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IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

RICHARD LEE VAN DYKE d/b/a Dick Van Dyke Registered Investment Advisor, Plaintiff-Appellant,	Appeal from the Seventh Judicial Circuit, Sangamon County, Illinois
v.	No. 14-MR-305
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-Appellees.	The Honorable John W. Belz, Judge Presiding

AMICUS CURIAE BRIEF OF NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

Anne-Valerie Mirko
General Counsel
NASAA
750 First Street, N.E.
Suite 1140
Washington, D.C. 20037
Pro hac vice admission pending

Christopher D. Galanos
ARDC #: 6296544
Quinn, Johnston, Henderson, Pretorius & Cerulo
400 S. Ninth Street, Ste. 102
Springfield, IL 62701

Attorneys for NASAA

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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. It has 67 members, including the securities regulators in all 50 states, the District of Columbia, the U.S. Virgin Islands, and Puerto Rico. 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 or provide investment advice, 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 a substantial interest in the outcome of this matter, as an adverse decision in this case would hamper the ability of the Illinois Securities

Department to fulfill its important investor protection mission by limiting its ability to pursue administrative actions alleging fraud against investment advisers. Further, an adverse decision in this case would set a negative precedent, not only in Illinois, but throughout the U.S. An adverse decision would likely be cited by unscrupulous advisers in other states attempting to skirt their fiduciary duty to their clients.

SUMMARY OF THE ARGUMENT

The trial court's decision affirming the administrative findings of the Secretary of State should be affirmed because 815 ILCS 5/12J does not contain a requirement that the alleged fraudulent conduct involve a securities transaction. In interpreting the antifraud provisions of the Investment Advisers Act of 1940, courts have not required there be a securities transaction. The Securities and Exchange Commission and other state securities regulators have taken a similar approach, interpreting the investment adviser antifraud provisions to apply to the entire relationship between an investment adviser and its clients regardless of whether the advice or conduct involved a security.

Further, the antifraud provisions of the investment adviser statutes form the foundation of the fiduciary duty investment advisers owe their clients. A restrictive interpretation of the antifraud provisions of Section 12J, limiting their applicability to only instances involving a security, stands to make an investment adviser's fiduciary duty illusory, given the broad scope of financial advice provided by investment advisers today.

ARGUMENT

I. The Court need not reach the issue of whether equity indexed annuities are securities, because the antifraud provisions of 815 ILCS 5/12J do not require the purchase or sale of a security.

There is ample evidence in the record to sustain the Court's decision below to uphold the administrative findings that Van Dyke violated the antifraud provisions of

Section 12J when he "switched" his investment advisory clients from previously purchased equity indexed annuities to new equity indexed annuities that resulted in substantial surrender penalties to the clients and significant additional commissions for Van Dyke. This Court need not reach the primary issue presented by Van Dyke, regarding whether the equity indexed annuities at issue in this case are securities under Illinois law, because Section 12J has no requirement that the alleged fraudulent conduct be in connection with or involve a security.

A. Section 12 of the Illinois Securities Law of 1953 contemplates fraud beyond the offer or sale of a security.

The antifraud provision contained in Section 12 of the Illinois Securities Law of 1953 provides:

> It shall be a violation of the provisions of this act for any person: . . .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.

815 ILCS 5/12J. Section 12J's prohibition on fraudulent conduct is not limited to conduct, schemes, devices, or courses of business of an investment adviser only in connection with the offer or sale of a security—and the Court should not interpret such a requirement into this antifraud provision, as that would contradict generally accepted principles of investment adviser antifraud statutes and weaken the fiduciary duty investment advisers owe their clients. *See SEC v. Capital Gains Research Bureau, Inc.*, 84 S.Ct. 275, 283 (1963).

Further, the United States Supreme Court has instructed that remedial legislation such as securities statutes should be broadly construed to effectuate their purpose.

Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). State courts also have recognized the necessity of a broad reading of their securities statutes 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 (Tn. 2002); *Maryland Secs. Comm'r v. U.S. Secs. Corp.*, 122 Md. App. 574, 591 (1998). Reading the antifraud provisions at issue here narrowly would frustrate the remedial purpose of the Illinois Securities Law.

B. Courts interpret the similar antifraud provisions of the Investment Advisers Act of 1940 beyond actions in the purchase or sale of a security.

When interpreting the Illinois securities laws, Illinois courts look to similar provisions in the federal securities laws. *See, e.g., Tirapelli v. Advanced Equities, Inc.*, 35 Ill.App.3d 450, 455 (1st Dist. 2004). Section 12J is substantially similar to the federal antifraud provisions found in Section 206 of the Investment Advisers Act of 1940, which provides:

> 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.

15 U.S.C. § 80b-6. In *Abrahamson v. Fleschner*, 568 F.2d 862 (2nd Cir. 1977), the Second Circuit found that the antifraud provisions in Sections 206(1) and (2) were not limited to actions in which there was a purchase or sale of a security. In *Abrahamson*, the Court rejected the argument that the plaintiffs could not maintain their actions under Section 206 because they were neither purchasers nor sellers of securities, therefore making their claims too speculative. *Id.* at 877. In rejecting this argument, the Court found "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 for their clients." *Id.* The Court continued, "[t]o accept appellees' contention would lead to the incongruous result that an investor's claims would be speculative even if the adviser had made fraudulent statements to conceal the fact that he was stealing his client's funds." *Id.*

More recently, in *SEC v. DiBella*, No. 304-cv-1342, 2005 WL 3215899 (D. Conn. Nov. 29, 2005), the Court found "the SEC need not prove [...] a violation of section 206 of the Investment Advisers Act of 1940 was 'in connection with' the provision of investment advice[,]" *id.* at 8, let alone in connection with the purchase or sale of a security. At issue in *DiBella* was defendant's motion to dismiss an action brought by the Securities and Exchange Commission ("SEC" or "Commission") for aiding and abetting violations of Section 206(2) in connection with undisclosed conflicts of interest related to a pension fund's investment in a private equity venture. *Id.* at 1. The alleged violation in *DiBella* involved the failure of the Connecticut State Treasurer, who made investment decisions for the state pension fund, to fully disclose the involvement of a personal friend in a deal in which the pension fund increased its investment in order to increase the fee of the Treasurer's friend. *Id.* at 1-2. The fraud in *DiBella* was the failure to fully disclose the conflict of interest, not the purchase of the security or even the advice relating to the investment.

In 2011, an action by the SEC alleging fraud pursuant to Section 206 survived a motion to dismiss in *SEC v. Mannion,* 789 F. Supp. 2d 1321 (N.D. Geo. June 2, 2011), when the fraud was not in connection with the purchase or sale of security. *Mannion* involved the managers of a hedge fund inflating the value of certain investments of the

fund in an attempt to conceal losses in the fund. The conduct in *Mannion* did not involve the purchase or sale of a security, but instead an attempt to conceal the true value of certain investments.

Further, in interpreting these provisions the Commission has said

> [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 of prohibited conduct on the client.

SEC Rel. No. IA-1092, 39 SEC Docket 494 (Oct. 8, 1987) (citations omitted). The Commission further explained, "in this regard [we] have applied Sections 206(1) and (2) 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 Commission in the above release were at the time—and remain to be—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.").

