STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BANKING AND FINANCE,	)	
Petitioner,	)	
vs.	)	Case No. 02-1284
DONALD J. DENTON AND STRATEGIC STRATEGIES, INC.,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, on August 15, 2002, a formal administrative hearing in the above-styled case was held in Orlando, Florida, before Fred L. Buckine, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Frederick H. Wilsen, Esquire
Department of Banking and Finance
400 West Robinson Street
Suite S-225
Orlando, Florida 32801-1799

For Respondents: Donald J. Denton, pro se
139 East Park Drive
Celebration, Florida 34747

STATEMENT OF THE ISSUES

The issues in this case are whether Respondents, Donald J. Denton and Strategic Strategies, Inc. (hereinafter "Respondents," "Denton," or "Strategic Strategies"), are guilty

of selling or offering for sale securities in Florida that were not registered pursuant to Chapter 517, Florida Statutes, in violation of Section 517.07(1), Florida Statutes; whether Respondents are guilty of acting as unregistered dealers, associated persons, or issuers by having sold or offered for sale any securities from this state, in violation of Section 517.12(1), Florida Statutes; and, if so, what penalties are appropriate and should be imposed. All references to Florida Statutes are for the years 1998 and 1999.

PRELIMINARY STATEMENT

On February 27, 2002, Petitioner, Department of Banking and Finance (hereinafter "Department"), filed an Amended Administrative Complaint for Entry of Final Order to Cease and Desist, and Impose Penalties against Respondents alleging various violations of Chapter 517, Florida Statutes.

The charges are that Respondents, while not registered in the securities industry to perform or engage in the securities business, sold to investors unregistered securities in the form of investment contracts that were represented as interests in a trust for interests in the death benefits in viaticated life insurance policies known as viatical settlement agreements or "viaticals."

Specifically, the Department alleged that in Florida, Respondents induced and sold to investors, investment contracts

as interests in a trust representing interests in viatical settlement agreements of American Benefits Services, Inc. (hereinafter "ABS") for money paid thereby supporting violation of Section 517.07(1), Florida Statutes (selling unregistered securities), and violations of Section 517.12(1), Florida Statutes (unregistered person selling securities).

Respondents' response to the Amended Complaint and request for hearing was referred to the Division of Administrative Hearings (DOAH) to conduct a hearing to resolve disputed facts. Section 120.57(1), Florida Statutes. The final hearing was initially scheduled for June 25, 2002, and upon request of the parties, an order granting a continuance and rescheduling the final hearing for August 15 and 16, 2002, was entered on June 19, 2002.

Respondents, in their answer to the request for admissions and by stipulation at the hearing, agreed that there were 26 sales by Respondent, Denton, and four sales by Respondent, Strategic Strategies.

The Department presented the testimony of seven witnesses: Kerry Neal; Theodore F. Hoff; Paul Richard Williamson; Samuel Preston Martin, IV; Gilbert Principe; Joseph C. Long; and Roger Handley, the Department's financial investigator and an expert in securities law. The Department offered in evidence Exhibits P-1 through P-39 without objection. Respondents presented no

witnesses and offered in evidence Composite Exhibit R-1, consisting of 143 pages, without objection.

Respondents filed a Proposed Recommended Order on September 3, 2002. The two-volume Transcript was filed on September 18, 2002. The Department's Motion for Additional Time to Submit Proposed Recommended Order was granted by order dated October 3, 2002, thereby waving the time requirement for this Recommended Order. The Department filed a Proposed Recommended Order on October 10, 2002. Both Proposed Recommended Orders have been considered by the undersigned in preparation of this Recommended Order.

FINDINGS OF FACT

Based upon the observation of the witnesses and their demeanor while testifying, the documentary evidence received in evidence, and the entire record complied herein, the following relevant and material facts are found:

1. The Department is the agency charged with the enforcement and administration of the provisions of Chapter 517, Florida Statutes, the "Securities and Investors Protection Act," and the rules promulgated there under (hereinafter the "Securities Act"). As authorized by the Securities Act, the Department conducted an investigation of the activities of Respondents.

2. At no time pertinent, material, and relevant hereto were Respondents, Denton or Strategic Strategies, licensed or registered by the Department pursuant to the provisions of the Securities Act in any capacity. Specifically, Respondents were not licensed or registered in Florida as a broker/dealer, registered representative, or investment advisor.

