

2018 IL App (1st) 171913-U
No. 1-17-1913
August 28, 2018

SECOND DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THRIVENT INVESTMENT)	Appeal from the Circuit Court
MANAGEMENT INC.,)	Of Cook County.
)	
Plaintiff-Appellant,)	No. 16 CH 16406
)	
v.)	The Honorable
)	Rodolfo Garcia,
ILLINOIS SECURITIES DEPARTMENT,)	Judge Presiding.
OFFICE OF THE ILLINOIS SECRETARY,)	
JESSE WHITE, Secretary of State for the State)	
Of Illinois, and TANYA SOLOV, Director)	
Of the Illinois Securities Department,)	
)	
Defendants-Appellees.)	

JUSTICE WALKER delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* The Illinois Secretary of State Securities Department has authority to investigate allegations that a registered securities dealer committed fraud in the sale of variable annuities, even though the Department of Insurance has sole authority to regulate the issuance and sale of variable annuities. Oppressive discovery requests do not violate a respondent's constitutional rights unless judicial discovery procedures will not adequately protect the respondent's rights.

¶ 2 Thrivent Investment Management, Inc., filed a complaint for an injunction to bar the Illinois Secretary of State Securities Department (Securities Department) from investigating allegations that Thrivent committed fraud in the sale of variable annuities. Thrivent amended the complaint to add a claim that the Securities Department's discovery requests violated Thrivent's constitutional rights. The circuit court dismissed the complaint with prejudice and denied Thrivent's motion for leave to file another amended complaint.

¶ 3 We hold (1) the Illinois Securities Law (Act) (815 ILCS 5/1 *et seq.* (West 2016)) gives the Securities Department authority to determine whether Thrivent, a registered securities dealer and investment adviser, committed fraud in any of its business practices; (2) the complaint does not allege facts showing judicial processes for discovery will violate Thrivent's constitutional rights; and (3) the proposed amended complaint does not cure the defects of the dismissed complaint. Accordingly, we affirm the dismissal of the complaint with prejudice and the denial of the motion for leave to amend.

¶ 4

BACKGROUND

¶ 5 In October 2015, the Securities Department sent a Statement of Evidence to Thrivent, alleging Thrivent committed acts that could subject Thrivent to suspension of its registrations as an investment adviser and securities dealer. Thrivent filed a complaint in which it asked the court to enjoin the Securities Department's investigation. Thrivent alleged the Securities Department's investigation centered on Thrivent's sales of variable annuities, and the Illinois Department of Insurance had exclusive jurisdiction over sales of variable annuities.

¶ 6 The Securities Department moved to dismiss the complaint. Before the court ruled on the motion to dismiss, Thrivent filed an amended complaint. It sought a judgment declaring the

Securities Department had no jurisdiction over variable annuity sales in count I, and in count II it sought an injunction barring the Securities Department's investigation. Thrivent added two counts claiming that the document requests the Securities Department sent to Thrivent in the course of its investigation violated Thrivent's right to due process (count III) and its right to "be free from unreasonable searches, seizures, and invasions of privacy" (count IV). For the alleged constitutional violations, Thrivent asked for relief under section 1983 of title 42 of the United States Code. See 42 U.S.C. § 1983 (2012).

¶ 7 The Securities Department moved to dismiss the amended complaint under sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 5/2-619 (West 2016)). In April 2017, the Securities Department sent Thrivent a notice of hearing, informing Thrivent that an officer of the Secretary of State would hear evidence concerning Thrivent's alleged misconduct.

¶ 8 Thrivent responded that only the Attorney General had authority to initiate the proceedings against Thrivent, and the attorney who sent the notice of hearing worked for the Securities Department, not the Attorney General. The Attorney General subsequently appointed David Finnigan and Thomas Hoffmann of the Securities Department as special assistant Attorneys General for pursuing the charges against Thrivent. Finnigan and Hoffmann initiated proceedings against Thrivent by sending Thrivent a notice of hearing that detailed the allegations against Thrivent and set a hearing date of October 18, 2017.

¶ 9 In the notice for the October hearing, the Securities Department alleged Thrivent registered in Illinois as a securities dealer and as an investment adviser. Thrivent sold variable annuities to some investors, and in 2011 Thrivent offered an option of adding a

guaranteed lifetime withdrawal benefit (GLWB) to its variable annuities. The Securities Department asserted in more than 50 transactions, Thrivent solicited its investors and recommended they replace their variable annuities with the new variable annuities that added a GLWB rider.

