No. 121452

IN THE SUPREME COURT OF ILLINOIS

RICHARD LEE VAN DYKE d/b/a Dick Van Dyke Registered Investment Advisor, *Plaintiff-Appellee,* v. JESSE WHITE, in his official capacity as Illinois Secretary of State, The Illinois Department of Securities, and TANYA SOLOV, in her official capacity as the Director of the Illinois Department of Securities., *Defendants-Appellants.*	On Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-14-1109, There heard on appeal from the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, No.: 14-MR-305 The Honorable John Belz, Judge Presiding

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CROSS REPLY BRIEF OF PLAINTIFF-APPELLEE

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POINTS AND AUTHORITIES

ARGUMENT

I. VAN DYKE DID NOT "ACT AS" AN INVESTMENT ADVISOR FOR ANY OF THE INSURANCE ANNUITY REPLACEMENTS AT ISSUE.

A. The Securities Department Inaccurately Portrays Van Dyke's Position and Attempts to Justify its Failure to Meet its Burden of Proof by Improperly Shifting that Burden to Van Dyke.

The Securities Department argues that "Van Dyke concedes that he acted as an investment adviser with regard to at least some of his clients' purchases of their Original [insurance annuity policies]." Appt's Reply, p. 30. Van Dyke made no such concession. In the next sentence, the Agency improperly shifts the burden of proof to Van Dyke by claiming that he has "assert[ed] that there is no evidence that *he continued to act as an investment advisor* when he recommended the replacement transactions." *Id.* (emphasis added). Van Dyke made no such argument. What Van Dyke said was as follows:

> Van Dyke has never disputed that he acted as an investment advisor *early on* when he had investment advisor agreements with *some* of his clients *and assisted them with liquidation of certain securities* to purchase the original annuities." But the Securities Department *never alleged* that he acted improperly in any of those earlier transactions.

Van Dyke Brief, p. 71 (emphasis added).

The Securities Department cannot dispute the accuracy of the above quote, so it mischaracterizes Van Dyke's words in an attempt to bootstrap irrelevant time periods into this case to literally *invent* a position that Van Dyke must somehow *disprove* that he was acting as an investment advisor when he engaged in the straightforward insurance annuity transactions at issue. Van

Dyke did not have the burden of proving anything in this case; the Securities Department did. Yet, the Agency continues, on page 31 of its Reply, to place the burden of proof on Van Dyke:

> Van Dyke cites no evidence demonstrating that their investment-adviser relationships ended when he subsequently recommended that they [surrender the original insurance annuities] to buy the [replacement insurance annuities]. . . . Nor does Van Dyke cite any testimony cabining his clients' view that he was their investment adviser to any transaction or time period. (AE Br. at 70-71). Rather, his clients testified that they viewed him as their financial adviser and relied on him for investment advice. (*E.g.,* R.720, 724, 730, 765, 768).

Appt's Reply, p. 31 (emphasis added). Van Dyke fully addressed the irrelevance of the testimony relied upon by Securities Department in the above-quote (Van Dyke brief, pp. 70-71), to which the Agency's only response is to double down with the same citations to irrelevant time periods while ignoring the detailed and accurate summary of the *relevant* and *undisputed* facts set forth by Van Dyke. *Cf.* Appt's Reply, pp. 29-31 to Van Dyke's brief, pp. 69-71.

The Securities Department does not dispute (and therefore concedes) that *each and every* "transaction" during the twenty (20) month period at issue in the Notice of Hearing involved, in fact, the surrender of an *insurance annuity policy* to be replaced by another *insurance annuity policy* (or policies). There is *no evidence* that Van Dyke provided *any* advice or services relating to stocks, bonds or any other "security" during any of those straightforward insurance annuity replacements. The best the Agency can come up with is a footnote wherein it argues that Van Dyke's financial planning agreement with the Klees was

effective for a minimum of three years. Appt's Reply, p. 31, n. 2. But the Agency never addresses how the *insurance annuity* exchanges with Jimmie Klee were in any manner related to that agreement, nor does it cite to any evidence or testimony to suggest that Van Dyke was acting pursuant to that agreement when he recommended to Klee that he purchase the insurance annuity replacements.[1]

