DATESUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of, THE NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISERS - NEW YORK STATE, INC., Plaintiff-Petitioner, -against- THE 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, Defendants-Respondents.	**VERIFIED ARTICLE 78 AND DECLARATORY JUDGMENT PETITION** Index No. Motion Sequence No.

Plaintiff-Petitioner the National Association of Insurance and Financial Advisors–New York State, Inc. ("NAIFA–NYS") brings this action to challenge the legality of Defendant-Respondent the New York State Department of Financial Services ("DFS") Insurance Regulation 187 ("Regulation 187"), codified at 11 N.Y.C.R.R. Part 224.

PRELIMINARY STATEMENT

1. DFS exceeded its permissible authority by promulgating Regulation 187 without any constitutional or statutory authorization. Regulation 187 directly contradicts existing New York insurance statutes. Regulation 187 requires life insurance agents, brokers, and insurers "to establish standards and procedures" so that any transaction with respect to life insurance policies and annuities "is in the best interest of the consumer." It mandates that "[o]nly the interests of the consumer shall be considered in making recommendation," and an

insurance agent's may get compensated only if "the amount of the compensation or the receipt of an incentive does not influence the recommendation." This cannot be squared with an agent's statutory duty "to act as agent of [an] authorized ***insurer***," under New York Insurance Law Section 2103(b), and under Section 2101(a), which define an insurance agent as "any authorized or acknowledged agent of an ***insurer***." What is more, the Legislature has twice taken up and failed to pass broad standards for the life insurance market. Yet, DFS took it upon itself to promulgate novel and extensive fiduciary duties because "other entities" are too slow to act, drastically impacting the entire industry. This Court should invalidate Regulation 187 for any one of three reasons.

2. ***First***, Regulation 187 are *ultra vires* because an administrative agency may promulgate regulations only if the power to do so is granted by the State Constitution or a statute, and none of the statutes DFS cites authorizes Regulation 187. *Boreali v. Axelrod*, the seminal case on agency authority to promulgate regulations, confirms that DFS overstepped its statutory limits by imposing fiduciary obligations in the life insurance market. DFS acted solely on its own ideas of sound policy without any legislative or statutory guidelines, choosing to favor consumers at the insurance industry's expense—which ironically harms consumers as much as insurers, brokers, and agents. This is not surprising because DFS failed to justify Regulation 187 with any factual support, showing that it acted without the aid of "special expertise or technical competence." DFS should be granted little flexibility here because Regulation 187 goes to issues that the Legislature recently addressed and failed to enact by statute.

3. ***Second***, even if the Court were to interpret the statutes that DFS cites as authorizing Regulation 187, DFS has violated the New York State Constitution and the United States Constitution. Regulation 187 (i) violates the separation-of-powers doctrine,

(ii) contains impermissibly vague and confusing terms, and (iii) violates due process by purporting to apply retroactively. It is well settled that the Legislature may not delegate to an agency its responsibility to set policy. To the extent the Legislature empowers an agency to promulgate regulations implementing a policy, the Legislature must place limits and safeguards to ensure that the agency is merely carrying out legislative policy—not making new policy. But the statutes on which DFS relies for Regulation 187 contain no safeguards. Moreover, a number of broad and confusing terms in Regulation 187, such as "producer," "recommendation," and "compensation," provide insufficient notice about whom the regulation affects and how to comply with it—opening the door to DFS's unequal and arbitrary enforcement.

4. ***Third***, even if Regulation 187 were properly promulgated, the Court should strike it as arbitrary and capricious. Regulation 187 will not further DFS's stated purpose of protecting New Yorkers from conflicted advice. Rather, it will harm consumers by causing the market for—and advice about—life insurance policies and annuities to shrink. Regulation 187 is arbitrary or capricious because (i) the record does not contain a sufficient—or any—factual predicate for this regulation; (ii) there is no rational basis for exempting direct-marketing transactions while imposing a fiduciary standard on all others; (iii) there is no factual basis supporting the decision to conflate agents and brokers into a single group called "producers." Regulation 187's arbitrariness is to be expected because the public record does not reflect that DFS collected any independent data on—much less considered—the benefits to consumers compared to industry costs. And DFS refused to consider evidence from parties commenting on the proposed regulation.