¶ 10 The notice of hearing continued with the following allegations:

"58. In accordance with Thrivent Investment policy, the salespersons and investment advisor representatives were required to have a reasonable basis for the exchange and to document their review, analysis and the facts supporting the reasonable basis for the exchange.

59. The reason given by the salespersons and advisors for each and every one of these transactions was that the client wanted and would benefit from the GLWB.

60. However, no economic analysis of the transactions to determine if the client would benefit from the GLWB rider was contained in the records for these transactions and none was conducted.

* * *

64. Thrivent's written supervisory procedures also required proper documentation for the recommendation to exchange a variable annuity. Thrivent did not adequately enforce this requirement. For example, numerous replacement documents provided inadequate or inaccurate information to the investor regarding the costs, features and benefits of the legacy and new Variable Annuities. Furthermore, there was not clear documentation that these errors had been corrected and communicated in writing to the investors.

* * *

73. Thrivent Investment investors were not sophisticated and did not understand the costs, features, benefits and risks of the Variable Annuity replacement transaction recommended to them by Thrivent Investment Financial Advisors.

74. Investors have been misled and or inadequately informed regarding material information relevant to their variable annuity replacement transaction, the GLWB rider, and fees.

75. Investors stated that they discussed with their Thrivent Investment brokers investment and retirement planning. LL[, a Thrivent investor,] stated that the variable annuity transaction was market driven and because LL was nearing retirement.

76. For example investor, RG, gave the following reason for the replacement: 'It was about retirement income...the second one gave us a guarantee of income that would not drop; could only gain.'

77. Additionally, RG stated he had been informed by his broker about the fees RG was paying and that the fees were 1% when in fact the fees RG is currently paying are over 2.5%.

* * *

80. Investor LL stated that the GLWB rider would: 'Always receive same amount every month. It will never go down in value...can go up, but not down.'

81. LL's broker told LL that 'LL has no fees because LL has enough invested and had been with the company so long.'

82. In fact, LL is paying over 2% in fees for the new Variable Annuity.

83. Thrivent Investment in its account statements does not clearly disclose and set forth the actual dollar amount that investors are paying in fees for their Variable Annuities.

* * *

92. Section 12.J of the Act provides, *inter alia*, that it shall be a violation of the 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:

- a. To employ any device, scheme or artifice to defraud any client or prospective client;
- b. To engage in any transaction, practice, or course of business which operates a fraud or deceit upon any client or prospective client; or
- c. To engage in any act, practice, or course of business which is fraudulent, deceptive or manipulative.

* * *

96. Section 8.E.1(b) [of the Act] provides, *inter alia*, that the registration of an investment adviser, investment adviser representative, dealer, or salesperson may be suspended or revoked if the Secretary of State finds that the investment

adviser, investment adviser representative, dealer, or salesperson has engaged in any unethical practice in connection with any security; the offer or sale of securities or any fraudulent business practice."

¶ 11 The circuit court found that the Securities Department had authority to investigate the alleged misconduct, and therefore, the court dismissed the complaint. Thrivent moved to vacate the dismissal and it sought leave to amend the complaint again. It appended to its motion a proposed second amended complaint. The proposed amendment restated the claim that the Securities Department lacked authority to investigate Thrivent's sales of variable annuities with or without GLWB riders. Thrivent also sought to bolster its allegations that the investigation violated Thrivent's constitutional rights. Thrivent alleged:

"21. Between July 2014 and October 2015, [Thrivent] responded to eight separate requests from the Securities Department for documents and information ***.

* * *

29. On November 2, 2016, the Securities Department notified [Thrivent] that it 'plan[ned] on conducting an on-site branch office exam of [Thrivent representatives in Illinois]. The exam will be a complete examination of all securities and investment advisory representative business conducted at this branch office and will not just focus on Variable Annuities.' ***

* * *

38. On January 27, 2017, the Securities Department served [Thrivent] with a demand for documents. *** This request demanded wide-ranging financial

information relating to over 50 individual [Thrivent] clients, among others, requiring: (1) Information relating to 'ALL household accounts associated with [each] customer's name (including closed accounts)[';] (2) 'New Account and Suitability Inforamtion (sic) Forms,' with no time limitation; and (3) wide-ranging VA information for the customers ***. The demand for 'ALL household accounts,' both open and closed accounts, could potentially involve hundreds of [Thrivent] customer accounts.