The Securities Department's continued focus on the original annuities is puzzling for at least two reasons. First, the Agency has *never* taken the position that Van Dyke violated the Securities Law when he recommended the original insurance annuities. Indeed, the opposite is true. The very essence of the Agency's claim is that Van Dyke's insurance clients should have kept – and never surrendered – the original insurance annuities. Second, assume for a moment that the Agency *had alleged* that Van Dyke violated the Securities Law when, back in 2005, 2006 or 2007, he assisted *some* of his clients in selling stocks, bonds or other "securities" to obtain funds later used to purchase the original insurance annuities. *If* that had been alleged, it is *possible* to envision some overlap in the jurisdiction of the Securities Department and the DOI. Any alleged misconduct in liquidating the securities would be under the jurisdiction of the Securities Department, while any alleged misconduct in recommending

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[1] The testimony in the record about the Klee agreement came from auditor Clausen, who merely identified the agreement as one of the many documents obtained during the audit after which the ALJ admitted it into evidence. AR 527, Tr. p. 25.

the insurance annuities would be under the jurisdiction of the Department of Insurance. But that is not remotely what happened in the instant case.

Finally, the Securities Department fails to identify *any* testimony or evidence to suggest that Van Dyke actually employed any device, scheme or artifice to defraud any of the twenty-one (21) individual insurance clients at issue in the Notice of Hearing. The reason is obvious. Van Dyke's clients did not complain, they were happy with their insurance annuities, they testified in his favor, and not a single one of them claimed to be defrauded at any time. *See, e.g.,* Van Dyke Brief, pp. 20-25.

B. The Securities Department Ignores the Plain Language of Section 12J and Instead Relies on Inapplicable Federal Law.

The Securities Department does not contest or even address Van Dyke's analysis of the plain language of the definition of an "investment advisor" set forth in 815 ILCS 5/2.11 and its application to the "*acting as* an investment advisor" requirement of Section 12J. *See* Van Dyke Brief, pp. 68-69. The language unambiguously states that a person acts as an investment advisor only when he or she is rendering advice relating to "securities." *Id.*; 815 ILCS 5/2.11 (SA88). Rather than confront this critical *legal point*, the Securities Department merely asks this court to defer to its unsupported aggregate analysis by implying that some "evidence" (without identifying any) "fairly supports the agency's decision," and by inappropriately relying on a "clear error" standard of review. Appt's Reply, p. 30. Interpretation of Section 12(J) is, in fact, a straightforward

legal issue reviewed *de novo*. *Cinkis v. Village of Stickney Mun. Officers Electoral Bd.*, 228 Ill.2d 200, 210 (2008) ("agency's interpretation of the meaning of the language of a statute constitutes a pure question of law" in which "review is independent and not deferential"); Van Dyke Brief, p. 28.

Much of the Agency's Section 12(J) legal position is devoted to advancing a conclusory argument, devoid of any facts, by citing isolated portions of Section 12(J) and claiming that it broadly prohibits any device, scheme or artifice to defraud a client "without referring to or requiring a sale of a security in connection with the violating conduct." Appt's Reply, p. 32. The only way to read Section 12(J) in such a restrictive fashion is to ignore, as the Agency does, both the plain language of Section 12J and the definition of an investment adviser set forth on page 68 of Van Dyke's brief. Section 12(J), in full, states as follows:

> Sec. 12. Violation. It shall be a violation of the provisions of this Act for any person:
> . . .
>
> J. *When acting as an investment adviser*, investment adviser representative, or federal covered investment adviser, by any means or instrumentality, directly or indirectly:
>
> (1) To employ any device, scheme or artifice to defraud any client or prospective client;
>
> (2) To engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client; or
>
> (3) To engage in any act, practice, or course of business which is fraudulent, deceptive or manipulative. The Secretary of State shall for the

> purposes of this paragraph (3), by rules and regulations, define and prescribe means reasonably designed to prevent such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

815 ILCS 5/2.12(J) (emphasis added). The plain language of Section 12(J) *requires* proof that Van Dyke was "*acting as* an investment advisor;" an inquiry that can only be considered in the context of the definition of an "investment advisor" set forth in Section 2.11 of the Act. SA88; 815 ILCS 5/2.11.