5. NAIFA–NYS members are committed to NAIFA Code of Ethics, which, among other things, requires members to work diligently to satisfy their client needs, present all

essential facts regarding clients' financial decisions accurately and honestly, and obey all laws and regulations in the industry. Nevertheless, Regulation 187 will be needlessly burdensome for industry participants to implement and will cause havoc about its enforcement.

6. Ultimately, consumers will be hardest hit by reduced access and product choice, closing the doors on many independent insurance agents who may exit the New York market due to the new duties imposed on them. This would most likely affect low-income, less-sophisticated consumers who would benefit most from in-person broker or agent advice about other available products or options. Consumers may also face higher prices because of reduced supply in the marketplace.

7. While Plaintiff-Petitioner's members' business is based on building trust with consumers, it is wary of an overreaching regulatory mandate such as Regulation 187, which will harm the marketplace and, in turn, the customers who rely on it. This misguided and overbearing approach to regulating insurance and financial services is unfortunately forming a pattern in New York State, as this Court recently annulled a DFS regulation that similarly exceeded statutory authority in limiting marketing practices in the land title insurance industry. *New York State Land Title Assoc. v. New York State Department of Financial Services*, No. 151562/2018, 2018 WL 3306755 (N.Y. Sup. Ct. N.Y. County July 5, 2018). There are more targeted ways for DFS to achieve its goals by minimizing Regulation 187's harmful—though perhaps unintended—consequences.

8. Therefore, Plaintiff-Petitioner asks this Court to invalidate Regulation 187.

PARTIES

9. Plaintiff-Petitioner NAIFA–NYS is a domestic not-for-profit corporation. Its members include thousands of life insurance agents and brokers, financial advisors and associates, and others in the financial services industry throughout New York State. The

members represent tens of thousands of New Yorkers who have entrusted their financial security needs to these licensed and regulated professionals. NAIFA–NYS members serve their New York life insurance and financial product clients by providing advice on asset management, personal net growth, employee benefits, retirement planning, college funding, business succession, legacy planning, and other important decisions concerning their clients' insurance and financial future.

10. Respondent DFS was created on October 3, 2011 by the New York Financial Services Law, which consolidated the Departments of Insurance and Banking into a single state agency for the purpose of enforcing the Insurance, Banking, and Financial Services Laws. N.Y. Fin. Serv. § 102.

11. Respondent Maria T. Vullo, the Superintendent of DFS, appointed by the governor, by and with the advice and consent of the Senate, to supervise the business of, and the persons providing, financial products and services, including any persons subject to the provisions of the insurance and the banking statutes. N.Y. Fin. Serv. §§ 201, 202. She is sued here in her official capacity only.

HARM TO PLAINTIFF-PETITIONER, CONSUMERS, AND THE OVERALL LIFE INSURANCE MARKET

12. Implementing Regulation 187 will have a drastic negative effect on Plaintiff-Petitioner, its members, and consequently, the consumers this regulation is attempting to benefit. If upheld, Regulation 187 will immediately disrupt and derail the market for lower-priced insurance products and chill the performance of routine policy services and advice by agents and advisors. The result will be less information and fewer products for New York State consumers.

13. In addition, Regulation 187's vagueness and ambiguity will likely lead to inconsistent application and arbitrary enforcement in the insurance industry, as well as general

confusion. That, in turn, will generate litigation that will drain resources from litigants as well as the courts. The market disruptions will negatively affect New York State consumers.

JURISDICTION AND VENUE

14. This Court has jurisdiction over this proceeding against Defendant-Respondents pursuant to New York State CPLR Sections 301, 3001, and 7801(b), and New York State Administrative Procedures Act Section 205.

15. Under CPLR Sections 506 and 7804(b), venue is proper in the County of New York because DFS's principal office is within the Judicial District that includes the County of New York.

FACTUAL BACKGROUND

A. Plaintiff-Petitioner is an association that represents insurance agents and advisors, financial advisors and planners, as well as insurance brokers and dealers.

16. Founded in 1890 as The National Association of Life Underwriters, The National Association of Insurance and Financial Advisors ("NAIFA") is the oldest and largest association representing insurance professionals from every Congressional district in the United States.[1] NAIFA–NYS is the New York State chapter of this national organization. NAIFA's mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members.[2]

17. NAIFA–NYS members are insurance agents, financial advisors, multiline agents, health insurance and employee benefits specialists, and both captive and independent advisors.[3] NAIFA–NYS's members, in turn, represent through trust-based relationships tens of thousands

[1] *See* The National Association of Insurance and Financial Advisors, https://www.naifa.org/about-naifa/mission-vision [last accessed at November 15, 2018].

