

No. 121452

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**IN THE SUPREME COURT OF ILLINOIS**


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J Richard Lee Van Dyke d/b/a	)	
Dick Van Dyke Registered Investment	)	Appeal from the Appellate Court of
Advisor,	)	Illinois, Fourth Judicial District
Plaintiff-Appellee,	)	No. 4-14-1109
	)	
v.	)	
	)	
Jesse White, in his official capacity as	)	There Heard on Appeal from the
Illinois Secretary of State, The Illinois	)	Circuit Court of the Seventh Judicial
Department of Securities, and Tanya	)	Circuit, Sangamon County, Illinois,
Solov, in her official capacity as Director	)	No. 14-MR-305
Of the Illinois Department of Securities,	)	
Defendants-Appellants	)	The Honorable
	)	John W. Belz,
	)	Judge Presiding

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**AMICUS CURIAE BRIEF OF NORTH AMERICAN SECURITIES  
ADMINISTRATORS ASSOCIATION, INC. IN SUPPORT OF  
THE ILLINOIS DEPARTMENT OF SECURITIES**

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## INTEREST OF AMICUS CURIAE

The North American Securities Administrators Association, Inc. (“NASAA”) is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. NASAA has 67 members, including the Illinois Department of Securities and the securities regulators from all other U.S. states. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in connection with the offer and sale of securities.

NASAA members’ fundamental mission is protecting investors and their principal activities include registering certain types of securities, licensing the firms and agents who offer and sell securities, investigating violations of state law, and, where appropriate, instituting enforcement actions. NASAA and its members also educate the public about investment fraud and advocate for the adoption of strong, fair, and uniform securities laws and regulations at both the state and federal level.

NASAA supports the work of its members by coordinating multi-state enforcement actions, offering training programs, publishing investor education materials, and presenting the views of its members in testimony before Congress and in comment letters to regulatory agencies on matters of securities regulation. Another core function of the association is to represent the membership’s interests, as *amicus curiae*, in significant cases involving the interpretation and application of state and federal securities laws and the rights of investors.

NASAA and its members have an interest in this matter because the outcome of this case could impede the ability of the Illinois Securities Department and other state securities regulators to fulfill their important investor protection missions. Further, an

adverse decision in this case would set a negative precedent, not only in Illinois, but throughout the country.

### **SUMMARY OF THE ARGUMENT**

The appellate court below correctly determined that Section 12(J) of the Illinois Securities Law of 1953, 815 ILCS 5/12(J), applies to Van Dyke's conduct because Van Dyke was registered with the Illinois Department of Securities as an investment adviser. Section 12(J) is a broad antifraud provision that holds investment advisers to high fiduciary duties. The appellate court was incorrect, though, not to apply these heightened fiduciary duties to Van Dyke's conduct in switching clients between indexed annuities. Instead, the appellate court erroneously applied suitability standards contained in Illinois' insurance regulations. Doing so was contrary to precedent wherein federal and state investment adviser antifraud provisions are held to be applicable to the entire scope of an investment adviser's relationship with a client. Furthermore, carving out an exception to an investment adviser's otherwise inviolable fiduciary duty obligations for sales of indexed annuities would erode the protections afforded to investors under federal and state securities laws. This Court should therefore hold instead that Van Dyke's fiduciary duties under Section 12(J) did apply to Van Dyke's conduct at issue.

### **ARGUMENT**

#### **I. Van Dyke Owed Fiduciary Duties to his Advisory Clients under the Illinois Securities Law.**

Investment advisers are fiduciaries of their clients. As the U.S. Supreme Court explained in the landmark 1963 case *SEC v. Capital Gains Research Bureau*, 375 U.S. 180 (1963), the federal Investment Advisers Act of 1940 "reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship . . ."

