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COURT OF APPEALS

STATE OF NEW YORK

INDEPENDENT INSURANCE AGENTS AND
BROKERS OF NEW YORK,

Respondent,

-against-

NO. 73

NEW YORK STATE DEPARTMENT OF
FINANCIAL SERVICES,

Appellant.

Fulton County Courthouse
223 W. Main Street
Johnstown, NY 12095
September 8, 2022

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

HOWARD S. KRONBERG, ESQ.
KEIDEL, WELDON, AND CUNNINGHAM, LLP
Attorney for Appellant
925 Westchester Avenue
Suite 400
White Plains, NY 10604

SARAH L. ROSENBLUTH, ESQ.
OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL
Attorney for Respondent
1 Commerce Plaza
11th Floor
Albany, NY 12210

Ellen S. Kolman
Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: So let us begin
2 with today's case, which is Number 73, Matter of
3 Independent Insurance Agents and Brokers of New York v. the
4 New York State Department of Financial Services.

5 Counsel?

6 MS. ROSENBLUTH: Good morning, Your Honors, and
7 may it please the Court, Sarah Rosenbluth for appellant,
8 Department of Financial Services.

9 I'd like to reserve two minutes for rebuttal.

10 ACTING CHIEF JUDGE CANNATARO: You have two
11 minutes.

12 MS. ROSENBLUTH: Thank you.

13 The best interest standard, which has now been
14 adopted in at least twenty-eight other states is a common
15 sense regulation that uses clear and commonly understood
16 terms to regulate insurance agents and brokers. It is a
17 rational exercise - - -

18 JUDGE RIVERA: Counsel, good morning.

19 MS. ROSENBLUTH: Good morning.

20 JUDGE RIVERA: What is the evil or the concern
21 that the regulation is intended to address, and how does
22 the language match that goal?

23 MS. ROSENBLUTH: Yes, Your Honor. It's - - - the
24 legislature has made the judgment as evidenced by a number
25 of statutes that it is the policy of the legislature in the



1 State of New York that the department shall supervise the
2 individuals engaged in the business of providing financial
3 services and products, and shall ensure a high level of
4 honesty, transparency, and competence when consumers seek
5 out the assistance of these financial business people.

6 And so in terms of the language, the - - - what I
7 would like to point to you primarily is page 306 of the
8 appendix. I mean, that's refers - - - that contains the
9 regulatory impact statements where the department sets out
10 its authority, and it explains that when it instructs
11 producers to act in the consumer's interest, rather than
12 their own financial interest, the department says that goes
13 to the heart of what it means to operate in an honest and
14 trustworthy manner.

15 ACTING CHIEF JUDGE CANNATARO: Counsel, it seems
16 as if the industry has its own set of fairly similar
17 standards to which they hold themselves. Could we not just
18 rely on their own self-regulation to do the job in the
19 manner - - - in which it appears both of you want them to
20 do it?

21 MS. ROSENBLUTH: No, Your Honor. It's - - -
22 first of all, this is amply within the statutory authority,
23 and the department also considered comments during the
24 notice and comment period by the industry to the effect of
25 there are existing standards that are similar, can't we



1 just rely on those?

2 And there are important differences between this
3 rule and other existing sort of rules of self-regulation,
4 and also federal rules. Other rules, for example, might
5 require producers to put their - - - just for example, to
6 put consumer's interest ahead of their own, but does not
7 prohibit them from considering their own interests. So
8 this goes meaningfully further than existing regulations.

9 ACTING CHIEF JUDGE CANNATARO: That gets to the
10 matter at hand - - -

11 MS. ROSENBLUTH: Sure.

12 ACTING CHIEF JUDGE CANNATARO: - - - which is
13 vagueness.

14 MS. ROSENBLUTH: Um-hum.

15 ACTING CHIEF JUDGE CANNATARO: Are there
16 differences between your regulation and the ones that the
17 industry imposes on itself that somehow in view of at least
18 one lower court rendered it vague?

19 MS. ROSENBLUTH: No, Your Honor. The - - - there
20 - - - so there are certain differences in terms of the
21 meaning - - - the definition of recommendation, for
22 example. And I'll refer here to the model rule. That's
23 not the industry's self-regulation. I'm not exactly
24 familiar with the terms of any self-regulations. But for
25 example, the model rule has - - -



1 ACTING CHIEF JUDGE CANNATARO: Due to their
2 ethics standards. I think they have a certain ethical code
3 that they subscribe to.