[2] *Id*.

[3] *Id*.

of New Yorkers who have wisely and appropriately entrusted their financial security needs to these licensed and regulated professionals. NAIFA–NYS's members, with and through the licensed insurance and financial products companies operating in New York, provide needed advice on asset management, growth of personal net worth, employee benefits, retirement planning, college funding, business succession, and legacy planning, among other vital services.

18. The business of NAIFA–NYS's members is largely based on, and succeeds only through, the trust that they build with their clients.[4] Providing recommendations and performing services to clients that are always in the clients' best interest comes second nature to NAIFA–NYS's members. In fact, the NAIFA Code of Ethics, to which NAIFA–NYS's members subscribe, embodies some of the very principles contained in the proposed regulatory amendments.

19. NAIFA–NYS members commit, among other things, to the following under the National Association of Insurance and Financial Advisors Code of Ethics:

- to help maintain client's confidences and protect their right to privacy;
- to work diligently to satisfy the needs of clients;
- to present accurately and honestly, all facts essential to client's financial decisions;
- to render timely and proper service to clients and ultimately their beneficiaries;
- to continually enhance professionalism by developing skills and increasing knowledge through education;
- to obey the letter and spirit of all laws and regulations which govern profession; and
- to conduct all business dealings in a manner which would reflect favorably on NAIFA and the profession.

[4] *See* Ex. 3 (NAIFA-NYS, Inc. Comments on Proposed Amendments to Regulation 11 NYCRR Part 224 (Regulation 187), February 26, 2018) at 1. "Ex. _" refers to the exhibits attached to the Verified Article 78 and Declaratory Judgment Petition.

These principles, and many others geared toward maximizing client protection, are put into practice every day as NAIFA–NYS members work to assure their clients' financial futures or provide security to their clients' families if a tragedy may visit them.

B. Regulation 187 imposes a fiduciary standard, which it calls a suitability requirement.

20. The primary requirement of Regulation 187's best-interest-of-consumer standard (in Section 224.4(b)(1)) reads as follow:

> (b) The producer. . . acts in the best interest of the consumer when:
>
> (1) the producer's . . . recommendation to the consumer is based on an evaluation of the relevant suitability information of the consumer 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. Only the interests of the consumer shall be considered in making the recommendation. The producer's receipt of compensation or other incentives . . . is permitted by this requirement provided that the amount of the compensation or the receipt of an incentive does not influence the recommendation. .

21. Regulation 187 provides that the agent or broker make recommendations to customers "without regard to the financial or other interests of the producer, insurer, or any other party." Thus, if an agent could offer two products that both meet the regulatory standard but one carries a higher level of compensation to that agent, he or she would violate Regulation 187 by offering the product with the greater relative compensation.

22. Under Section 224.4(g) of Regulation 187, the agent must form a "reasonable basis to believe that the consumer has the financial ability to meet the financial commitment under the policy." The requirement in Section 224.4(b)(3)(i) of Regulation 187 that the agent inform the customer of a product's favorable or unfavorable consequences contains no reasonability limitation. This provision seemingly requires the agent to pry deeply into a customer's financial position to reasonably determine if he or she can afford the policy.

23. Such intrusiveness could annoy the customer and undermine the trust relationship with the agent. Compounding the compliance challenge is the fact that many life and annuity products have financial commitments and returns that last into the future and that could increase over time. At the recommendation stage, it may be impossible to determine the benefits of those products in the distant future.

24. DFS has stated that Regulation 187 mirrors the proposed best interest standard of the Certified Financial Planner Board of Standards.[5] The CFP Board states that its standard is an expanded application of the fiduciary standard it requires for certified professionals acting in the best interest of clients when giving advice.[6] DFS has also been express about Regulations 187 "fill[ing] in regulatory gaps to protect New York consumers from the elimination of the federal Department of Labor's Conflict of Interest Rule."[7] The DOL rule that DFS tries to replace imposed a fiduciary standard on products sold in qualified employer plans.

C. Regulation 187 makes exceptions for direct sales

25. In Section 224.2(a), Regulation 187 exempts the "purchase of a policy where the application is solicited and received in response to a generalized offer by the insurer by mail or under other methods without producer involvement and where there is no recommendation made." This exempts on-line, telephone, and traditional-mail sales—even for investment products such as annuities—while counterintuitively imposing Regulation 187's strict requirements on in-person transactions.

