendation and to provide advice…when the "producer" merely prefers to sell a policy. <u>Brown v. Entertainment Merchants Ass'n</u>, 564 U.S. 786 (2011) (ruling that the State of California could not force manufacturers of violent video games to put warning labels on them.)

E. Certain of the Terms Used in Defining the "Best Interests" Standard have been Found to be Unenforceable in Related Contexts

The "Best Interests" standard is nothing more than the codification of what insureds, who fail to specify the coverage they want, allege in a lawsuit against their insurance agent or broker when they suffer an uninsured loss and then seek to hold the agent or broker responsible. Then these insureds sue their agent or broker for not procuring the "best, proper and adequate coverage" for the insured's needs. Thus, amorphous terms, so lacking in any precision or objective standard as to what they mean are always used to cover whatever would have provided coverage at that moment.

Statements that the broker was supposed to "*fully cover*" or get "*proper coverage*" have been consistently held not to trigger any duty on the broker to procure anything specific as they are too subjective and thus, a legal nullity. New York courts have uniformly concluded that a "general request for insurance coverage is insufficient to constitute a specific request for coverage." Erwig v Cook Agency, 173 A.D.2d 439 (2nd Dept. 1991) (*Emphasis added*); see also Chaim v. Benedict, 216 A.D.2d 347 (2nd Dept. 1995) (plaintiff's request for a "top of the line" policy and to be "***fully covered***" was insufficient to establish liability upon the insurance broker for failing to procure underinsured motorist coverage which the plaintiff had not specifically requested); L.C.E.L. Collectibles, Inc. v. American Ins. Co., 228 A.D.2d 196 (1st Dept. 1996) ("[p]laintiff's request for 'the best and most comprehensive coverage' did not trigger [a] duty" to procure flood insurance not specifically requested by the plaintiff).

POINT VI

THE REGULATION IS INVALID BECAUSE IT PURPORTS TO CREATE A CONTINUING DUTY TO THE CONSUMER EVEN AFTER THE POLICY IS ISSUED, IN CONTRAVENTION OF LONGSTANDING COMMON LAW RULES

The Amendment impermissibly forces the Producer to have a continuing duty to the Consumer ever after the policy is issued and the Producer-Consumer relationship traditionally terminated. In particular, Section 224.1 of the Regulation ("Applicability") makes the Regulation applicable not just to the procurement of an insurance contract but an in-force one, meaning during the continuation of its effective term, however long that is.

> This Part shall apply to any transaction or recommendation [to purchase or replace an annuity contract made to a consumer by an insurance producer or an insurer, where no insurance producer is involved, that results in the purchase or replacement recommended] with respect to a proposed or **in-force policy**.
>
> (*Emphasis added.*)

The imposition of such a continuing duty on the producer contravenes longstanding common law rules and is invalid.

An insurance policy is nothing more than a bi-partite contract of insurance between the policyholder and the insurer. Gilbane Bldg. Co./ TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co., 143 A.D.3d 146 (1st Dept. 2016); Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co., 53 A.D.3d 140, 145 (1st Dept. 2008) ("[a]n insurance policy is a contract between the insurer and the insured"). The broker is not one of those parties and is a legal stranger to that contractual relationship. Thus, it owes no duty as to any insurance policy once the contract is issued.

In conformity with that basic understanding of contract law courts have held that an insurance broker has no continuing duty to advise or consult after the policy is issued. M & E Mfg. Co., Inc. v. Frank H. Reis, Inc., 258 A.D.2d 9 (3rd Dept. 1999). This is partly based on the fact that insurance brokers are not professionals like doctors, lawyers and CPAs and thus have no fiduciary duty. Chase Scientific Research, Inc. v. NIA Group, Inc., 96 N.Y.2d 20 (2001).

Knowing an insurance product and being able to perform a legal coverage analysis for each and every line in it, complete with answering hypotheticals, is something a hundred years of New York Insurance law could not accomplish with any consistency or agreement, and that is among the best insurance attorneys and jurists in the nation. The Regulation seeks to now hold a Producer to provide that legal skill as to the analysis of an insurance product not just at procurement, but for the life of the insurance contract. Making the Producer responsible turns the Producer into a guarantor. The Regulation, as to this issue, is again invalid as it is in direct conflict with longstanding common law rules on the issue of the duration of a Producer's duties.

The Regulation is also inconsistent with another fundamental tenet of insurance law: That "[h]e who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party," including "insurance contracts," is "conclusively presumed to know its contents and to assent to them." Metzger v. Aetna Ins. Co., 227 N.Y. 411, 416 (1920). Since Metzger, all four New York Appellate Divisions have applied this presumption to bar plaintiffs' actions against insurance brokers that are premised on brokers' alleged negligence and/or breach of contract in failing to procure appropriate or adequate insurance. See, e.g., McGarr v. Guardian Life Ins. Co. of Am., 19 A.D.3d 254, 256 (1st Dept. 2005) (claim against broker for procuring an inadequate limit of insurance dismissed where the policyholder received the policy and was thus conclusively presumed to have read and understood its terms); see also Busker on Roof Ltd. Partnership Co. v. Warrington, 283 A.D.2d 376, 376-377 (1st Dept. 2001); Portnoy v. Allstate Indem. Co., 82 A.D.3d 1196, 1198 (2nd Dept. 2011); Stilianudakis v. Tower Ins. Co. of New York, 68 A.D.3d 973, 974 (2nd Dept. 2009); LaConte v. Bashwinger Ins. Agency, 305

A.D.2d 845, 846 (3rd Dept. 2003); Madhvani v. Sheehan, 234 A.D.2d 652, 654-655 (3rd Dept. 1996); Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 19 A.D.3d 1056, 1057-1058 (4th Dept. 2005), *aff'd.*, 7 N.Y.3d 152 (2006); Nicholas J. Masterpol, Inc. v. Travelers Ins. Companies, 273 A.D.2d 817, 817 (4th Dept. 2000). With the singular and limited exception where the applicant makes a clear "Specific Request" for coverage (creating an element of comparative negligence for a tort claim), the duty to read is an absolute bar to suing a broker for failing to procure coverage in the "Best Interests" of the applicant.

It is unreasonable to require that an agent or broker know each insurance product and be able to perform a coverage analysis for each and every line in it, complete with answering hypotheticals. Indeed, even lawyers and jurists cannot agree on the boundaries of coverage with any consistency. Yet the Regulation seeks to now require a Producer to provide that legal skill as to the analysis of an insurance product at procurement and throughout the life of the insurance contract. Requiring the Producer to be responsible for such all-encompassing advice negates the application of the duty to read as addressed above and turns the Producer into a guarantor of a result that is impossible to predict. Indeed, the Superintendent suggests that impossibility of the task of determination of what policy is in the "best interest" of the consumer by stating: "Producers often can choose from many different carriers, creating thousands of iterations of a term life policy." **Exhibit "8,"** Assessment of Public Comments to the First Amendment to 11 NYCRR 244 [sic] (Insurance Regulation 187), p. 9.

CONCLUSION

The Regulation promulgated by the New York State Department of Financial Services will create havoc with arm's length transactions between insurance brokers, insurance agents, the public and the insurers who issue life and annuity policies. The amendments usurp the power of the Legislature, exceed that of the Superintendent, and contradict existing case law and statutes. Worst of all, it creates an unworkable and unconstitutional subjective standard for conduct compliance and enforcement. The Regulation should be immediately annulled.

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