*Id.* at 191. Advisers must act with “utmost good faith, and [make] full and fair disclosure of all material facts.” *Id.* at 194. This duty under federal law springs from Section 206 of the Investment Advisers Act, the statute’s antifraud provision. *See Transamerica Mortg. Adv. v. Lewis*, 444 U.S. 11, 17 (1979). It appears this Court has not had occasion to discuss the scope of an investment adviser’s duties under the Illinois Securities Law, but other state supreme courts have agreed with *Capital Gains* that investment advisers (whether registered with the state’s securities regulator or not) owe their clients fiduciary duties under state securities laws. *See, e.g., Hays v. Ellrich*, 31 N.E.3d 1064, 1073 (Mass. 2015); *Iacurci v. Sax*, 99 A.3d 1145, 1156 (Conn. 2014); *Udall v. Colonial Penn. Ins. Co.*, 812 P.2d 777, 785 (N.M. 1991). *See also* Arthur Laby, *SEC v. Capital Gains Research Bureau and the Investment Advisers Act of 1940*, 91 B.U. L. REV. 1051, 1079 (2011) (“The advisers’ federal fiduciary duty has become firmly entrenched in the law. The obligation appears in court decisions, SEC enforcement actions, and SEC administrative materials, such as rulemaking releases and decisions by administrative law judges. The principle appears unassailable.”). Both federal law and Illinois law make it a violation for investment advisers to engage in fraudulent conduct. *See* 15 U.S.C. § 80b-6. *See also* 815 ILCS 5/12(J).

When interpreting Section 12(J), this Court should look to federal precedent for guidance. *Tirapelli v. Advanced Equities, Inc.*, 351 Ill.App.3d 450, 455, 813 N.E.2d 1138, 1142 (1<sup>st</sup> Dist. 2004). This Court accordingly should follow *Capital Gains* and the decisions of other state courts – including the appellate court below – and hold that Van Dyke owed fiduciary duties to his advisory clients.

**II. This Court Should Apply Van Dyke’s Fiduciary Duties to the Entire Scope of His Advisory Relationship to Clients, Including the Indexed Annuity “Switches” at Issue in this Case.**

**A. Courts do not limit an adviser’s fiduciary duties to transactions or advice regarding securities.**

Securities laws should be construed broadly to effectuate their remedial purposes. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). State courts recognize the necessity of interpreting securities laws broadly to promote investor protection. *See, e.g., Carrington v. Arizona Corp. Comm’n*, 18 P.3d 97, 99 (Ariz. 2001); *King v. Pope*, 91 S.W.3d 314, 324 (Tenn. 2002); *Maryland Secs. Comm’r v. U.S. Secs. Corp.*, 716 A.2d 290, 299 (Md. 1998). In this vein, federal courts have applied an adviser’s fiduciary duty obligations under Section 206 of the Investment Advisers Act to the entire scope of the adviser’s relationship with a client. For example, in *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1977), the Second Circuit Court of Appeals held that Section 206’s antifraud provisions were not limited to only conduct involving the purchase or sale of a security. *Id.* at 877. Rather, “Congress intended to protect investors against frauds committed by investment advisers who managed their clients’ funds, as well as frauds committed by advisers who did not make purchases or sales [of securities] for their clients.” *Id.*

More recently, in *SEC v. DiBella*, No. 04-cv-1342, 2005 WL 3215899 (D. Conn. Nov. 29, 2005), *aff’d* 587 F.3d 553 (2d Cir. 2009), a federal district court explained that an investment adviser can violate its fiduciary duties under section 206 even if the adviser has not rendered any actual investment advice to a client: “Section 206(2) contains no requirement that a violation of that section occur in connection with the provision of investment advice.” *Id.* at \*8. The violation at issue in *DiBella* was an adviser’s failure

to fully disclose a conflict of interest, not conduct related to investment advice or to the purchase of a security.

The U.S. Securities and Exchange Commission (“SEC”) agrees. In a 1985 rule release, the SEC wrote:

[u]nlike other general provisions in the federal securities laws which apply to conduct in the offer or sale of securities or in connection with the purchase or sale of any security, the pertinent provisions of Section 206 do not refer to dealings in securities but are stated in terms of the effect or potential effect on prohibited conduct on the client.