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5 *See* Ex. 2 (Department of Financial Services, Assessment of Public Comments to the First Amendment to 11 NYCRR 224 (Insurance Regulation 187).

6 *See* cfp.net, at https://www.cfp.net/about-cfp-board/code-and-standards#professionals (stating "[c]entral to the new Code and Standards is an expanded application of the fiduciary standard that requires CFP® professionals to act in the best interest of the client at all times when providing financial advice).

7 The Department of Financial Services, Press Release, "DFS Issues Final Life Insurance and Annuity Suitability and Best Interest Regulation Protecting Consumers from Conflicts of Interest," July 18, 2018, available at https://www.dfs.ny.gov/about/press/pr1807181.htm.

26. This exemption creates an unfair playing field for producers.[8] For example, insurers and others selling online by asking consumers simply to check a box next to the amount of coverage they wish to buy will not have to comply with Regulation 187 (by informing consumers about other available options or offering other guidance). But an agent or broker selling the exact same product would be subject to Regulation 187. Since life insurance products are not easily sold, many consumers may simply opt for the easier method of obtaining a policy through a direct sale, without ever knowing what product available was suitable for them or was offered in their "best interest."

D. Regulation 187 will adversely affect consumers, agents, and brokers.

27. NAIFA–NYS's members are concerned that extending the requirement of suitability from annuity sales to all life insurance products and codifying what is effectively a fiduciary standard for both life insurance and annuity products will derail the market for lower-priced insurance products by making the production burden outweigh any financial benefit. This regulatory effort will place a chilling effect on the willingness of agents and advisors to perform routine policy services for clients, such as giving advice or assistance on certain in-force policy matters.[9] Many agents will likely avoid providing these services if they believe there is the risk of violating a poorly defined regulatory obligation.[10] This will disrupt the life insurance marketplace that previously served New Yorkers well.[11]

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8 *See* Affidavit of Donald Damick, ¶¶ 20-21.

9 *See id*., ¶¶ 13-19.

10 *See id*., ¶¶ 13-21.

11 *See id.*, ¶¶ 13-21.

E. The Legislature tried and failed to adopt a statute to address what Regulation 187 attempts to address.

28. Since 2015, the Legislature twice attempted to pass bills that would have accomplished what Regulation 187 does. But the Legislature has not adopted either yet. Assemblyman Jeffery Dinowitz introduced State Assembly Bill A6933, titled The Investment Transparency Act, which was referred to the Judiciary Committee on April 10, 2015, and then again referred to the Committee on January 6, 2016.[12] It died in committee without receiving any votes.[13] On January 20, 2017, under the same title as A6933, Assemblyman Dinowitz introduced State Assembly Bill AB2464 and referred it to the Judiciary Committee.[14] Both of these proposed bills, having near identical language, required non-fiduciaries (such as brokers, dealers, and financial planners) to disclose potential conflict of interests.[15] AB2464 was amended and referred again to the Judiciary Committee in May 8, 2018, receiving enough votes to exit the Committee but ultimately never making it to a floor vote.[16] Although AB2464 was set aside in May 10, 2018, Assemblyman Dinowitz plans to re-propose and debate the Investment Transparency Act at the next legislative session in January 2019.[17]

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[12] *See* A.B. A6933 (N.Y. 2015–16), available at https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A06933&term=2015&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y#

[13] *Id*.

[14] *See* A.B. 2464 (N.Y. 2017–18), available at https://assembly.state.ny.us/leg/?default_fld=%0D%0A&leg_video=&bn=AB2464A&term=2017&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y&LFIN=Y&Chamber%26nbspVideo%2FTranscript=Y

[15] *See generally id*.; and A.B. A6933 (N.Y. 2015–16).

[16] *See* A.B. 2464 (N.Y. 2017–18).

[17] *See* Kenneth Corbin, "Will Fiduciary Wave Follow Democrat Statehouse Victories?," *Financial Planning*, Nov. 7, 2018, date, available at https://www.financial-planning.com/news/democrats-set-to-reintroduce-fiduciary-regulations; *see also* Mark Schoeff Jr., "State-level Activity Slows on Fiducairy Legislation," *InvestmentNews.com*, July 12, 2018, available at https://www.investmentnews.com/article/20180712/FREE/180719966/state-level-activity-slows-on-fiduciary-legislation.