The Agency argues that the language in Section 12J was modeled after Section 206 of the IAA (Investment Advisor's Act of 1940, 15 U.S.C. § 80b-6) and federal law "does not require that investment advice involve a security to prove a violation." Appt's Reply, p. 32, citing *Abrahamson v. Fleschner,* 568 F.2d 862, 877-879 (2d Cir. 1977); *SEC v. Lauer,* 2008 WL 4372896, 2008 U.S. Dist. Lexis 73026 (S.D. Fla. 2008). There are at least two fatal flaws with the Agency's reliance on federal law. First, the federal cases cited all involved an investment advisor giving advice about *securities* (and were brought by litigants who claimed they were defrauded). *Abrahamson,* 568 F.2d at 878 ("Plaintiffs here alleged fraudulent representations relating to specific purchases and sales of unregistered *securities* . . . .); *Lauer,* 2008 U.S. Dist. LEXIS 73026 at *29 (alleged misrepresentation that no more than 20% of value of Fund would be "invested in the *securities* of any one issuer").

Second, and more importantly, the General Assembly substantially modified the federal language by adding the italicized phrase "*[w]hen acting as* an investment advisor . . . ." The federal statute provided only as follows:

> § 80b-6. It shall be unlawful for *any investment adviser*, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly--
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;
> . . .
> (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

15 U.S.C. § 80b-6 (emphasis added); *Abrahamson,* 568 F.2d at 869 n.10 (quoting Section 206 of the IAA). Unlike the federal statute, the General Assembly *added language* expressly limiting Section 12J to situations where an advisor is *acting as* an investment advisor at the time of the purported violation.

The Securities Department is a state agency, not a federal one. Its jurisdictional authority derives from state law, not federal law. Yet, throughout this case the Agency repeatedly cites to and relies upon inapplicable federal cases in an effort to justify its decision to grossly exceed its jurisdiction and delve into

regulatory areas in which it has no statutory authority, rules, regulations or expertise.

II. VAN DYKE DID NOT FORFEIT ANY OF THE ISSUES RAISED IN THE CROSS-RELIEF SECTION OF HIS BRIEF.

The Securities Department inaccurately suggests that Van Dyke never raised an argument about the total amount of the fines "in the administrative proceedings or circuit court, and so forfeited it on appeal." Appt's Reply, p. 34. The total amount of the fines never became an issue until the Agency rendered its Final Order. Van Dyke argued to the Agency that *no violations* occurred (and the Agency lacked jurisdiction), and therefore no fine whatsoever could be imposed. *See, e.g.,* AR18-AR29; AR175-AR226. Obviously it was impossible to challenge the total amount of the fines at any point prior to the Final Order. Thereafter, in the circuit court, Van Dyke advanced the same points and provided the court with a detailed summary of the evidence presented during the hearing – on an individual basis – summarizing for example the testimony of his clients who were all happy with the replacement insurance annuities, never claimed to be defrauded, and were informed of the details of the old annuities versus the new annuities. C121-C159. After summarizing the testimony of the fourteen clients who testified in his favor at the hearing (C139-C149), Van Dyke pointed out that not a single one of them supported the Agency's claim that "Van Dyke deceived them" in any of the ways alleged in the Notice of Hearing. C149. Van Dyke further noted that the Securities Department found fraud as to all 21

insurance clients and all 33 insurance annuity replacements, yet the prosecutor presented no evidence at all relating to seven of the clients; three of whom were deceased thus resulting in their heirs receiving enhanced death benefits under the new insurance annuities (due to the bonuses and death benefit features of the new annuities) with no penalty or surrender costs. C155-C156.

The forfeiture doctrine does not restrict parties to making the same arguments advanced in the circuit court on a particular issue. *Brunton v. Kruger*, 2015 IL 117663, ¶ 76. As this Court put it in *Brunton*, "[w]e require parties to preserve issues or claims for appeal; we do not require them to limit their argument here to the same arguments that were made below." *Id.* (finding that even if appellant did not make "common interest argument in the circuit court," no forfeiture occurred because argument was relevant to issue raised in circuit court). Finally, as this Court is aware, forfeiture is a limitation on the parties, not on the court. *Behl v. Duff*in, 406 Ill. App. 3d 1084, 1094 (4th Dist. 2010) (declining to apply forfeiture where necessary to achieve a just result); *Seitz-Partridge v. Loyola University of Chicago*, 409 Ill. App. 3d 76, 88 (1st Dist. 2011) (same).

III. THIS COURT SHOULD REMAND WITH DIRECTIONS TO THE CIRCUIT COURT TO PERMIT BRIEFING ON THE ISSUE OF WHETHER VAN DYKE IS ENTITLED TO ATTORNEY'S FEES.