4 MS. ROSENBLUTH: Sure. I'm not exactly familiar
5 with what those terms would be. But in any event, the
6 terms of this regulation have been adopted in sum and
7 substance, and in some cases verbatim by the National
8 Association of Insurance Commissioners, which sets forth
9 national standards, and it has been adopted now by at least
10 twenty-eight other states.

11 So I think that really widespread adoption by
12 more than half the states in the country shows that the
13 terms at issue here are not hopelessly unintelligible.
14 Certainly other - - -

15 JUDGE WILSON: Is that for review here; rational
16 basis?

17 MS. ROSENBLUTH: Um - - -

18 JUDGE WILSON: On the constitutional question.

19 MS. ROSENBLUTH: On the constitutional question,
20 I think that's one way of looking at it, Your Honor. And
21 certainly the agency has authority to - - - when it is
22 delegating within the - - - its sphere of - - - I'm sorry.

23 When it's regulating within it's sphere of
24 delegated authority, it does enjoy a presumption that it's
25 - - - it's acting rationally. And certainly, that's not



1 just a matter of presumption here, but it's borne out by
2 the record.

3 JUDGE WILSON: So if the regulations exactly
4 duplicated the industry code - - -

5 MS. ROSENBLUTH: Um-hum.

6 JUDGE WILSON: - - - what would - - - what about
7 that would make it unconstitutional?

8 MS. ROSENBLUTH: Nothing, Your Honor.

9 JUDGE WILSON: And if it differed?

10 MS. ROSENBLUTH: I mean, it's permitted to
11 differ. The agency exists to regulate - - - is a regulator
12 that represents different constituencies than does any
13 self-regulating entity of the industry. So it's absolutely
14 permissible for it to differ meaningfully, and put
15 different emphases than does any self-regulation.

16 JUDGE GARCIA: Counsel, if - - - when we look at
17 the vagueness test, and we look at notice - - - the notice
18 prong, person of ordinary intelligence generally expressed,
19 is that different here? Are we looking at a different
20 audience? Are we considering this regulation through the
21 lens of a very highly regulated industry?

22 MS. ROSENBLUTH: Yes, we are, Your Honor. And
23 that is set forth - - - that standard is set forth, for
24 example, in the Hoffman Estates United States Supreme Court
25 case where it talks about the difference in vagueness



1 standards that would apply. For example, in criminal
2 statutes, where any ordinary person is regulated and also
3 faces deprivation of liberty by contravening that statute,
4 on the one hand. And on the other hand, economic
5 regulation that does regulate, as you say, highly
6 sophisticated and highly regulated entities. And it's
7 worth noting here that insurance is one of the most heavily
8 regulated industries nationwide. And certainly - - -

9 JUDGE TROUTMAN: So, are you suggesting that the
10 vagueness standards that we apply in criminal cases in - -
11 - when you're considering insurance should be no less,
12 because one involves liberty; the other the contrary.

13 MS. ROSENBLUTH: The vagueness standard in this
14 case that applies to economic regulations is less strict
15 than that - - - then that that applies in a criminal
16 context. Regardless, I think we satisfy either test. But
17 one reason why - - - in addition to the sophistication of
18 the parties at issue, another reason why we apply a less
19 strict test to regulated business entities, is because
20 there is that opportunity for clarification. And the terms
21 here are clear, even without resorting to any - - -

22 JUDGE RIVERA: Now let's get to that one - - -

23 MS. ROSENBLUTH: Sure.

24 JUDGE RIVERA: - - - which is where I was hoping
25 we'd get.



1 The reasonableness, I think you have a very good
2 argument on that. I'll ask your adversary about that. But
3 suitability - - -

4 MS. ROSENBLUTH: Um-hum.

5 JUDGE RIVERA: - - - how is that not vague? It
6 seems such a broad concept. So many factors go into that
7 that are idiosyncratic for any particular client or
8 customer.

9 MS. ROSENBLUTH: Um-hum. Right. So the - - -
10 well, first, the term "suitable" is itself separately
11 defined in Section 224.3(h), and then there is in
12 subsection (g) there are - - - those factors that are the
13 "suitability factors".