F. DFS conducted no independent research and instead relied on stale United States DOL studies that had to do with an entirely different set of products.

29. DFS provides no facts or regulatory impact analysis demonstrating the purported need for this alleged fix. Instead, DFS offers anecdotal "support."[18] To the contrary, DFS concedes that many agents, brokers, and insurers already voluntarily comply with the now derailed DOL fiduciary rule requirements.[19] Indeed, the business of licensed and regulated agents and brokers would collapse if they did not carefully nurture their trust-based relationships with tens of thousands of New Yorkers.[20]

FIRST CAUSE OF ACTION – RELIEF UNDER ARTICLE 78

(DFS ACTED *ULTRA VIRES* ANY AUTHORIZING STATUTES IN PROMULGATING REGULATION 187)

30. NAIFA–NYS repeats and re-alleges each allegation in paragraphs 1 through 29 above.

31. The power to make policy is vested in the Legislature. N.Y. Const. art III § 1. The executive branch may promulgate regulations only if the Legislature sets the policy through a statute and permits the executive branch to implement the policy. *See Rapp v. Carey*, 44 N.Y.2d 157, 166 (1978) (recognizing "the principle that the Governor has only those powers delegated to him by the Constitution and the statutes"). Not only does Regulation 187 lack any statutory authority, but it actually places obligations on agents that are inconsistent with New York Insurance Law Section 2103. Indeed, the statutes specifically address brokers and dealers

[18] *See* Ex. 2 (Department of Financial Services, Assessment of Public Comments to the First Amendment to 11 NYCRR 224 (Insurance Regulation 187)); *see also* Ex. 7 (Department of State, Division of Administrative Rules, *New York State Register August 1, 2018/Vol. XL, Issue 31*, Aug. 1, 2018), at 20 ¶3; Affidavit of Donald Damick, ¶¶ 22-24.

[19] *See* Ex. 2 (Department of Financial Services, Assessment of Public Comments to the First Amendment to 11 NYCRR 224 (Insurance Regulation 187)).

[20] *See* Affidavit of Donald Damick, ¶ 26.

thus making DFS's conflation all the more unsupportable. As for the other dozen-plus statutory provisions DFS cites, not one of them grants it the power to promulgate Regulation 187, or even mentions imposing industry-wide fiduciary duties.[21] The statutory provisions should not be read as granting to DFS the power to promulgate Regulation 187 because a statutory grant of power to an agency "must be deemed limited by [the agency's] role as an administrative, rather than a legislative, body." *Boreali v. Axelrod*, 71 N.Y.2d 1, 6 (1987).

32. Far from granting DFS authority to promulgate Regulation 187, New York Insurance Law Sections 2103 and 2101(a) ***contradicts*** the obligations that the regulation imposes. Specifically, New York Insurance Law Section 2103 expressly set outs DFS's licensing powers over agents. That provision makes clear that an agent is an agent of an insurer. Section 2103(b) states that "[t]he superintendent may issue a license to any person, firm, association or corporation who or which has complied with the requirements of this chapter, ***authorizing the licensee to act as agent of any authorized insurer***." Further, Section 2101(a) of New York Insurance Law provides as follows:

> 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, health maintenance organization or annuity contract, other than as a licensed insurance broker.

33. Under the statute then, an insurance agent acts on behalf of an insurer. Agents also have contractual duties to insurers on whose behalf they operate.[22]

34. Not to be confused with agents, brokers are separately licensed under Insurance Law Section 2104. Under New York Insurance Law Section 2101(c) an "insurance broker" should act to "safeguard the interests of the insured," ***not*** the insurer. Section 2103 does not

[21] Insurance Law Sections 301, 308, 309, 2103, 2104, 2110, 2123, 2208, 3209, 4224, 4525, Arts. 24 and 42; and Financial Services Law Sections 202 and 302.

[22] *See* Affidavit of Donald Damick, ¶¶ 4-8, and ¶¶ 11-12.

mention "brokers." Similarly, nothing in Section 2104 suggest that it authorizes combining agents with brokers. The Legislature made clear the distinction between insurance agents and brokers, not just by keeping the terms in separate sections, but also through the specific definitions of agent and broker throughout Article 21.