The Securities Department does not dispute that the plain language of Section 100/10-55 *requires* an award of attorney's fees "in any case" in which "any administrative rule [is] invalidated by a court for any reason," including when the agency has exceeded its statutory authority or has failed to follow the

required statutory procedures to adopt the rule. Indeed, the rule contains *mandatory* language stating that "the court *shall award* the party bringing the action . . . reasonable attorney's fees." 5 ILCS 100/10-55(c) (emphasis added); Van Dyke Brief, pp. 74-75. *Cf., People v. Dominguez*, 2012 IL 111336, ¶ 17 ("The use of the word 'shall' means that it is mandatory . . . ."). Instead, the Agency inappropriately relies on forfeiture by arguing that Van Dyke never properly preserved the issue in the circuit court and he purportedly "does not argue that he is entitled to fees because the Department lacked authority to prosecute this action." Appt's Reply, pp. 36-37.

Van Dyke contested the jurisdiction of the Securities Department and its improper rule-making at every stage of the proceedings in this case. *See, e.g.,* AR11-AR13; AR15-AR29; AR64-65, C121-C137; C263-C284. The only reason the attorney's fees issue has not been briefed in the circuit court is because the parties never got to that stage. The "court" that invalidated the Securities Department's made-up rules in this case – and determined that the Agency exceeded its jurisdiction by treating insurance annuities as securities – was the appellate court, not the circuit court. *Van Dyke*, 2016 IL App (4th) 141109, ¶¶22-28, 36, 38. If the circuit court had ruled in Van Dyke's favor, as it should have, Van Dyke would have filed an appropriate motion for his attorney's fees with a supporting affidavit. It was premature to seek such relief prior to that point. *Cf. Ackerman v. Ill. Dept. of Public Aid*, 128 Ill. App. 3d 982, 983 (3d Dist. 1984) (after the circuit court invalidated rule, "plaintiff *then applied* to the circuit court for an

allowance of attorney fees . . . .") (emphasis added). All Van Dyke is asking for is a remand to the circuit court to permit him to seek his attorney's fees now that the appellate court has ruled in his favor. *See also Behl*, 406 Ill. App. 3d at 1094.

On the merits, the Securities Department cites various cases claiming that it did not exceed its jurisdiction or engage in improper rulemaking because all it did was "interpret" Section 12 of the Securities Law. But the cases cited are not remotely analogous. For example, in *Alternative Fuels, Inc. v. Director of IEPA*, 215 Ill. 2d 219 (2004), the agency was interpreting the specific *statutory term* "discarded material" in an appropriate manner. *Id*. at 247-38. Here, by comparison, the Agency made up rules out of thin air that had nothing to do with interpreting any specific statutory language – *e.g.,* Finnigan's rule that "the Department doesn't recognize a bonus as a reason for switching an annuity," or O'Neal's "age factor" and "time value of money" rules. *See also id*. at 247 n. 12 (Pursuant to the APA, a "'[r]ule' means each agency statement of general applicability that implements, applies, interprets, or prescribes law *or policy* . . . ."); 5 ILCS 100/1-70.

Finally, the Securities Department's attempt to hang its hat on Section 12J (Appt's Reply, pp. 37-38) fails for the reasons stated in Section I of this cross reply brief. *See supra*, § I (A-B), pp. 1-8. Van Dyke's "defense on cross-relief" is not, as the Securities Department inaccurately asserts, "a factual issue going to the merits of the Department's charges." That would be the case *only if* the Securities Department had alleged or claimed – which it did not – that Van Dyke

violated the Securities Law in some fashion when he assisted a few of his clients in liquidating certain securities when they purchased the original annuities. *Id*.

CONCLUSION

For the foregoing reasons, Van Dyke requests an order affirming the appellate court and remanding this case to the circuit court with directions to permit Van Dyke to seek his attorney's fees, and for such other relief as this Court deems appropriate.

Dated: November 9, 2018

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 12 pages.

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CERTIFICATE OF SERVICE

I, William P. Hardy, attorney for Plaintiff-Appellee, certify that I electronically filed and served the foregoing brief with the Clerk of the Illinois Supreme Court by using the Odyssey eFileIL system, and that I caused one copy to be served on the attorneys listed below by email, on November 9, 2018:

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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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