14 Now, the fact that they may call for - - -

15 JUDGE RIVERA: How is suitable defined?

16 MS. ROSENBLUTH: Suitable is defined as in
17 furtherance of the consumer's needs and objectives based on
18 the information provided by the consumer. And the
19 suitability information admittedly calls in some instances
20 for subjective information from the consumer. Some is
21 pretty objective. Some's age, income, marital status and
22 the like. But there are some that are admittedly more
23 subjective factors that the consumer can choose to answer
24 in a variety of ways.

25 For example, financial needs objective, risk



1 tolerance. But the fact that the terms - - - that the
2 regulation calls for the solicitation of subjective
3 information doesn't - - -

4 JUDGE RIVERA: It is possible with that
5 particular term, though, even with the fact there's
6 another, let me call it, guidance for a moment that you're
7 providing for the - - - let's just say the agent for the
8 moment. The agent thinks it's suitable; but the individual
9 themselves would never think is suitable. How do you
10 resolve that issue? Do they always have to defer to the
11 customer, the purchasers' - - -

12 MS. ROSENBLUTH: Well, certainly - - -

13 JUDGE RIVERA: - - - idea of what is suitable,
14 which may not - - - obviously, because you're going to an
15 expert -

16 MS. ROSENBLUTH: Um-hum.

17 JUDGE RIVERA: - - - which may not be a result of
18 a full analysis of all the relevant concerns.

19 MS. ROSENBLUTH: Well, the definition of suitable
20 is tied to the consumer's own financial needs and
21 objectives. So assuming that there has been no
22 miscommunication, the consumer and the producer should be
23 agreeing on what is suitable.

24 And just further to your point about the - - -

25 JUDGE RIVERA: I'm sorry to interrupt. Does that



1 mean that they have to agree on what are the concerns and
2 factors that go into that calculation to make the
3 determination as to what is suitable?

4 MS. ROSENBLUTH: I mean, certainly the producer
5 is exercising some expert judgment, but it is all based on
6 what the consumer - - - on the information that the
7 consumer provides. And importantly, here, there is no
8 requirement as petitioner suggests for the producer to
9 somehow displace individual autonomy to override consumer
10 stated preferences.

11 JUDGE TROUTMAN: So you're saying as long as they
12 have the relevant information provided by the producer, the
13 ultimate decision can be made by the consumer, but they are
14 still fulfilling their responsibilities?

15 MS. ROSENBLUTH: That's exactly right, Your
16 Honor. And that is underlined in Section 224.4(f), which
17 says that a producer has no obligation and no - - - will
18 not be exposed to any liability if the consumer decides to
19 go against his transaction. If the consumer rejects the
20 transaction.

21 JUDGE WILSON: The list of suitability
22 information, is it exhaustive or is it exemplary?

23 MS. ROSENBLUTH: It's exemplary, Your Honor. So
24 it's - - -

25 JUDGE WILSON: So there could be other types of



1 suitability information not listed. How - - - how is the
2 producer supposed to know what that is?

3 MS. ROSENBLUTH: Well, presumably, in such a
4 case, a consumer will, you know, in the course of an open-
5 ended conversation might refer to any pieces of information
6 that might be highly idiosyncratic to that person and,
7 therefore, would not be captured in the exemplary - - -
8 exemplary list, but, you know, that consumer might inform
9 the producer that this one thing happens to be really
10 important to me. So - - - so there's no need to sort of be
11 clairvoyant in - - - in - - - in - - -

12 JUDGE RIVERA: But what if the client doesn't
13 tell you something? But DFS thinks well, anyone with this
14 kind of expertise who is working in the best interest of
15 the client would have asked about those things. Who's - -
16 - who's liable in that scenario?

17 MS. ROSENBLUTH: Well, if the producer solicits -
18 - - I mean, certainly, if the producer solicits all the
19 examples of suitability information, there would be no
20 requirement to somehow make up additional factors to
21 solicit. There might be a scenario where a consumer
22 suggests that something's important.