35. This distinction between agents and brokers, which has been a cornerstone of statutory, regulatory and enforcement treatment of brokers and agents for decades, is also well settled in the case law. As the First Department has held, it "has been long recognized in this State that there is a distinction between insurance agents and brokers. . . . The former acts as agent of an insurance carrier and the latter appears as representative of the insured." *See American Motorists Ins. Co. v. Salvatore*, 476 N.Y.S.2d 897, 900 (1984 1st Dep't); *see also United Specialty Ins. Co. v. Fisk Fine Art Servs., LLC*, 2017 U.S. Dist. LEXIS 51287, *7, 2017 WL 1250424 (S.D.N.Y. 2017) (stating that an insurance agent acts on behalf of insurer while ab insurance broker acts on behalf of insured).

36. Yet Regulation 187 ignores this basic aspect New York Insurance Law and places obligations on agents that are inconsistent with their statutory—as well as contractual—duties to insurers. To be clear, if an agent must act solely "in the best interest of the consumer," then it cannot carry out its statutory duty "to act as agent of [an] authorized insurer," as Section 2103(b) requires. *See also* Section 2101(a). Therefore, not only is Regulation 187 unauthorized by statute, but it slams head-on into New York Insurance Law Sections 2103(b) and 2101(a).

37. What is more, not one of the New York Insurance Law provisions that DFS cites authorizes DFS to promulgate Regulation 187, which imposes across-the-board fiduciary duties for life insurance agents, brokers, and insurers. Likewise, the Insurance Superintendent's enumerated powers under New York Financial Services Law Sections 202 and 302 do not permit

Regulation 187.[23] While these statutory provisions prohibit insurance industry professionals from being untruthful or misrepresenting information about policy terms (which Petitioner fully supports), none authorizes DFS to impose what is effectively an industry-altering fiduciary standard.

38. The seminal case on agency regulations and separation of powers, *Boreali*, confirms that the statutes cannot be read to provide authority for Regulation 187. In fact, if the Legislature had granted to DFS wide enough discretion to allow it to promulgate Regulation 187, that would have been an unconstitutional violation of the separation-of-powers doctrine under *Boreali*. Because the court must construe the statute so as to avoid serious constitutional questions whenever possible, the statutes must be read as not authorizing the Regulations. *See*, *e.g.*, *Grasso*, 54 A.D.3d at 183.

39. The *Boreali* Court identified four factors that this Court should consider in determining whether Regulation 187 exceed the scope of existing legislative policy and creates new law in violation of the separation of powers: (i) Is the regulatory scheme laden with exceptions based solely on economic and social concerns? (ii) Does the regulation go beyond merely filling in the details of broad legislation describing the overall policies to be implemented? (iii) Did the agency act in an area in which the Legislature tried and failed to reach an agreement on a policy? (iv) Does the regulation control an issue for which no special expertise or technical competence in the regulated field is involved? *See* 71 N.Y.2d at 11–14.

[23] Of all the statutory provisions DFS cites, only Section 2110(a)(15) expressly mentions a best-interest standard, and states that the Superintendent can revoke someone's 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 permits a best-interest standard in this limited circumstance, that standard does not apply to every other circumstance. *See*, *e.g.*, *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.").

Here, all four factors lead to the conclusion that Regulation 187 impermissibly create policy. Regulation 187 fails under each of these factors.

40. Regulation 187 reflects DFS's "economic and social concerns" that favor consumers at the insurance industry's expense—but in fact failing.

41. Regulation 187 goes beyond merely filling in the details of broad legislation, and instead describes plenary policies to be implemented.

42. DFS acted in an area where the Legislature tried and failed to pass a statute.

43. DFS failed to justify Regulation 187 with evidence, thus demonstrating that it acted without the aid of "special expertise or technical competence.

SECOND CAUSE OF ACTION – RELIEF UNDER ARTICLE 30
(REGULATION 187 IS UNCONSTITUTIONAL)

44. NAIFA–NYS repeats and re-alleges each allegation in paragraphs 1 through 43 above.

45. Even if the statutes DFS cited actually delegate authority to promulgate Regulation 187, that delegation and Regulation 187 in particular would still be unconstitutional and void. There are three reasons for this: (i) broad delegation of authority to promulgate Regulation 187 would violate the separation-of-powers doctrine; (ii) Regulation 187 contains impermissibly vague and confusing terms; and (iii) Regulation 187 violates due process by purporting to apply retroactively.

