# Challenging New York's "Best Interest" Standard: A Comparison to COCUS

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Recent challenges filed by trade associations representing insurance agents in the state of New York seek to overturn the amendment of Regulation 187, which will impose a "best interest" standard on life insurance agents in the offering and sale of annuities and life insurance in New York. The standard would create an effective "fiduciary" relationship between insurance agents and their prospective and actual customers.

Two lawsuits, *In re Independent Insurance Agents & Brokers of New York, Inc.* and *In re National Association of Insurance and Financial Advisors – New York State, Inc.* , raise a number of issues challenging the legality of the Regulation under New York law, including the state's constitution and common law. The New York Department of Financial Services (DFS) has yet to file its responsive argument. Below is a summary of the arguments and a general comparison to arguments raised in the litigation that took place over the past several years involving the United States Department of Labor's adoption of a new definition of "fiduciary" under ERISA (the "DOL rule"). In *Chamber of Commerce of the United States of America v. Department of Labor* (*COCUS* ), that litigation culminated in a decision by the the Fifth Circuit invaliding the DOL rule.

**OVERVIEW**

In general, the New York lawsuits ask the state courts to address:

- Whether DFS acted *ultra vires* in promulgating Regulation 187 because:
  - Regulation 187 places obligations on agents that contradict New York Insurance Law Sections 2103 and 2101(a).
  - The statutes DFS cites do not grant it the power to promulgate Regulation 187, which is a disguised fiduciary standard.
  - *Boreali v. Axelrod* confirms that DFS lacks statutory authority to promulgate Regulations 187.
- Whether Regulation 187 is unconstitutional because:
  - The Legislature would have violated the separation-of-powers doctrine by delegating statutory authority to DFS.
  - Regulation 187 contains impermissibly vague and confusing terms, like "best interest" and "recommendation."
  - Regulation 187 violates due process by purporting to apply retroactively.
- Whether Regulation 187 is invalid because it purports to create a continuing duty to consumers even after the policy is issued, in contravention of longstanding common law principles.
- Whether Regulation 187 is arbitrary and capricious because:
  - DFS did not supply an estimate of costs, including the cost to small businesses.
  - DFS did not explain why the regulation exceeds federal standards.
  - DFS was arbitrary and capricious in exempting direct-marketing transactions while imposing a fiduciary standard on all others.
  - DFS was arbitrary and capricious in conflating brokers and agents.

Seeking to invalidate the comparable DOL rule, the challengers in *COCUS* raised a series of legal issues addressed by the federal appellate court:

- Does the new definition of an investment advice fiduciary comport with ERISA Titles I and II?
- Is the new definition "reasonable" under *Chevron, U.S.A., Inc. v. N.R.D.C., Inc.*, and not violative of the Administrative Procedures Act (APA)?

- Does the BICE exemption, including its impact on fixed indexed annuities, assert affirmative regulatory power inconsistent with the bifurcated structure of Titles I and II and is invalid under the APA? Further, "are the required BICE contractual provisions consistent with federal law in creating implied private rights of action and prohibiting certain waivers of arbitration rights?"

**DISCUSSION**

The *COCUS* opinion is comparable to the New York lawsuits at least on a superficial level:

- Both involve legal actions by the industry to invalidate a regulation imposing a fiduciary duty – or its functional equivalent – on customer-facing financial service representatives.
- Both involve legal theories that the regulator acted *ultra vires* in the statutory scheme, acted arbitrarily and capriciously, and violated the relevant constitutional provisions.
- In addition, a close reading of the "analysis" in *COCUS* with the arguments made in the New York cases (particularly the "Big I" and PIANY pleadings), illustrates the potential similarity in the emphasis placed on several issues, including the common law arguments and the standards of reasonableness.

Furthermore, compare the following language from the *COCUS* analysis:

> *The common law understanding of fiduciary status is not only the proper starting point in this analysis, but is as specific as it is venerable. Fiduciary status turns on the existence of a relationship of trust and confidence.*

with the following from the New York pleadings:

> *At common law an insurance broker is not a fiduciary and owes no fiduciary duty. In contrast, an agent owes a higher duty to its principal. Longstanding New York case law further confirms there is no fiduciary standard in the insurance law.*

Similarly comparable is the analysis in *COCUS* regarding the applicability of these similar common law standards in evaluating whether an agency's actions are unreasonable. Compare the following language from *COCUS* :

> *The Supreme Court has warned that "there may be a question about whether [an agency's] departure from the common law … with respect to particular questions and in a particular statutory context renders its interpretation unreasonable."*

with the following from the New York pleadings:

> *An administrative regulation will only be upheld as valid if it has a rational basis, that is, if it is not unreasonable, arbitrary or capricious.*

There are other aspects of the New York pleadings that reflect a common set of themes regarding a regulatory agency's action in attempting to "create" a legal "fiduciary" duty where, under the law and virtually legal precedent currently in existence, none exists.

That said, in reality, *COCUS* is only similarly comparable to the New York lawsuits in that both involve legal actions to invalidate a regulation attempting to impose a fiduciary duty and both involve arguments with common themes. On another level of analysis, the cases are not meaningfully comparable.

- The statutory schemes at issue – ERISA and the New York insurance code – involve fundamentally different issues, legislative arrangements, and case law milieu.
- The specific constitutional theories are not at all comparable, e.g., there is no First Amendment challenge in the New York lawsuits.