23 JUDGE RIVERA: Then you're saying the floor is
24 set out - - - or the factors, excuse me - - -

25 MS. ROSENBLUTH: Are the floor.



1 JUDGE RIVERA: - - - are the floor - - -

2 MS. ROSENBLUTH: Yes.

3 JUDGE RIVERA: - - - and you're not expecting
4 them to exceed that?

5 MS. ROSENBLUTH: They need - - -

6 JUDGE RIVERA: If they do - - -

7 MS. ROSENBLUTH: They need not.

8 JUDGE RIVERA: - - - in the scenario, that's
9 fine. But if they don't, they've complied with the
10 responsibilities as DFS sees it?

11 MS. ROSENBLUTH: Yes, in most cases, yes. I
12 could potentially construct a hypothetical in which a
13 consumer suggested there's one idiosyncratic piece of
14 information that's extremely important to that person, and
15 the producer probably would want to understand that and
16 base the recommendation on that, but I can't, off the top
17 of my head, consider what the - - -

18 JUDGE WILSON: So it sounds as if you're saying,
19 essentially, that if the producer goes through the
20 checklist of the suitability information items that are in
21 the regulation, that's a safe harbor?

22 MS. ROSENBLUTH: Yes. And it's - - - that's
23 almost right, Your Honor. Certainly, going through the
24 checklist of suitability factors is an important step.
25 There are a few other steps that are listed out in Section



1 224.4(b). But yes; that's exactly right.

2 And again, one of the most important points I
3 would like to make this morning is that the best interest
4 standard calls for adherence to a process. It does not
5 call for any particular substantive outcome.

6 JUDGE SINGAS: Counselor, you note in your briefs
7 that insurers can get additional information, they can call
8 in and ask for help or guidance with the regulations.
9 First, how do you think that helps us in the vagueness
10 analysis?

11 MS. ROSENBLUTH: Um-hum.

12 JUDGE SINGAS: And second, couldn't it be that if
13 so much support is needed that, in fact, the regulations
14 might be too vague?

15 MS. ROSENBLUTH: Sure. So with respect to your
16 first question, sort of doctrinally where that fits in, I
17 think, is again, I refer to the Hoffman Estates case where
18 it says that the reality of a highly-regulated industry is
19 that there is that opportunity for a clarification, a give
20 and take, perhaps, a resort to administrative process. And
21 here, we detail in our brief sort of how that information
22 is communicated. So that really alleviates the concern
23 that anyone's going to be, for example, subject to
24 substantial fines or penalties. It really alleviates the
25 notice problem. They have really a full opportunity to



1 clarify.

2 And more than just resort to the agency, another
3 critical point here is that they're under supervision by
4 insurers. All of these producers, they're not islands
5 here. They're working with insurers, and there are very
6 important duties of supervision that are again set out in
7 224.6. And so the insurers - - - and already have been
8 really a huge resource here for producers in prescribing
9 forms, really making it clear to producers how they expect
10 this to go. And there's training, and the like.

11 So that training again also was another
12 opportunity for clarification. To the extent that that
13 clarification is needed, I certainly don't think that
14 weighs against - - - or that weighs in favor of vagueness
15 here. I think that - - -

16 ACTING CHIEF JUDGE CANNATARO: Thank you, Ms.
17 Rosenbluth.

18 MS. ROSENBLUTH: Okay.

19 MR. KRONBERG: May it please the Court, Howard
20 Kronberg from Keidel, Weldon, and Cunningham for
21 petitioner-respondent.

22 Your Honor, I'd like to preface this by saying
23 this is my first time arguing before this Court. I'm
24 honored to be here today. I would have been a little
25 nervous anyway with all of this. So if I constantly get



1 dry mouth and need water, please don't let it indicate - -
2 -

3 ACTING CHIEF JUDGE CANNATARO: Those are the
4 people you need to be worried about.

5 MR. KRONBERG: Okay. It's not an indication of
6 any nonbelief on my position.

7 I remember from law school being taught that when
8 there's a complicated issue, go to your best argument, and
9 it's two and they're interrelated.

10 The first is it is unconstitutionally vague, and
11 the second is it reverses your decision in Murphy v. Kuhn.
12 It completely changes the common law standard to be applied
13 here.

14 Preface this by saying my first job in law
15 school, my first year in 1981, was as a law clerk at Weg &
16 Myers with Dennis D'Antonio who I understand yesterday
17 argued an insurance case before you. I've been doing it
18 ever since.