3. At all times pertinent, material, and relevant hereto, Denton, whose address is 139 East Park Drive, Celebration, Florida 34747-5052, was licensed as a Health Agent under license No. AO666272 issued by the Florida Department of Insurance.

4. At all times pertinent, material and relevant hereto, Strategic Strategies was an Ohio corporation, now dissolved, whose company business address was Post Office Box 341470, Columbus, Ohio 43234. Strategic Strategies was served the Administrative Complaint via its agent in Ohio. The Department was advised by Strategic Strategies' agent that the company would not further respond to the charges.

5. From November 1, 1998, through July 21, 1999, Denton, in Florida as an agent, offered and sold to investors, investment contracts purportedly being interests in viaticated life insurance policies known as settlement agreements with titles such as, "Viatical Insurance Benefits Participation Agreement." The interests in viaticated life insurance policies

were represented to be provided by Accelerated Benefits Services (hereinafter ABS).

6. Denton engaged in sales with four Florida investors in four transactions through Strategic Strategies during the period of March 15, 1999, through July 27, 1999.

7. Denton engaged in 26 sales with 26 Florida investors in 26 transactions.

8. On or about January 21, 1999, Dr. Kerry L. Neal, a Florida investor, paid $50,000 for an investment sold to him by Denton. The investment was represented as safe, insured by the state of Florida, and consisting of an interest in the ABS trust with a participation of $25,000 in two viaticated insurance settlement agreements as a 14.2 percent fractional interest in the insurance policies' face value.

9. A monthly income program was offered in the participation disclosure materials provided to Dr. Neal by Denton. Dr. Neal was promised a guaranteed rate of return of 42 percent, with the option of getting the principal back after 36 months with a 15 percent return if the viator (the person insured by the insurance policy) did not die during the 36-month period and the policies had not matured.

10. Of his $50,000 investment, Dr. Neal has only received approximately $8,000 as disbursements from the ABS bankruptcy

trustee resulting in Dr. Neal having suffered a present financial loss of $42,000.

11. On or about January 3, 1999, Dr. Theodore F. Hoff, a Florida investor, paid $200,000 for an investment sold to him by Denton. The investment was represented as safe, insured by the state of Florida, and consisting of an interest in the ABS trust with fractional interests in eight viaticated life insurance settlement agreements.

12. A monthly income program was offered in the participation disclosure materials provided Dr. Hoff together with a guaranteed rate of return of 42 percent, with the option of getting the principal back after 36 months with a 15 percent return if the viator did not die during the 36-month period and the polices had not matured.

13. Of his $200,000 investment, Dr. Hoff has only received a total of approximately 15 percent in disbursement from the ABS bankruptcy trustee, thereby resulting in a present financial loss to Dr. Hoff of approximately $170,000.

14. On or about March 23, 1999, Dr. Paul Richard Williamson, a Florida investor, paid $50,000 for an investment sold to him by Denton. The investment was represented as safe, insured by the state of Florida, and consisting of an interest in the ABS trust with fractional interests in two viaticated life insurance settlement agreements.

15. A monthly income program was offered in the participation disclosure materials provided to Dr. Williamson together with a guaranteed rate of return of 42 percent, with the option of getting the principal back after 36 months with a 15 percent return if the viator did not die during the 36-month period and the polices had not matured.

16. Of his $50,000 investment, Dr. Williamson has only received $8,253.68 in disbursement from the ABS bankruptcy trustee, thereby resulting in a present financial loss to Dr. Williamson of approximately $41,746.32.

17. On or about January 4, 1999, Dr. Samuel Preston Martin, a Florida investor, paid $100,000 for an investment sold to him by Denton. The investment was represented as safe, insured by the state of Florida, and consisting of an interest in the ABS trust with fractional interests in two viaticated life insurance settlement agreements.

18. A monthly income program was offered in the participation disclosure materials provided to Dr. Martin together with a guaranteed rate of return of 42 percent, with the option of getting the principal back after 36 months with a 15 percent return if the viator did not die during the 36-month period and the polices had not matured.

19. Of his $100,000 investment, Dr. Martin has only received $16,000 in disbursements from the ABS bankruptcy trustee, thereby resulting in a present financial loss to Dr. Martin of approximately $84,000.