SEC Release No. IA-1092, 39 SEC Docket 494 (Oct. 8, 1987) (internal citations omitted). The release stated further that Section 206 applies “in circumstances in which the fraudulent conduct arose out of the investment advisory relationship between an investment adviser and its clients, *even though the conduct does not involve a securities transaction.*” *Id.* (emphasis added). The views expressed by the SEC in this release were—and are—shared by NASAA and its members. *See id.* (“The views expressed in this statement were developed jointly by Division [of Investment Management] staff and by the North American Securities Administrators Association to . . . provide uniform interpretations of federal and state adviser laws to financial planners and other persons.”).

**B. The law is unclear as to whether securities law or insurance law applies when a conflict exists regarding the appropriate standard of care to apply to the conduct of a dually-registered investment adviser.**

Although it is well settled that investment advisers owe their clients fiduciary duties, it is less clear what result should follow when these securities law duties butt up against different standards set under other sources of law. In particular, there is no consensus across the nation as to the duties a dually-registered investment adviser and



insurance producer owes to a client when selling an indexed annuity or similar securities-like insurance product.

This Court is, of course, the ultimate arbiter of Illinois law. See *Fergus v. Marks*, 321 Ill. 510, 514, 152 N.E. 557, 559 (1926). When faced with a conflict within state law, this Court has a duty to interpret the competing laws in a manner that best avoids inconsistencies and gives effect to each. *Barragan v. Casco Design Corp*, 216 Ill.2d 435, 441-442, 837 N.E.2d 16, 21 (2005). In the present case, when faced with the conflict between Van Dyke's competing duties under Illinois' insurance and securities laws, the appellate court below applied the less stringent suitability standards set by Illinois insurance law, 50 Ill. Adm. Code § 3120.50. This Court should reject that approach and instead hold dually-registered investment advisers and insurance producers like Van Dyke to their higher fiduciary duties imposed by the Illinois Securities Law.

In other states, there would be no conflict of laws issue at all in this case because insurance producers are treated as fiduciaries of their insured customers. In *Tank v. State Farm Ins.*, 715 P.2d 1133 (Wash. 1986), the Supreme Court of Washington noted that this fiduciary relationship exists "because of the high stakes involved for both parties to an insurance contract and the elevated level of trust underlying insureds' dependence on their insurers." *Id.* at 385. Florida similarly treats insurance producers as fiduciaries. "Florida law has long recognized that an insurance broker owes a fiduciary duty of care to the insured." *Tiara Condominium Assn. v. Marsh, USA, Inc.*, 991 F. Supp. 2d 1271, 1279 (S.D. Fla. 2014).

California courts do not treat insurers as fiduciaries *per se*, but they do acknowledge that insurers owe heightened duties beyond those of a typical service

provider. See *Abbit v. ING USA Annuity & Life Ins.*, No. 13-cv-2310, 2017 WL 2123616, at \*15 (S.D. Cal. May 16, 2017). For example, in *Fischer v. Aviva Life & Annuity Co.*, No. 10-cv-1693, 2010 WL 3582559 (E.D. Cal. Sept. 10, 2010), a plaintiff asserted breach of fiduciary duty claims against an insurance company that had sold a life insurance policy to the plaintiff. The court denied the life insurance company's motion to dismiss because the defendant had "acted as investment advisers" to the plaintiff. *Id.* at \*6.

Van Dyke's reliance on *Babiarz v. Stearns*, 2016 IL APP (1<sup>st</sup>) 150988, 57 N.E.3d 639 (2016), for the proposition that he should be subject to the lower suitability standards set by Illinois insurance regulations is misplaced. *Babiarz* is distinguishable from the present case. Specifically, *Babiarz* involved an insurance agent controlled by the insurer, not an insurance producer like Van Dyke who was an independent contractor of the insurer.<sup>1</sup>

**C. When a conflict exists in the law regarding the appropriate standard to apply to the conduct of a registered investment adviser, this Court should apply the higher standard – in this case the fiduciary duty standard.**

The fiduciary duty investment advisers owe their clients is a critical component in the relationship between an adviser and his or her clients. If that fiduciary duty and the corresponding antifraud provisions of the law on which that duty is based are limited to only that portion of the relationship involving advice or transactions involving securities, investors who rely on their advisers to look out for their best interests would be harmed.