19 In 1987, I started to do E&O defense and have
20 been doing it throughout. We are the successor, our law
21 firm, to Lustig & Brown, which argued Murphy and Hoffend
22 and Chase Scientific. We've been counsel for the Big I. I
23 have been for many years.

24 We're the attorneys, my partner, Jim and I, that
25 literally get the call every day, every morning, throughout



1 the day by insurance brokers with this question; what do I
2 do.

3 Insurance agents and brokers in the State of New
4 York want to do what's right by their clients. They want
5 to do what's right, of course by the - - -

6 JUDGE GARCIA: And counsel - - -

7 MR. KRONBERG: Yes.

8 JUDGE GARCIA: - - - what terms specifically in
9 this regulation are they having trouble with?

10 MR. KRONBERG: All of it, Judge.

11 JUDGE GARCIA: But tell me some terms. We can
12 say all of it and there's some broad language in the
13 Appellate Division, but could you identify for me the terms
14 that you're getting calls on, or you think specifically are
15 vague?

16 MR. KRONBERG: Okay. Suitability in the
17 regulation is a tautology. You cannot define suitability
18 and then say suitability is defined as what is suitable and
19 documents that are suitable.

20 One of the judges asked about the checklist of
21 suitability documents. That's incorrect. It's not a
22 checklist. DFS is wrong. It's examples, and therein lies
23 the problem.

24 One of my great problems with this regulation is
25 this. Murphy said procure the coverage requested. It's a



1 bright line. To remember this -- and this is going to
2 sound crazy -- I had the word "sausage" written in my
3 papers. Why? Because as we all remember growing up,
4 nobody wants to know how sausage is made. We don't care.
5 If it's delicious, that's fine. Sausage is - - - making of
6 it is outcome determinative. Murphy is outcome
7 determinative.

8 The process doesn't matter. It doesn't matter
9 how a broker or agent gets the insurance, as long as it's
10 what they wanted.

11 ACTING CHIEF JUDGE CANNATARO: But counsel, it
12 seems as if the current thinking is these products are so
13 complicated now, that what's requested is very often the
14 result of a recommendation made by a person who's in a
15 position, at least from the perspective of the consumer, to
16 know what it is the product is and how it works, and that's
17 going to greatly affect the consumer's decision about which
18 products to select. And this regulation to me distilled to
19 its simplest form - - -

20 MR. KRONBERG: Right.

21 ACTING CHIEF JUDGE CANNATARO: - - - is just a
22 command that you think about your client before you think
23 about yourself. What's wrong with that?

24 MR. KRONBERG: Nothing, Judge. I don't think
25 this does that, though. And - - -



1 JUDGE TROUTMAN: But again, Judge Garcia asked
2 you specifically - - -

3 MR. KRONBERG: Right.

4 JUDGE TROUTMAN: - - - about the questions that
5 you were called upon to answer from clients. So what is
6 the question that is most asked that is a problem with this
7 reg?

8 MR. KRONBERG: My apologies if I wasn't clear.

9 We're called on to answer questions all the time
10 about regulations. We have not gotten anything on this
11 yet, okay.

12 JUDGE WILSON: But so the suitability information
13 definition has existed for something like fifteen years,
14 and you're the go-to people and nobody has asked you what
15 that means?

16 MR. KRONBERG: No. They haven't.

17 JUDGE WILSON: So maybe they understand it.

18 MR. KRONBERG: All right. I don't - - - I don't
19 think - - -

20 JUDGE WILSON: I heard - - - what I heard Ms.
21 Rosenbluth say, and maybe you don't agree - - -

22 MR. KRONBERG: Right.

23 JUDGE WILSON: - - was that at least as to the
24 suitability information - - -

25 MR. KRONBERG: Yes.



1 JUDGE WILSON: - - - if the producer goes through
2 that as a checklist and asks the client about those sorts
3 of information, that would be a safe harbor with a couple
4 of caveats.

5 One caveat is that there's no obligation on the
6 producer, but if - - - if the potential customer says well,
7 wait a minute, there's some other things about my situation
8 you ought to know, the producer's got to take that into
9 account although there's no obligation to ask for that.
10 And there are other pieces of regulation outside of the
11 suitability information that the producer's going to have
12 to comply with as well.

13 But essentially, that checklist is - - - she said
14 exemplary, but if you complete it, that's a safe harbor.
15 Would that be vague? If that's - - - if that's the
16 interpretation?