20. On or about November 10, 1999, Dr. Gilbert Principe, a Florida investor, paid $125,000 for an investment sold to him by Denton. The investment was represented as safe, insured by the state of Florida, and consisting of an interest in the ABS trust with fractional interests in two viaticated life insurance settlement agreements.

21. A monthly income program was offered in the participation disclosure materials provided Dr. Principe together with a guaranteed rate of return of 42 percent, with the option of getting the principal back after 36 months with a 15 percent return if the viator did not die during the 36-month period and the polices have not matured.

22. Of his $125,000 investment, Dr. Principe has only received approximately $20,000 (16 percent) in disbursement from the ABS bankruptcy trustee, thereby resulting in a present financial loss to Dr. Principe of $105,000.

23. The above investors, Drs. Neal, Hoff, Williamson, Martin and Principe, were clients of Denton who held himself out as a financial advisor. By special and private invitations from

Denton, they were invited twice yearly to attend investment seminars conducted by Denton.

24. Denton directly or indirectly represented that the viatical investment would make money for the above named investors; he represented to each investor that the return could be 9.86 percent per year for three (3) years paid monthly as a income program.

25. The above-named investors lost their money as victims of a Ponzi scheme run by principals of ABS involving the sale of viatical agreements in Florida. Ray Levy was the owner of ABS, a viatical settlement brokerage company that raised funds for the purchase of viatical settlements. Jeffery Pains, Esquire, was the escrow agent for ABS. Levy, Paine and others were convicted in federal court of fraud since approximately 90 percent of the $208 million obtained from thousands of investors solicited nationwide was used for the purchase of real estate and items for personal use.[1]

26. ABS offered and sold its viaticals to thousands of investors in Florida and in other states. There were approximately a total of 7,000 ABS transactions. The Department filed charges against ABS and Ray Levy that resulted in a Final Order adopting a stipulated settlement. ABS and Ray Levy agreed to comply with Florida law, stop offering the income program, return $900,000 to certain investors, and pay $60,000 to the

Department for costs. Other agents (insurance, financial advisors, etc.) that sold the interests in the ABS viaticals have been charged with violations of the Securities Act by the Department, resulting in cease and desist orders being issued and fines being imposed.

27. Denton offered the following defenses to his conduct: sales were exempt securities; sales were insurance policies; investors were wealthy and experienced; his reliance upon ABS's printed literature absolved him from personal liability; and the Department had an obligation to communicate to him personally any knowledge of problems with business practices of ABS, all of which are without merit.

28. The undisputed evidence of record, clearly and convincingly supports that: First, Respondent, Denton, while not registered in the securities business, intentionally or knowingly, solicited and sold unregistered securities; and second, Respondent, Strategic Strategies, had four sales and Denton has 26 sales.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Sections 120.57 and 120.569, and Chapter 517, Florida Statutes. This case involves Respondents, unregistered

dealers or associated persons, selling unregistered securities in Florida.

30. Section 517.07(1), Florida Statutes, addressing persons selling unregistered securities, provides:

> (1) It is unlawful and a violation of this chapter for any person to sell or offer to sell a security within this state unless the security is exempt under s. 517.051, is sold in a transaction exempt under s. 517.061, is a federal covered security, or is registered pursuant to this chapter.

31. Section 517.12(1), Florida Statutes, addressing a dealer or associated person selling securities, provides:

> (1) No dealer, associated person, or issuer of securities shall sell or offer for sale any securities in or from offices in this state, or sell securities to persons in this state from offices outside this state, by mail or otherwise, unless the person has been registered with the department pursuant to the provisions of this section. The department shall not register any person as an associated person of a dealer unless the dealer with which the applicant seeks registration is lawfully registered with the department pursuant to this chapter.

32. Section 517.221(1) and (3), Florida Statues, addressing cease and desist orders and administrative fines that may be imposed, provides:

> (1) The department may issue and serve upon a person a cease and desist order whenever the department has reason to believe that such person is violating, has violated, or is about to violate any provision of this chapter, any rule or order promulgated by the department, or any

> written agreement entered into with the department.
>
> * * *
>
> (3) The department may impose and collect an administrative fine against any person found to have violated any provision of this chapter, any rule or order promulgated by the department, or any written agreement entered into with the department in an amount not to exceed $5,000 for each such violation. All fines collected hereunder shall be deposited as received in the Anti-Fraud Trust Fund.

