



On April 29, 2021, the Appellate Division Third Department issued a **unanimous** decision in which it held that Regulation 187 as amended is unconstitutional, dealing a “monumental” victory to Big I NY. The New York State Department of Financial Services, (“DFS”) subsequently filed for and was granted leave to further appeal to the New York Court of Appeals. The amended regulation remains in force until and unless the Court of Appeals ultimately overturns it.

In November 2018, an Article 78 legal proceeding was filed in the Albany County Supreme Court jointly by Big I NY and PIA NY, acting together, against the DFS, to challenge what was the first amendment to NY Insurance Regulation 187 that the DFS promulgated. The title of the amended regulation is “Suitability and Best Interests in Life Insurance and Annuity Transactions”.¹ It was approved by DFS Superintendent Maria T. Vullo on July 17, 2018, and it took effect on August 1, 2019. In essence, it held Producers, (Brokers and Agents alike), to a Fiduciary-like, “Best Interests” standard in the procurement of life insurance and annuities.

An Article 78 proceeding is used to appeal or litigate the decision of a New York State or local agency to the New York courts. It is a lawsuit brought on by a “petition” as opposed to a Summons & Complaint. There are four instances where an article 78 proceeding is proper: (1) to review a decision of a state body or officer that was based on insufficient evidence; (2) to review a decision of a state body or officer that was obviously incorrect or unreasonable, or based on an error of law; (3) to compel a state body or officer to act; and, (4) to prohibit a state body or officer from acting beyond its authority.

Based on all of the criteria listed above, the purpose of our Article 78 legal proceeding was to have the court declare that the first amendment to the Regulation was invalid and should be stricken.

In the December 2018 issue of The E&O Report, we reviewed the six separate and distinct legal arguments that we made in support of the petition. Of course the DFS, through the New York State Attorney General acting as their attorneys, opposed our lawsuit. The DFS filed a motion to dismiss and we opposed. Justice Henry Zwack of the Albany County Supreme Court issued an Order in August 2019, denying and dismissing the petition and holding that the first amendment to Regulation 187 was proper.

The Big I New York board made the decision to appeal that court decision to the New York Appellate Division, Third Department in Albany. PIA NY decided not to participate. The appellate papers were fully briefed and submitted to the appellate court by both sides in early 2021.

On March 10, 2021, oral argument of the appeal was held virtually before the judges of the Appellate Division, Third Department. Thereafter, on April 29, 2021, the Appellate Division Third Department issued a **unanimous** decision in which it held that Regulation 187 as amended is unconstitutional.² In its decision, the appellate court stated the following:

"Here, while the consumer protection goals underlying promulgation of the amendment are laudable, as written, the amendment fails to provide sufficient concrete, practical guidance for producers to know whether their conduct, on a day-to-day basis, comports with the amendment's corresponding requirements for making recommendations and compiling and evaluating the relevant suitability information on the consumer." The appellate court further stated the following in its decision:

"Additionally, once a recommendation is deemed to have been made, the guidelines with respect to the suitability information that producers must obtain from the consumer and the suitability considerations that must necessarily be disclosed are inadequate to the extent that they rely upon subjective terms that lack long-recognized and accepted meanings and provide insufficient guidance with respect to how producers must conduct themselves in order to comply with the amendment." The DFS recently filed an appeal of the decision issued by the Appellate Division, Third Department, to the New York Court of Appeals; this is the highest court in the New York Court System. Big I NY is committed to the legal fight against this amended regulation. We are hopeful that the Court of Appeals will ultimately affirm the decision issued by the Appellate Division, Third Department and agree that Amended Regulation 187 is unconstitutional.

The filing of the appeal by the DFS in the Court of Appeals stays the decision of the Appellate Division, Third Department. Accordingly, at the current time New York insurance agents and brokers should be certain to comply with the various requirements of Amended Regulation 187.

We will continue to keep you advised of the status of the legal challenge to NY Insurance Regulation 187 as the litigation progresses. However, if any Big I NY member has a question regarding the legal challenge, please contact Big I NY's Assistant Vice President of Government Relations, Scott Hobson, at shobson@biginy.org. Or, you can always call us at 914-948-7000.

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[1] The caption of the Article 78 Petition is Independent Insurance Agents and Brokers of New York, Professional Insurance Agents of New York State, Inc., et al. v. The New York State Department of Financial Services and Maria T. Vullo; The Albany County Supreme Court Index Number for the action is 907005-18.

[2] If you would like to review copies of the legal papers that supported the article 78 petition that was filed in the Albany County Supreme Court and Judge Zwack's decision in connection with the petition, or the appellate papers that were filed in connection with the appeal to the Appellate Division, Third Department and the appellate court decision that was issued, they are available on the Big I NY website under the area for the Article 78 Challenge to Insurance Regulation 187.

Keidel, Weldon & Cunningham, LLP concentrates its practice in the defense of insurance agents and broker's errors and omissions claims and litigation, errors and omissions loss control counsel and education, insurance coverage analysis and litigation and insurance regulatory matters. Please direct any comments or questions to James C. Keidel, Esq. by mail to the main office of Keidel, Weldon & Cunningham, LLP, at 925 Westchester Avenue, Suite 400, White Plains, NY 10604, telephone at (914) 948-7000 or e-mail at jkeidel@kwcllp.com. The law firm also maintains offices in Syracuse, New York; New York City, New York; Wilton, Connecticut; Fair Lawn, New Jersey; Warwick, Rhode Island, Philadelphia, Pennsylvania, Williston, Vermont and Naples, Florida.

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