39. *** The Securities Department served an administrative subpoena demanding significant information, for a period of five years, regarding a significant number of 'Mutual Funds' transactions by [Thrivent], without any limitation to any particular mutual fund or funds sold by [Thrivent], or by a particular [Thrivent] representative. *** The subpoena literally demands documents and information relating to thousands of transactions. Moreover, most of the mutual fund information demanded by the Securities Department in the subpoena is not maintained in [Thrivent's] ordinary course of business. ***

40. On February 7, 2017, the Securities Department served [Thrivent] with another demand for documents. *** This request demanded, among other things, 'statutes, case law or legal opinions that find or state that Section V. A "Membership" is not discriminatory to non-Lutherans ***.' The demand also requires a statement from a [Thrivent] representative 'detailing whether or not any Thrivent Investment clients have made any charitable gift facilitated by him to any party' ***. The correspondence concludes by threatening: 'Failure to

respond fully and accurately to this request within ten (1[0]) business days of the receipt of this correspondence may be treated as a violation of Section 12.D of the Act. Any person who knowingly violated Section 12.D of the Act shall be guilty of a class 4 felony pursuant to Section 14.A of the Act.'

42. On February 10, 2017, the Securities Department issued yet another administrative subpoena, this one seeking to compel oral testimony from a [Thrivent] employee in the field. Further, by letters dated February 10, 2017, the Securities Department demanded information from [Thrivent] and seven of its representatives, relating to alleged complaints made against the representatives. Certain of the alleged complaints date back several years, and one relates to a product sold in 1997."

¶ 12 At a hearing on August 7, 2017, the circuit court denied the motion to vacate the dismissal and the motion for leave to amend the complaint. Thrivent filed a notice of appeal. Thrivent then asked the circuit court to approve a bystander's report Thrivent prepared concerning the August 7 hearing. The judge denied the motion, noting that he could not personally verify the accuracy of all of Thrivent's assertions, and holding Thrivent had no need for the bystander's report because the court resolved the contested issues as matters of law.

¶ 13 ANALYSIS

¶ 14 Thrivent claims (1) the circuit court should have permitted Thrivent to amend its complaint to include a claim that "the Department's Administrative Proceedings Were Void

Because They Were Not Initiated by the Attorney General;" (2) the circuit court erred by denying the motion for approval of the proposed bystander's report; (3) the complaint and the proposed amended complaint stated a viable cause of action for the violation of Thrivent's constitutional rights; (4) the complaint stated a viable cause of action for an injunction because the Securities Department had no authority to investigate the alleged misconduct; and (5) the circuit court erred when it relied on the Statement of Evidence in the court's ruling on the motion to dismiss the complaint.

¶ 15 Attorney General's Authorization

¶ 16 On July 6, 2017, the Attorney General appointed two attorneys who worked for the Securities Department to act as special assistant Attorneys General for the case against Thrivent, and those attorneys authorized the notice of hearing, dated July 17, 2017. By appointing the special assistant Attorneys General, the Attorney General authorized the proceedings on the charges. See *People ex rel. Director of Corrections v. Edwards*, 349 Ill. App. 3d 383, 388-89 (2004); *Dixon v. O'Connor*, 94 Ill. App. 3d 656, 658-59 (1981). The circuit court did not abuse its discretion by denying Thrivent leave to include in its amended complaint a claim regarding the authorization of special assistant attorney generals, which would have been a frivolous claim. See *Watkins v. Office of State Appellate Defender*, 2012 IL App (1st) 111756, ¶¶ 30-36.

¶ 17 Bystander's Report

¶ 18 The circuit court refused to approve the proposed bystander's report because the statements of the parties and the court at the hearing on the motion to vacate the judgment had no bearing on the legal issues of whether the amended complaint and the proposed

second amended complaint stated any viable claims for relief. Thrivent did not refer to its bystander's report in its arguments on the issues of whether the complaint and the proposed amendment stated viable claims. Thrivent has not indicated how its proposed bystander's report could affect our resolution of this appeal. We cannot say the circuit court abused its discretion when it refused to approve the proposed bystander's report. See *Pierce v. MacNeal Memorial Hospital Ass'n*, 46 Ill. App. 3d 42, 54 (1977).

¶ 19 Constitutional Rights

¶ 20 We review *de novo* the ruling on the motion to dismiss the complaint under either section 2-615 or 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 5/2-619 (West 2016)). See *Patrick Engineering v. City of Naperville*, 2012 IL 113148, ¶ 31.