33. To impose administrative fines against unlicensed or unregistered persons the Department has the burden and must prove by clear and convincing evidence the material allegations contained in its Administrative Complaint, to wit:

> that in Florida, Respondents (Donald J. Denton, 26 sales and Strategic Strategies, Inc., 4 sales) induced and sold to investors investment contracts being interests in a trust representing interests in viatical settlement agreements of American Benefits Services, Inc. (hereinafter "ABS") for money paid thereby supporting violation of Section 517.07(1), Florida Statutes (selling unregistered securities) and violations of Section 517.12(1), Florida Statutes (unregistered person selling securities).

See Department of Banking and Finance v. Osborne Stern Company, Inc., 670 So. 2d 932 (Fla. 1996). In the case at bar, the Department has proven by clear and convincing evidence the specific allegations hereinabove.

34. Section 517.171, Florida Statutes, however, imposes the burden upon Respondents, Denton and Strategic Strategies, if they are claiming the benefit of an exemption from registration before engaging in the sale or offering securities for sale.

> Burden of proof.–
>
> It shall not be necessary to negate any of the exemptions provided in this chapter in any complaint, information, indictment, or other writ or proceedings brought under this chapter; and the burden of establishing the right to any exemption shall be upon the party claiming the benefit of such exemption.

35. The evidence of record does not support any contention by Respondents that the investments that are determined herein to be securities or the transactions by which purchasers acquired the investments are subject to exemptions or are, in fact, exempted from the provisions of Chapter 517, Florida Statutes.

36. Neither Section 517.07(1) nor Section 517.12(1), Florida Statutes, requires guilty knowledge or "scienter" associated with securities fraud cases. See State v. Houghtaling, 181 So. 2d 636 (Fla. 1966). Therefore, the "state of mind" of Respondents is irrelevant for purposes of determining whether they sold unregistered securities in violation of Section 517.07(1), Florida Statutes, or whether they failed to register as dealers or associated persons prior

to selling securities in violation of Section 517.12(1), Florida Statutes.

37. No definition of a security can be given to fit all cases, but the thing sold[2] will in each case be examined to determine if it falls within the purview of the statute. See McElfresh v. State, 151 Fla. 140, 9 So. 2d 277 (1942).

38. Section 517.021(18) and (19), Florida Statutes, defines "security" as the thing sold, and to include any of the following:

> (18) "Sale" or "sell" means any contract of sale or disposition of any investment, security, or interest in a security, for value. With respect to a security or interest in a security, the term defined in this subsection does not include preliminary negotiations or agreements between an issuer or any person on whose behalf an offering is to be made and any underwriter or among underwriters who are or are to be in privity of contract with an issuer. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing shall be conclusively presumed to constitute a part of the subject of such purchase and to have been offered and sold for value. Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert into another security or another issuer, is considered to include an offer of the other security.
>
> (19) "Security" includes any of the following:

(a) A note.

(b) A stock.

(c) A treasury stock.

(d) A bond.

(e) A debenture.

(f) An evidence of indebtedness.

(g) A certificate of deposit.

(h) A certificate of deposit for a security.

(i) A certificate of interest or participation.

(j) A whiskey warehouse receipt or other commodity warehouse receipt.

(k) A certificate of interest in a profit-sharing agreement or the right to participate therein.

(l) A certificate of interest in an oil, gas, petroleum, mineral, or mining title or lease or the right to participate therein.

(m) A collateral trust certificate.

(n) A reorganization certificate.

(o) A preorganization subscription.

(p) Any transferable share.

(q) An investment contract.

(r) A beneficial interest in title to property, profits, or earnings.

(s) An interest in or under a profit-sharing or participation agreement or scheme.

> (t) Any option contract which entitles the holder to purchase or sell a given amount of the underlying security at a fixed price within a specified period of time.
>
> (u) Any other instrument commonly known as a security, including an interim or temporary bond, debenture, note, or certificate.
>
> (v) Any receipt for a security, or for subscription to a security, or any right to subscribe to or purchase any security.

39. Florida courts have continuously looked to the whole transaction(s) and to the content of the document in determining whether a document is a security[3] requiring registration under the sales of securities law and whether seller or dealer thereof was required to register. Bookhardt v. State, 710 So. 2d 700 (Fla. 5th DCA 1998). Also see O'Neill v. State, 336 So. 2d 699 (Fla. 4th DCA 1976).