While not identical to the antifraud provision in Illinois, an examination of the antifraud provisions in the Uniform Securities Act of 2002—the model for the securities laws in 18 states, 12A JOSEPH C. LONG, BLUE SKY LAW § 12:1 (updated Nov. 2015)—provides further support for the proposition that the antifraud provisions applicable to investment advisers are not limited solely to securities transactions. Sections 501 and 502 of the Uniform Act contain the act's antifraud provisions. Section 501 applies to

frauds related to the purchase or sale of securities. *See* Unif. Sec. Act § 501 (2002). Section 502 applies to frauds in relation to the provision of investment advice. *See* Unif. Sec. Act § 502 (2002). Specifically, Section 502 provides:

> It is unlawful for a person that advises others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities: (1) to employ a device, scheme, or artifice to defraud another person; or (2) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

Id. The plain language of Section 502 does not limit its applicability to frauds related to the purchase or sale of securities. Further, the official comments to Section 502 reveal that a violation of Section 502 involving the purchase or sale of a security is also a violation of Section 501, indicating a clear intention that Section 502's prohibition on fraudulent investment advice is not limited solely to advice regarding the purchase or sale of a security, but instead to the whole of the advice an investment adviser provides his or her clients.

As the administrative interpretations, cases, and model act language above show, the antifraud provisions applicable to investment advisers are not limited to frauds in connection with securities transactions. No such requirement can be found in the language of these provisions and securities regulators and Courts have agreed that no such requirement exists, making a determination as to whether equity indexed annuities are securities immaterial to upholding the lower court's affirmation of the administrative findings that Van Dyke's "switching" scheme was in violation of Section 12J. Further, limiting these antifraud provisions to frauds or schemes only in connection with securities

transactions would be inconsistent with the fiduciary duty investment advisers owe to their clients.

II. Section 12J, like Section 206, provides the foundation of an investment adviser's fiduciary duty to its clients, which extends far beyond advice only related to the purchase or sale of securities.

Today, many investment advisers hold themselves out as being able to provide comprehensive financial advice, as Van Dyke 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 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.

A. Investment advisers owe their clients a fiduciary duty that is not limited to only advice regarding securities.

It is well settled law that investment advisers owe their clients a fiduciary duty, and Sections 206(1) and 206(2) form the basis of that duty at the federal level. Section 12J serves the same purpose in Illinois. As the Supreme Court found "[t]he Investment Advisers Act of 1940 [] reflects a congressional recognition of the delicate fiduciary nature of an investment adviser relationship . . . ." *Capital Gains Research Bureau, Inc.*, 84 S.Ct. at 283. Explaining further, the Supreme Court found investment advisers, as fiduciaries, owe to their clients "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading his clients." *Id.* at 284 (citations omitted) (internal quotations omitted). *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.").

An investment adviser's fiduciary duty extends to the whole of the relationship with the adviser's clients and is not limited to solely securities transactions. *Id.* The cases cited above demonstrate that an investment adviser's duty to its clients extends far beyond advice directly related to securities transactions. *See, e.g., Capital Gains Research Bureau*, 84 S.Ct. at 277 (finding that investment adviser had a duty to disclose its own trading activities); *DiBella*, 2005 WL 3215899 at 5 (denying defendants' motion to dismiss based on SEC's allegations of failing to fully disclose conflicts of interest); *Mannion*, 789 F. Supp. 2d at 1325-28 (denying defendants' motion to dismiss based on SEC's allegations of investment adviser overvaluing certain hedge fund investments to the fund's investors).

Providing advice regarding securities is but one aspect of the services offered by an investment adviser. While providing such advice is the activity that brings a person within the state or federal securities regulatory structure, such qualification is not meant to somehow narrow or limit an adviser's fiduciary duty to only those activities of buying and selling of securities. Doing so would deprive investors of protection from the potential misdeeds of an adviser associated with the myriad investment products and other financial advice investment advisers provide their clients today. Limiting an investment adviser's fiduciary duty in this respect would make the protections afforded by the fiduciary duty illusory.