¶ 21 Thrivent claims in its amended complaint and its proposed second amended complaint that the Securities Department violated both its duty not to subject Thrivent to unreasonable searches and its duty not to deprive Thrivent of its liberty or property without due process. "[A]n investigation that is arbitrary or in excess of statutory authority or undertaken for an improper purpose, such as to harass, violates due process." *Scott v. Association for Childbirth at Home, International*, 88 Ill. 2d 279, 299 (1981). To state a claim under section 1983 for violation of constitutional rights, the plaintiff must assert facts that could support a finding that state procedures will not protect the plaintiff's constitutional rights. *O'Keefe v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 267 Ill. App. 3d 960, 962 (1994). "If the process available in the state action is adequate, due process is satisfied, and no section 1983 claim can lie." *O'Keefe*, 267 Ill. App. 3d at 962-63.

¶ 22 In *Scott*, the Attorney General issued subpoenas and demanded certain records from the Association. The Attorney General contended that the Consumer Fraud Act (Ill. Rev. Stat. 1977, ch. 121 1/2, pars. 261 *et seq.*) gave the Attorney General the power to demand the records and the responses to subpoenas. The Association argued that the demands violated the Association's right to due process and its right to freedom from unreasonable searches. The *Scott* court held:

"[T]he exercise of the Attorney General's investigative powers under the Act is subject to judicial supervision. The Attorney General has no power of his own to compel either the filing of reports or the production of documents. If voluntary compliance is refused, he must resort to a court for an order enforcing compliance. (Ill. Rev. Stat. 1977, ch. 121 1/2, pars. 266, 267.) The safeguard against abuse or excessive zeal that is satisfied, in the case of actual search or seizure, by the warrant and probable cause requirements is provided in the case of an administrative investigation by judicial review in the enforcement proceeding." *Scott*, 88 Ill. 2d at 299-300.

¶ 23 Here, too, the Securities Department cannot compel responses to its requests for discovery without a court order. Thrivent has not alleged facts showing that judicial proceedings on the Securities Department's requests will fail to protect Thrivent's constitutional rights. Following *Scott* and *O'Keefe*, we find the amended complaint does not state a claim under section 1983 for a violation of Thrivent's constitutional rights. Because the proposed amended complaint does not cure the defect, the circuit court did not abuse its discretion when it denied the motion for leave to amend the counts based on alleged

violations of Thrivent's constitutional rights. See *Cooney v. Magnabosco*, 407 Ill. App. 3d 264, 270 (2011).

¶ 24

Authority to Investigate

¶ 25

Thrivent claims that it stated a cause of action for an injunction to bar the Securities Department from investigating allegations that Thrivent committed fraud in its sales of variable annuities with GLWBs. Thrivent relies primarily on *Van Dyke v. White*, 2016 IL App (4th) 141109 *appeal allowed*, 2017 IL 121452, in which the Securities Department investigated claims of misconduct in the sale of indexed annuities. The *Van Dyke* court said, "the indexed annuities in question are annuities issued by insurance companies authorized to transact business in Illinois. Thus, they are not securities under Illinois law." *Van Dyke*, 2016 IL App (4th) 141109, ¶ 24. Because insurance companies also issue variable annuities, Thrivent asserts that variable annuities cannot count as securities. The *Van Dyke* court further asserted, "variable annuities *** fall under the sole jurisdiction of the Department of Insurance. See 215 ILCS 5/245.24 (West 2012)." *Van Dyke*, 2016 IL App (4th) 141109, ¶ 25. The *Van Dyke* court held that most of the claims of misconduct in that case fell under the exclusive jurisdiction of the Department of Insurance. However, the *Van Dyke* court noted "the [Securities Department] also determined Van Dyke violated section 12(J) of the Act (815 ILCS 5/12(J) (West 2012)) by engaging in fraudulent or manipulative conduct as an investment adviser, which does not require the sale of securities" (*Van Dyke*, 2016 IL App (4th) 141109, ¶ 29), and because "Van Dyke acted both as a registered investment adviser under the Act and as a licensed insurance producer under the Insurance Code, he was subject

to the legal duties under each regulatory regime, including the Act's antifraud provisions" (*Van Dyke*, 2016 IL App (4th) 141109, ¶ 30).