THIRD CAUSE OF ACTION – RELIEF UNDER ARTICLE 78
REGULATION 187 IS ARBITRARY AND CAPRICIOUS

46. NAIFA–NYS repeats and re-alleges each allegation in paragraphs 1 through 45 above.

47. Under CPLR 7803, a court should strike down an agency regulation if it is arbitrary or capricious. *See N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991). This Court should scrutinize Regulations 187 for genuine reasonableness and rationality in the specific context of the regulations. *Id*. In reviewing the arbitrary and capricious nature of a regulation, the Court should consider the explanation the agency gives at the time of promulgation. *See Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991) ("[J]udicial review of an administrative determination is limited to the grounds invoked by the agency. . . . [A] reviewing court . . . must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."); *Street Vendor Project v. City of New York*, 10 Misc. 3d 978, 986 (N.Y. Sup. Ct. 2005) (reviewing court is limited to considering the reasons that an agency gives for its action, at the time that it takes the action).

48. Regulation 187's stated purpose is to force insurers to "establish standards and procedures for recommendations to consumers with respect to policies . . . so that any transaction with respect to those policies is in the best interest of the consumer and appropriately addresses the insurance needs and financial objectives of the consumer at the time of the transaction."[24] In its Assessment of Public Comments to the First Amendment to Regulation 187, DFS elaborates that it was trying to plug a hole that federal regulations left and thus create "a uniform standard of care across all types of investment transactions, including both annuity and life insurance

[24] *See* Regulation 187 § 224.0(b).

transactions, [that] provides consistent consumer protection and a consistent regulatory framework . . . regardless of product choice."[25]

49. Yet DFS conspicuously cites no evidence that Regulation 187 will accomplish these purposes and irrationally creates a self-defeating exception for direct sales that extends to term life insurance. DFS also conflates agents and brokers, cramming them into the "" category. Consumers are likely to be left worse off because of Regulation 187, which will disrupt the quality of services provided to New Yorkers as agents and other market participants become reluctant to expose themselves to new regulatory risks.

50. Regulation 187 fails to satisfy this Court's scrutiny for genuine reasonableness and rationality.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Petitioner respectfully requests that the Court grant the following relief:

(1) a declaratory judgment that DFS, in adopting and implementing 11 N.Y.C.R.R. 224, has acted *ultra vires* as well as arbitrarily and capriciously, and abused its discretion, violated lawful procedure and taken actions affected by errors of law by promulgating a regulation inconsistent with governing statutes;

(2) a declaratory judgment that DFS, in adopting and implementing 11 N.Y.C.R.R. 224, has violated the due-process rights under the United States and New York State Constitutions;

[25] *See* Ex. 2 (Department of Financial Services, Assessment of Public Comments to the First Amendment to 11 NYCRR 224 (Insurance Regulation 187)) (rejecting some commenters' recommendation to wait for other regulatory bodies to promulgate rules or standards before taking any action; and stating that "the future of the DOL rule is uncertain . . . [SEC's proposed rule] is still in the early stages").

(3) a declaratory judgment that DFS, in adopting and implementing 11 N.Y.C.R.R. 224, has overstepped its statutory authority in violation of the separation-of-powers doctrine;

(4) an order and judgment vacating and annulling 11 N.Y.C.R.R. 224 in its entirety;

(5) a permanent injunction prohibiting the Defendants-Respondents from enforcing 11 N.Y.C.R.R. 224;

(6) a declaratory judgment that DFS, in adopting and implementing 11 N.Y.C.R.R. 224, has breached the New York State Administrative Procedure Act;

(7) awarding to Plaintiffs-Petitioner its costs, disbursements, and attorneys' fees under CPLR Sections 8101 and 8601; and

(8) such other and further relief as this Court may deem just and proper.

Dated: November 16, 2018
New York, New York

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STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

DONALD DAMICK, being duly sworn, states:

I have read the foregoing Verified Article 78 and Declaratory Judgment Petition and know the contents thereof. The statements in the Verified Petition related to the National Association of Insurance and Financial Advisers - New York State, Inc., are true and correct to the best of my knowledge, information and belief.

Dated: November 16, 2018
New York, New York

[**]

Subscribed and sworn to before me
this 16 day of November, 2018

Notary Public

Manda Meenan
Notary Public, State of New York
No.01ME6362540
Qualified in Ontario County
My Commission Expires
July 31, 2021

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