40. In the case at bar, Section 517.021(19)(q), Florida Statutes, defining an "investment contract" is applicable. In Florida, the test of an "investment contract" is whether the scheme involves the investment of money in a common enterprise with profits to come solely from efforts of others. Yeomans v. State Department of Banking and Finance, Division of Securities, 452 So. 2d 1011 (Fla. 3rd DCA 1984), petition for review denied 461 So. 2d 114. Therefore, the question is whether the sales transactions in the case at bar constitute the sale of an

"investment contract," under Section 517.021(19)(q), Florida Statutes.

41. The case law definition of "investment contacts" is found in Securities and Exchange Commission v. W. J. Howey Co., 328 U.S. 293, 66 S. Ct. 1100, 90 L.Ed 1244 (1946). The Howey three-prong test for determining whether a transaction constitutes an "investment contract" for purpose of federal securities laws, applies under Florida's Securities Act. Rudd v. State, 386 So. 2d 1216, 1218 (Fla. 5th DCA 1980), review denied 392 So. 2d 1380.

42. Under Howey, an investment contract constitutes any contract, transaction, or scheme in which a person: (1) invests money; (2) in a common enterprise; and (3) expects profiting solely from the efforts of other persons. 328 U.S. at 298-299. In 1976, the Supreme Court in United Housing Foundation, Inc., v. Forman, 421 U.S. 837, 95 S. Ct. 2051, 44 L.Ed. 2d 2621 (1975) eased the third prong requirement hereinabove by restating it as expecting profits "from the entrepreneurial or managerial efforts of others." 421 U.S. at 852, 95 S. Ct. at 2060.

43. The case at bar satisfies the first prong of the Howey and Forman definition of an investment contract because the investors invested money. Focus now must be given to the second and third prongs of the definition of investment contracts.

44. The second prong, common enterprise, has spawned different schools of thought among the several lower federal courts and many state courts with two main avenues of "horizontal commonality" and "vertical commonality." These courts have considered "horizontal commonality," as the stricter test requiring a pooling of all the investors funds so that they are treated alike, and "vertical commonality," as the more liberal test and requiring only that the investors' economic return be based on the essential managerial efforts of other persons.

45. In Farag v. National Databank Subscriptions, Inc., 448 So. 2d 1098 (Fla. 2nd DCA 1984), the court rejected the defense based on horizontal commonality and appeared to have adopted an approach consistent with vertical commonality, at least where the promoter obtains a "number of investors." With more than one or two investors involved, Florida courts have not distinguished from investment contracts those programs in which promoters segregate each investor's funds.

46. The ABS viatical program clearly satisfies the vertical commonality test hereinabove. Notwithstanding ABS's structure of its viatical program, in terms of the maintenance of each investor's funds, the Ponzi feature of early investors being paid with the funds of later investors betrays the true arrangement, which satisfies the horizontal commonality test.

47. Whether or not the sale of viatical was a securities transaction was at issue in the federal case Securities & Exchange Commission v. Life Partners, Inc., 87 F.3d 536 (D.C. Cir.), reh'g denied, 102 F.3d 587 (D.C. Cir. 1996). The Life Partners case is distinguishable from the case at bar because in Life Partners the investors had a direct contractual relationship with the insurance companies and the scheme did not include an offer of monthly payments or a guaranteed return if a policy did not mature.

48. The emerging trend in state courts is to reject Life Partners. For instance, in Colorado, Joseph v. Viatical Management,LLC, 55 P.3d 264 (Colo. App. 2002); in Maryland, First Penn-Pacific Life Insurance Company v. William Evans, Chartered, 200 F.R.D. 532 (D. Md. 2001); in Arizona, Siporin v. Carrington, 23 P.3d 92 (Ariz. App. Div. 1 2001). These courts have found that the sale of interests in a trust for interests in viaticated life insurance policies amounts to the sale of investment contracts and thus a securities transaction regulated by state laws.

49. The third prong definition found in Howey and Forman, "expectation of profits from the entrepreneurial or managerial efforts of other persons," is of great importance in the ABS viatical program because of the ABS form of the transactions, to wit: involves the investors purchasing an interest in a trust,

which purchases interests in ABS viatical settlement agreements. The investors' funds are aggregated or pooled to acquire indirect interests in one or more viatical settlements.