17 MR. KRONBERG: If that - - - if that language is
18 specific in the regulation, which I don't read it that way
19 - - -

20 JUDGE WILSON: Um-hum.

21 MR. KRONBERG: - - - maybe that would be
22 different. But - - - but I don't - - -

23 JUDGE WILSON: That's - - - the maybe is what's -
24 - - let's see if we can get past the maybe.

25 Suppose that was the definitive interpretation.



1 This is a safe harbor if you go through that checklist.
2 Would you still have a vagueness problem?

3 MR. KRONBERG: On that particular part, no.

4 JUDGE WILSON: Okay.

5 MR. KRONBERG: I don't think I would.

6 JUDGE WILSON: So then what are the other parts
7 that you would have a vagueness problem with?

8 MR. KRONBERG: Whose - - - again, whose interest
9 is at stake, because as we litigated in the Vestal case,
10 which you refused to hear from the Third Department, I
11 represented a life insurance broker who was asked by an
12 attorney husband to get life insurance that he was
13 absolutely not qualified for because he had drug and
14 alcohol problems.

15 JUDGE RIVERA: Yeah, but isn't there a definition
16 - - - the consumer means the owner or prospective
17 purchaser?

18 MR. KRONBERG: Sorry, Your Honor?

19 JUDGE RIVERA: What's vague there? There is a
20 definition. Consumer means the owner or prospective
21 purchaser.

22 MR. KRONBERG: But that's - - -

23 JUDGE RIVERA: But what is vague in that?

24 MR. KRONBERG: Because the best interest, the way
25 the regulation defined it, and is admitted in the reply



1 brief - - -

2 JUDGE RIVERA: No, no. I'm asking you about that
3 definition. What's vague in that? Consumer means the
4 owner or respective purchaser - - -

5 MR. KRONBERG: Because - - -

6 JUDGE RIVERA: - - - of the policy; excuse me.

7 MR. KRONBERG: Because it's an incomplete
8 segment.

9 JUDGE RIVERA: Okay.

10 MR. KRONBERG: It's the consumer and it has to
11 look - - - and the agent has to look at the best interest
12 for the consumer, but the myth in the reply brief - - - and
13 I'm happy to cite the exact page - - - that it could also
14 mean the beneficiary of a life insurance policy.

15 JUDGE RIVERA: No, it doesn't say that. But I'm
16 happy to see what page you're talking about. I think they
17 clarified that it's this definition that applies, but if I
18 misread their brief that's fine.

19 MR. KRONBERG: At page 4 of their reply brief.

20 JUDGE RIVERA: Okay.

21 MR. KRONBERG: "The needs of the beneficiary
22 should be considered" second para - - - or first paragraph,
23 last sentence.

24 Now, they go on to say yes, it's this consumer -
25 - -



1 JUDGE RIVERA: But how is considering - - - that
2 sounds like a consideration, not that that's the consumer.

3 MR. KRONBERG: Fine. Because to go back to the
4 Vestal case - - -

5 JUDGE RIVERA: Yeah.

6 MR. KRONBERG: - - - the life insurance policy
7 that the applicant wanted was completely unsuitable, one,
8 for himself, and for the needs of the beneficiary, okay.
9 Third Department upheld dismissal for us based on Murphy,
10 saying you asked for this, you got it, and that's fine.
11 That will no - - - Murphy will no longer be good law. This
12 regulation reverses it. And to me, it's absolutely clear.
13 And if I may - - -

14 JUDGE RIVERA: Let's say we disagree with you.
15 Let's say we're not so clear. Do you lose?

16 MR. KRONBERG: I'm sorry, Your Honor?

17 JUDGE RIVERA: Let's say we disagree with you
18 about this - - - your argument that this overrules Murphy.
19 Let's say we do not see it that way.

20 MR. KRONBERG: Okay.

21 JUDGE RIVERA: Do you lose?

22 MR. KRONBERG: Yes.

23 JUDGE RIVERA: You've already said the factors
24 you agree with Judge Wilson and - - -

25 MR. KRONBERG: Yes.



1 JUDGE RIVERA: - - - and the fact it's a safe
2 harbor you said okay, with respect to that, maybe that
3 resolves it, but what else remains? The consumer is
4 defined. What else?