The fiduciary duty investment advisers owe their clients is a critical component in the relationship between an adviser and its clients. If that fiduciary duty and the corresponding antifraud provisions of the law on which that duty is based are limited to only advice or transactions involving securities, investors—who rely on their advisers to look out for their best interests and are often already confused by the differing standards governing brokers and investment advisers—would be subject to even more confusion, regulators would be hampered in their ability to fulfill their investor protection missions, and unscrupulous advisers would be more likely to recommend investments in non-securities knowing that they owe no fiduciary duty to their clients in providing such advice.

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 Research Bureau*, 84 S.Ct. at 284-85. 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.

B. Van Dyke breached his fiduciary duty in how he managed his clients' accounts, regardless of the type of annuities held in the accounts.

The findings made in the administrative proceedings that were upheld by the Court below demonstrated that Van Dyke 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 in both the administrative proceeding and in the court proceeding below, the adjudicator determined that the equity indexed annuities at issue were securities, that determination is not central to the determination that Van Dyke violated the antifraud provisions of Section 12J. Indeed, given the complex nature of these products which provide a return linked to a securities index, it is easy to see why the tribunals below deemed them to be securities. The question of whether the equity-linked products were securities ultimately makes no difference to the analysis. Van Dyke, 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, Van Dyke 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 Van Dyke. Van Dyke'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 Van Dyke. In doing so, Van Dyke's advisory clients incurred substantial surrender fees, while Van Dyke 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 [Van Dyke'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, [Van Dyke] employed devices, schemes, or artifices to defraud clients," *id.* at ¶34—a violation of Section 12J.

As demonstrated above, there is no statutory requirement in Section 12J that the alleged fraudulent conduct be in connection with a securities transaction, only that the scheme or course of business operate as a fraud on the investment adviser's clients. Courts have interpreted the federal antifraud provisions similarly and the SEC and state regulators agree. Further, the fiduciary duty created by these antifraud provisions would become illusory and investors would suffer if investment advisers could only be found to have violated the antifraud provisions for conduct in connection with securities transactions. Here, according to the administrative findings and as upheld in the court below, Van Dyke violated the fiduciary duty created by Section 12J when he "switched" his clients' equity indexed annuities, this determination should be upheld whether or not equity indexed annuities are securities.

CONCLUSION

For the reasons set out above, the decision of the trial court should be affirmed.

Dated: November 20, 2015

Respectfully submitted,

By:
Anne-Valerie Mirko

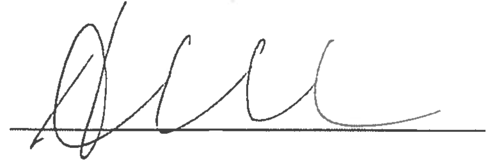
Anne-Valerie Mirko
General Counsel
NASAA
750 First Street, N.E., Suite 1140
Washington, D.C. 20037

Christopher D. Galanos
ARDC #: 6296544
Quinn, Johnston, Henderson,
Pretorius & Cerulo
400 S. Ninth Street, Ste. 102
Springfield, IL 62701

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 12 pages.

Dated: November 20, 2015



Anne-Valerie Mirko

CERTIFICATE OF SERVICE

The undersigned attorney herby certifies that he has caused 3 copies of the foregoing brief to be served upon:

Christopher Turner
Assistant Attorney General
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, IL 60601

William P. Hardy
Hinshaw & Culbertson, LLP
400 S. 9th Street, Suite 200
Springfield, IL 62701

Kirk W. Dillard
Julie L. Young
Lock Lord LLP
111 South Wacker Drive
Chicago, IL 60606

E. King Poor
Gary R. Clark
Charles E. Harper
Quarles & Brady LLP
300 N. LaSalle Street
Suite 4000
Chicago, IL 60654

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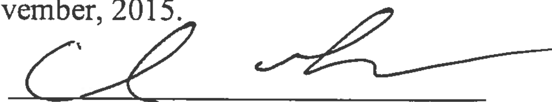

Christopher D. Galanos
Quinn, Johnston, Henderson,
Pretorius & Cerulo
400 S. Ninth Street, Ste. 102
Springfield, IL 62701