50. In the Life Partners investment vehicles, the viatical transactions involved the investors having a direct interest in a viatical settlement even though the promoter was listed as the policy owner in the insurance company records for the convenience of the insurance company. This form of transaction differs from the case at bar and is contrary to Respondents' argument; Life Partners is not controlling in the case at bar.

51. In the case at bar the investors took no part in the selection, managing or overseeing the investments. Investors relied entirely on ABS's investigation, analysis, selection of the viators and the policies to be acquired, and negotiations of the terms of the acquisitions, all of which were post investment, or at least not identified to the investor at the time of the investment. The estimation of the viators' life expectancy, the most significant impact on profit to be made, if any, was made by ABS and others and not by the investors. Therefore, the total success or complete failure of the enterprise rested with ABS and others, and not with those whose monies were at risk, the investors themselves.

52. Respondents have failed to show entitlement to an exemption from the registration requirements of Section 517.07,

Florida Statutes, as provided in Section 517.051, Florida Statutes. Respondents were not selling insurance policies; they were selling an investment contract represented as an interest in a trust that was to have acquired an interest in a viaticated life insurance policy to be secured and provided by ABS. The investors were not buying insurance.

53. Likewise, Respondents have failed to show entitlement to an exemption for the transactions from the registration requirements of Section 517.07, Florida Statutes, as provided for in Section 517.061, Florida Statutes. ABS sold to thousands of purchasers via general solicitations and advertisements; and Respondents, while not registered, were paid a commission or otherwise compensated for the sales. These transactions could not and did not qualify as an exempt transaction. Section 517.061(11)(a), Florida Statutes.

54. Chapter 626, Florida Statutes, Part X, known as the "Viatical Settlement Act" is not controlling of the issues in the case at bar. The Viatical Settlement Act generally provides that the Department of Insurance regulates the business that creates the viatical settlement purchase agreements. The Department does not regulate the resale of interests in a trust that represents that it holds an interest in a viatical, as in the case at bar. Further, the act pertains to an economic benefit being realized when a viaticated life insurance policy

matures and the insurance company pays the face value of the life insurance policy pursuant to a claim having been filed.

55. Section 626.9911(10), Florida Statutes, defines accredited investors as:

> (10) "Viatical settlement purchaser" means a person, other than a licensee under this part, an accredited investor as defined in Rule 501, Regulation D of the Securities Act Rules, or a qualified institutional buyer as defined by Rule 144(a) of the Federal Securities Act, or a special purpose entity which is created solely to act as a financing source for the viatical settlement provider, who gives a sum of money as consideration for a life insurance policy or an interest in the death benefits of a life insurance policy which has been or will be the subject of a viatical settlement contract, for the purpose of deriving an economic benefit. The above references to Rule 501, Regulation D and Rule 144(a) of the Federal Securities Act are used strictly for defining purposes and shall not be interpreted in any other manner.

The ABS viatical program became a securities transaction regulated by the Department at the point Respondents offered to investors via an investment contract in a trust that offered monthly interest payments and the offering contained a guaranteed 15 percent interest payment to the investors if the viator did not die within 36 months. Respondent failed to prove that any investor was deemed an accredited investor. No investor was found to have signed an affidavit that he or she was an accredited investor as required by Section 626.991(10),

Florida Statutes. Respondents also failed to prove that any investor was deemed an accredited investor as defined by Rule 501, Regulation D of the Securities Act Rules, establishing joint net income, individually or jointly, at time of purchase in excess of $1,000,000; individual income in each of the preceding two years in excess of $200,000 or joint income in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year.

56. Having proved the sale of securities in the case at bar, the Department must prove that Respondents sold or offered to sell the ABS viaticals. Section 517.021(14), Florida Statutes, defines "sell or offer to sell" as "any attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, or an investment or interest in an investment, for value."

57. The testimony and documents received in evidence in the record proves sale by both Respondents; Denton admitted that he made 26 sales and Strategic Strategies had four sales.

58. Section 517.021(6)(a)(1), Florida Statutes, defines a dealer as:

> Any person, other than an associated person registered under this chapter, who engages, either for all or part of her or his time, directly or indirectly, as broker or principal in the business of offering,

> buying, selling, or otherwise dealing or trading in securities issued by another person.