5 MR. KRONBERG: You mean what other - - - what
6 else makes it vague?

7 JUDGE RIVERA: Yes. What else makes it vague.
8 I'm trying to get to Judge Garcia's question. What are the
9 actual - - - parts of it are vague?

10 MR. KRONBERG: The vagueness comes from the fact
11 that this is, as mentioned, and is clear, it's a process.
12 You're going to have the DFS investigate agents and brokers
13 about a process. And if I may, I think there's actually
14 something dispositive of my argument, which both I cite at
15 page 23 of our respondent's brief, and DFS cites at page 4
16 of their brief, which is an official DFS - - - there's a
17 hyperlink there, and it's a sixteen-page document that
18 clarifies the regulation.

19 Now, from my perspective, just as a lay person, I
20 would say if the regulation is clear, and not
21 unconstitutionally vague. Why do you need a sixteen page
22 explanation of what you were trying to say?

23 If, as they say in their papers, they're the
24 experts, and they've been doing this and they took all this
25 time to draft this regulation, why - - - why did you need

1 sixteen pages to clarify it?

2 JUDGE WILSON: I'm sorry.

3 MR. KRONBERG: But - - - but it's like - - -

4 JUDGE WILSON: I suspect that some of your
5 insurance policies are longer than sixteen pages in pretty
6 small type.

7 MR. KRONBERG: Very much so, Judge. And the law
8 in the State of New York is that insured is bound by that
9 policy, whether or not they could even speak English, or
10 whether or not they have read it. But that's not going to
11 apply here.

12 I think it's really telling that at the very
13 first question, if - - - again, it supports my view that
14 this overturns Murphy, and it says that, "The Department
15 views the best interest standard more as a process than as
16 a singular outcome". Murphy is an outcome case. This
17 regulation by it - - -

18 JUDGE RIVERA: But isn't - - - isn't that simply
19 recognizing the obvious that a consumer has particular
20 concerns? Perhaps, some are shared by other consumers, but
21 they may have a unique situation and as Judge Cannataro has
22 already said, what does the regulation require but that the
23 person who's trying to provide these expert services to the
24 consumer is not thinking about how deep they can make their
25 wallet, but what are the needs of the consumer? That's



1 your priority.

2 Yes, of course you're going to make a living off
3 of it, but the priority is the consumer; not you.

4 MR. KRONBERG: I - - - your point is well taken,
5 Judge, and I'll go back to what you said in 1997 in Murphy
6 which is insurance brokers and agents are not financial
7 managers. And that insureds are the best ones to know what
8 their needs are.

9 JUDGE RIVERA: So that's - - - that's why - - -

10 MR. KRONBERG: And I think that was too vague.

11 JUDGE RIVERA: - - - it's about the
12 recommendations that you make. The consumer can make their
13 own decision whether or not they're persuaded and think
14 yes, that makes the best sense for me. Thank you for the
15 information.

16 MR. KRONBERG: I think you can - - - you're
17 correct, Judge, and I think you can drive a truck through
18 what a recommendation is or isn't.

19 As somebody who handles the litigation when
20 everything falls apart, I will tell you, every plaintiff's
21 attorney, like Mr. D'Antonio argued yesterday, who handles
22 these cases on behalf of plaintiffs, they're going to argue
23 that any statement was a recommendation.

24 What's going to happen is the courts are going to
25 be inundated with cases trying to clarify what these terms



1 mean.

2 JUDGE SINGAS: Counselor, suppose we determine
3 that it's not unconstitutionally vague.

4 MR. KRONBERG: Yes.

5 JUDGE SINGAS: What are you asking for; remittal
6 for the remainder of your issues or for us to decide?

7 MR. KRONBERG: I'd like you to decide. But I'm
8 glad you mentioned that, Judge, because this is how I'd
9 like to conclude.

10 As I said, I think if you let this regulation
11 stand, there's going to be more litigation than anyone can
12 imagine, and it's going to go against the admonition in
13 Murphy that warned against opening up the floodgates to
14 more litigation.

15 The worst that can happen is if you affirm it, is
16 we'll go back to the drawing board. I mean, it won't be
17 the end of it.

18 DFS and my clients are going to sit down
19 together, I would like with our involvement, and figure out
20 something that's workable. I don't believe it's the end of
21 the line. Thank you for your time.