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<sup>1</sup> A "captive" insurance agent only works for one insurance company, and therefore only sells the one company's financial products. An "independent" agent, however, is not beholden to one insurance company and may sell financial products from an array of different insurance companies.

Further, when determining how to interpret the antifraud provisions of the Investment Advisers Act of 1940, the Supreme Court noted “Congress intended that Investment Advisers Act of 1940 to be construed like other securities legislation enacted for the purpose of avoiding frauds, not technically and restrictively, but flexibly to effectuate its remedial purpose.” *Capital Gains*, 375 U.S. at 193-95. An interpretation limiting the antifraud provisions applicable to investment advisers and the corresponding fiduciary duty they require to instances strictly involving securities transactions would be technical and restrictive, the antithesis of how such laws have been interpreted historically.

Not every individual licensed to sell insurance products may hold themselves out to be an investment adviser. In order to hold the title of “Investment Adviser,” an individual must take affirmative action to pass the state-mandated Series 65 exam administered by NASAA, which signifies a minimum competency with financial concepts (beyond just insurance products) as to show a person is both knowledgeable and capable of providing financial advice for a fee. Furthermore, a person must ensure the appropriate fees are paid and paperwork is filed with the state, along with the appropriate filings within the Investment Adviser Registration Depository (IARD) and the Central Registration Depository (CRD). Thus, when individuals hold themselves out as “Investment Advisers,” they are signaling to every potential investor that they are qualified to provide financial services advice beyond the scope of a typical insurance agent. The designation as an investment adviser serves an important purpose in attracting and building trust with potential investors.

An insurance agent in Illinois who only serves as an insurance agent and only advertises themselves as an insurance agent should be held solely to the Illinois Department of Insurance suitability regulations. However, Van Dyke is not only an insurance agent. Van Dyke was a registered investment adviser and marketed himself to clients as such. When a person holds themselves out as an investment adviser they are conveying that they are qualified to provide fulsome investment advice across the spectrum of financial products such as those offered and sold by Van Dyke. The investment adviser designation holds meaning to investors and value to advisers apart from any other license they may hold. It is because the investment adviser designation holds special meaning that those who have earned the right to call themselves investment adviser are held to a higher standard in dealing with their clients.

The lower court decision facilitates a system of regulatory arbitrage and perverse incentives. A regulatory regime that holds investment advisers to the higher fiduciary duty standard when selling securities, but a lower suitability standard when selling annuities incentivizes investment advisers to skew their recommendations towards insurance products such as annuities. This is because the fiduciary duty standard requires investment advisers to put their clients' interests before their own, and to otherwise disclose material facts and material conflicts of interest to the investor.

Conversely, the suitability standard only requires an adviser to have a reasonable basis to believe an investment is in a client's best interest based on an array of factors, including age, investment portfolio, and investment objective. While an annuity product may very well be suitable for a client, under the suitability standard, the investment

adviser is not required to disclose the conflicts of interest that may be inherent in their recommendation, namely the size of the commission the adviser is set to receive.

Investment advisers in Illinois will play off of the bifurcated system created by the Court of Appeals as they seek to avoid claims of breach of fiduciary when such claims are related to the purchase or sale of insurance products. They will do this by asserting that despite the comprehensive nature of the advisory relationship with the client, the advice involved an insurance product and not a security. Therefore, all claims for breach of fiduciary duty must fail. This defense tactic is commonly seen in arbitration disputes between clients and stock brokers. In those instances, clients frequently allege a breach of fiduciary duty<sup>2</sup> and in response the stock brokers argue that they are subject to a suitability standard and are not fiduciaries.

Investors in Illinois deserve the protection afforded by applying the fiduciary duty standard of care to insurance agents holding themselves out to be investment advisers within the state of Illinois.