¶ 26 Here, as in *Van Dyke*, the Securities Department seeks information about alleged fraud connected with the sale of annuities. Also, as in *Van Dyke*, the Securities Department cited section 12(J) of the Act as authority for the investigation. The Securities Department also invoked section 8(E)(1)(b) of the Act, which provides that the Secretary of State may suspend or revoke the registration of an investment adviser or securities dealer if the Secretary of State finds the investment adviser or securities dealer engaged in any fraudulent business practice. 815 ILCS 5/8(E)(1)(b) (West 2016). Section 8(E)(1)(g) separately authorizes suspension or revocation of registration if the Secretary of State finds a violation of the Act. 815 ILCS 5/8(E)(1)(g) (West 2016). Thrivent suggests that we should interpret section 8(E)(1)(b) as authorizing only investigations into violations of the Act, but that interpretation would make section 8(E)(1)(b) redundant, adding nothing to section 8(E)(1)(g). We should not interpret a statute in a manner that makes terms redundant or meaningless. *Bonaguro v. County Officers Electoral Board*, 158 Ill. 2d 391, 397 (1994). Thus, section 8(E)(1)(b) authorizes investigations into allegations that an investment adviser or securities dealer committed fraud, even if the fraud does not involve securities. 815 ILCS 5/8(E)(1)(b) (West 2016).

¶ 27 Thrivent argues section 245.24 of the Insurance Code bars the Securities Department from investigating the allegations of fraud in the sale of variable annuities. Section 245.24 provides: "Notwithstanding any other provision of law, the Director [of Insurance] has sole authority to regulate the issuance and sale of variable contracts, and to promulgate such

reasonable rules and regulations as may be appropriate to carry out the purposes and provisions of this Article." 215 ILCS 5/245.24 (West 2016).

¶ 28 We find section 245.24 bars the Securities Department from regulating the issuance and sale of variable annuities, but it does not bar the Securities Department from investigating allegations that a registered investment adviser or securities dealer engaged in fraudulent business practices involving the sale of variable annuities. If the Director of Insurance finds that an insurer committed fraud in the sale of variable annuities, the Director may impose monetary fines and suspend the insurer's license to sell insurance. See 215 ILCS 5/2(a), 5/401(b), 5/500-70(a)(5) (West 2016). However, the Insurance Code does not authorize the Director of Insurance to revoke the registration of an investment adviser or securities dealer who commits fraud in connection with the sale of insurance products like variable annuities. Just as section 245.24 does not bar a private cause of action for fraud in the sale of variable contracts (see *New Mexico Life Insurance Guarantee Ass'n v. Quinn & Co.*, 809 P.2d 1278, 1287 (N.M. 1991)), it does not bar the Securities Department from investigating to determine whether a registered investment adviser committed fraud in the sale of insurance products. When a registered investment adviser also has a license to sell insurance products, the Director of Insurance and the Secretary of State share jurisdiction to determine whether the adviser committed fraud in the sale of insurance products. See *Lazarus v. Ohio Casualty Group*, 761 N.E.2d 649, 652–54 (Ohio App. 2001); *Culbreth v. Lawrence J. Miller, Inc.*, 477 A.2d 491, 498–99 (Pa. Super. 1984). The Director of Insurance determines whether the alleged fraud should preclude the person from selling insurance, while the Secretary of State decides whether the fraud should preclude the person from acting as an investment adviser or

securities dealer. Accordingly, we hold that the Secretary of State Securities Department had authority to investigate to determine whether Thrivent committed fraud in connection with the sale of variable annuities. The circuit court correctly dismissed the counts of the complaint in which Thrivent sought to preclude the Securities Department from investigating Thrivent's alleged fraud. Because the proposed amended complaint does not cure the defect, the circuit court did not abuse its discretion when it denied the motion for leave to amend the complaint.

¶ 29 Statement of Evidence

¶ 30 Finally, Thrivent claims the circuit court erred when it relied on the Statement of Evidence as a basis for granting the motion to dismiss the complaint. We review the circuit court's judgment, and not the reasons given for the judgment. *Eychaner v. Gross*, 202 Ill. 2d 228, 262 (2002); *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 387 (1983). The record requires affirmance of the circuit court's judgment even if the circuit court should not have relied on the Statement of Evidence. Accordingly, we do not address the moot issue concerning the Statement of Evidence.

¶ 31 CONCLUSION

¶ 32 The Attorney General authorized the proceedings against Thrivent. The bystander's report and the Statement of Evidence have no bearing on whether the circuit court correctly dismissed the complaint. Thrivent has not stated facts that could support a finding that judicial processes will fail to protect its constitutional rights to due process and freedom from unreasonable searches. The Act authorizes the Securities Department to investigate to determine whether registered investment advisers and securities dealers have committed

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fraud in any business practice, even if that practice involves the sale of variable annuities. Accordingly, we affirm the circuit court's judgment dismissing the complaint and denying Thrivent's motion for leave to amend the complaint.

¶ 33 Affirmed.