22 ACTING CHIEF JUDGE CANNATARO: Thank you,
23 counsel.

24 MS. ROSENBLUTH: I'd like - - -

25 JUDGE RIVERA: Counsel, can you address this



1 issue about the reply brief, page 4?

2 MS. ROSENBLUTH: Oh, sure. That's about the
3 consideration of the interest of the beneficiary? Sure.

4 So as Your Honor identified, the regulation does
5 define consumer as the owner or prospective purchaser of
6 the policy. The guidance makes clear that the needs of the
7 beneficiary should be considered to the extent that they're
8 relevant to serving the purchaser's interest.

9 To the extent that they diverge in some ways, and
10 that the purchaser does not have a certain sense of what
11 the beneficiary's interest are, the needs of the purchaser
12 control.

13 JUDGE TROUTMAN: What do you say with respect to
14 the claim that there will be much litigation on the issue
15 of recommendation?

16 MS. ROSENBLUTH: So my first point, Your Honor,
17 is that this regulation has been in effect in some form or
18 another, including with a similar definition of
19 recommendations since 2010. So for over a decade. There
20 are zero reported cases of consumers bringing lawsuits to
21 enforce Reg. 187. So I think that should give this Court
22 comfort that we're not opening the floodgates here.

23 JUDGE RIVERA: Well, but what's different?
24 Obviously, something's different.

25 MS. ROSENBLUTH: Sure. There is - - - there are



1 differences, and obviously, there's a more consumer-
2 friendly standard. However, there are a number of
3 safeguards built into the regulation that mitigate against
4 this risk of inundation, as it were.

5 For example, the regulation makes very clear in a
6 number of places that neither the department nor consumers
7 are to second-guess producer's judgments made with the
8 benefit of hindsight. The definition of best interest ties
9 the duty to these circumstances then prevailing at the time
10 of the recommendation.

11 Similarly, the definition of suitability
12 information ties - - -

13 JUDGE RIVERA: Are you making the producer a
14 fiduciary?

15 MS. ROSENBLUTH: Absolutely not, Your Honor. The
16 fiduciary duty is an ongoing duty that basically requires a
17 fiduciary to act in the interest of another on an ongoing
18 basis. And usually exercises discretionary control over
19 managing the beneficiary's assets or making decisions on
20 behalf of the beneficiary.

21 ACTING CHIEF JUDGE CANNATARO: Counsel, what
22 about this argument that really, even though the regulation
23 focuses itself towards a recommendation, the whole
24 interaction between the producer and the prospective client
25 is the process of making a recommendation.



1 So basically, everything that takes place in the
2 context of that relationship could conceivably fall under
3 the umbrella of recommendation.

4 MS. ROSENBLUTH: Right. Well, the definition of
5 a recommendation is tied to something that reasonably is
6 interpreted as advice, and results in the consumer entering
7 into a transaction in reliance on that advice. So there's
8 going to be a limited subset of statements made within that
9 interaction that actually are reliance inducing.

10 And then, just to briefly respond to my
11 opponent's invocation of the Vestal case, again, as a sort
12 of harbinger of bad things to come. That case would not
13 have come out differently under this rule.

14 In that case, the husband made material
15 misrepresentations on his policy - - - on his application.
16 Under 224.4(f), the producer is not liable if it is later
17 discovered that a recommendation was made on the basis of
18 materially inaccurate information provided by the consumer.

19 JUDGE GARCIA: Counsel, on, I think Judge Singas'
20 point, if we were to decide your way on the vagueness
21 question, what do you think the rest - - - about the rest
22 of the issues? Back to the Appellate Division or for this
23 Court?

24 MS. ROSENBLUTH: No, I agree with Mr. Kronberg
25 here that these are pure questions of law, and the Court



1 should proceed to dispose of the entire appeal and all the
2 issues presented.

3 ACTING CHIEF JUDGE CANNATARO: Thank you,
4 Counsel.

5 MS. ROSENBLUTH: Thank you.

6 (Court is adjourned)

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C E R T I F I C A T I O N

I, Ellen S. Kolman, certify that the foregoing transcript of proceedings in the Court of Appeals of New York State Department of Financial Services v. Independent Insurance Agents and Brokers of New York, Inc., No. 73 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Ellen S. Kolman

Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: September 15, 2022