Today, many investment advisers hold themselves out as being able to provide comprehensive financial advice, as Appellee did in this case, and provide advice to their clients over a broad range of financial activities ranging from tax planning, to investments, to insurance. It would make little sense to limit the antifraud provisions applicable to investment advisers to frauds related only to that part of a client's portfolio

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<sup>2</sup> FINRA arbitration statistics show the "Breach of Fiduciary Duty" controversy type has represented the greatest number of claims in FINRA arbitration cases each year since 2013. (See FINRA Dispute Resolution Statistics - Top 15 Controversy Types in Customer Arbitrations: <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics>)

that involved the buying or selling of securities, given the broad nature of the advice investment advisers provide their clients and the products linked to that advice.

**D. This Court should vacate the decision of the Appellate Court below and find that the indexed-annuity “switches” in this case violated Van Dyke’s fiduciary duties as an investment adviser.**

The findings made in the administrative proceedings and upheld by the Circuit Court below (before being overturned by the Appellate Court) demonstrated that the Appellee failed to uphold the fiduciary duty owed to his clients when he engaged in a scheme to “switch” his clients from previously held equity indexed annuities to new equity indexed annuities that resulted in significant surrender penalties for his clients and resulted in substantial new commissions for himself. While the Appellate Court determined that the equity indexed annuities at issue were not securities, that determination is not central to the determination that Appellee violated the antifraud provisions of Section 12(J). The question of whether the equity-linked products were securities ultimately makes no difference to the analysis. The Appellee, or any investment adviser for that matter, is not permitted to avoid its legal obligations to its clients by simply recommending a product believed by the adviser to not be a security.

Here, Appellee recommended that a number of his clients liquidate equity indexed annuities that he previously sold to them in order to purchase new equity indexed annuities from Appellee in his capacity as an insurance salesman. Appellee’s clients heeded his advice and, according to testimony and evidence presented during the administrative proceeding, sold their equity indexed annuities and purchased the new annuities recommended by Appellee. In doing so, Appellee’s advisory clients incurred substantial surrender fees, while Appellee generated more than \$180,000 in additional

commissions. Based upon this and other evidence presented during the administrative proceedings, the Secretary of State found that “the transactions at issue were both unsuitable and not in the best interest of [Appellee’s] clients” In Re Richard Lee Van Dyke DBA Dick Van Dyke Registered Investment Adviser, State of Illinois Secretary of State, Securities Department, Final Order, File No. 1100244 (Apr. 9, 2014) at ¶27, and that “[w]hile acting as an investment adviser and investment adviser representative, [Appellee] employed devices, schemes, or artifices to defraud clients,” *id.* at ¶34—a violation of Section 12(J).

When an insurance agent provides investment advice in their capacity as a registered investment adviser, they should be held to a fiduciary duty standard of care regardless of the financial product ultimately sold to an investor. Holding investment advisers to the lower suitability standard solely due to the sale involving an insurance product weakens investor protection as investment advisers selling such products will no longer be liable for failing to place the investors’ interest before their own or for failing to disclose material conflicts of interest within the sale of annuities.

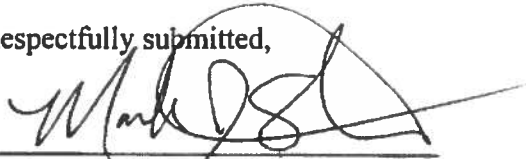
### CONCLUSION

For the reasons set out above, the decision of the appellate court should be vacated and the decision of the trial court reinstated.

Dated:

Respectfully submitted,

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**RULE 341(c) CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, this Rule 341(c) certificate of compliance, and the certificate of service, is 13 pages.

Dated: October 26, 2017

A handwritten signature in black ink, appearing to read 'C. Galanos', is written above a horizontal line.

Christopher D. Galanos

**CERTIFICATE OF SERVICE**

I certify that on October 26, 2017, I electronically filed the foregoing **AMICUS CURIAE BRIEF OF NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., IN SUPPORT OF THE ILLINOIS DEPARTMENT OF SECURITIES** with the Clerk of the Court for the Supreme Court of Illinois by using the Odyssey EfileIL System. A copy of the brief was served electronically to all registered users of the Odyssey EfileIL System. I further certify that the other participants in this appeal, named below, are not registered service contacts on the Odyssey EfileIL system, and thus were served by transmitting a copy from my email address to all primary and secondary email addresses of record designated by that participant on October 26, 2017. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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