59. Rule 3E-200.001(7)(a), Florida Administrative Code, defines an "associated person" as:

> any person who for compensation refers, solicits, offers, or negotiates for the purchase or sale of securities and/or of investment advisory services. A person whose activities fall within this definition is required to register with the Department as an associated person pursuant to Sections 517.12(1) or (4), F.S.

60. Respondents directly or indirectly offered and sold the securities. In doing so, they served as "brokers" in these transactions. Thus, the Department proved Respondents, by their activities and conduct, were dealers. Likewise, the Department proved that Respondents were associated persons, who--for compensation--referred, solicited, offered, or negotiated the sale of securities.

61. Violations of Section 517.07(1) and Section 517.12(1), Florida Statutes, are distinct and separate violations from each other. The facts in the record needed to establish the above violations may overlap; however, each provision requires proof of an important element not required to establish the violation of the other provision. Regarding the case at bar, the gist of the Section 517.07(1), Florida Statutes, violation is the presence of an unregistered security; the gist of the Section

517.12(1), Florida Statutes, is the presence of an unregistered dealer or associated person. Respondents presented no evidence to refute, rebut, or mitigate the charges brought by the Department, which were proven by clear and convincing evidence of record.

62. The Department has proven that Respondents' dealing in investment contracts of interest in a trust for interests in death benefits in viatical settlement agreements constitutes four violations of Section 517.07(1), Florida Statutes, and four violations of Section 517.12(1), Florida Statutes, as to Respondent, Strategic Strategies, Inc.

63. The Department has proven that Respondents' dealing in investment contracts of interest in a trust for interests in death benefits in viatical settlement agreements constitutes 26 violations of Section 517.07(1), Florida Statutes, and 26 violations of Section 517.12(1), Florida Statutes, as to Respondent, Donald J. Denton.

64. The statutory fine of $5,000 per violation, times eight separate violations, equals an administrative fine of $40,000 as to Respondent, Strategic Strategies, Inc.

65. The statutory fine of $5,000 per violation, times 52 separate violations, equals an administrative fine of $260,000 as to Respondent, Donald J. Denton.

66. These fines are fair for the enormity of the harm caused by Respondents.[4]

PENALTY

67. Personal accountability for the violations of several sections of the Florida Statutes provides the basis for Respondents' penalty. Under Chapter 517, Florida Statutes, specific acts that violate one section also violate several other sections thereof. Considering the totality of circumstances involved in the case at bar with appropriate weight to the aggravating factors and there being no mitigating factors present, the appropriate penalty for Respondents' violations is imposition of the maximum fines allowed by law.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that

The Department of Banking and Finance enter its final order finding Respondents guilty of violations of Sections 517.07(1) and 517.12(1), Florida Statutes; it is further

RECOMMENDED that

The Department of Banking and Finance order Respondent to cease and desist from engaging in any transaction constituting the sale of securities in Florida; it is further

RECOMMENDED that

The Department of Banking and Finance order Respondent, Strategic Strategies, Inc., be fined in the amount of $40,000; and, it is finally

RECOMMENDED that

The Department of Banking and Finance order Respondent, Donald J. Denton, be fined in the amount of $260,000.

DONE AND ENTERED this 20th day of November, 2002, in Tallahassee, Leon County, Florida.

FRED L. BUCKINE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of November, 2002.

ENDNOTES

1/ See Recommended Order dated November 8, 2000, in Dept. of Insurance v. James R. Stiffer, DOAH Case No. 00-3242PL, adopted in toto as its final order by the Department of Insurance on December 28, 2000.

2/ In this situation, insight can be found in the expression, "if it walks like a security, wobbles like a security and acts like a security, it must be a security."

3/ The term "security" in the Florida Statutes concerning sale of unregistered securities, and sale of securities by

unregistered dealers, has a specialized legal meaning, and testimony from two expert witnesses was beneficial to the understanding of the term. Therefore, the testimony of Professor Joseph C. Long and Roger Handley, on whether the investment offered constituted securities in the case at bar is not objectionable because it includes the ultimate issue to be decided. See Bookhardt v. State, 710 So. 2d 700 (Fla. 5th DCA 1998), rehearing denied, review denied 719 So. 2d 892.

4/ For the five witnesses who testified, their total loss was not less than $443,000.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.