

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF INSURANCE,            )  
  )  
      Petitioner,                        )  
  )  
vs.                                        )  
  )  
SEAN DARIN HOYT,                    )  
  )  
      Respondent.                      )  
\_\_\_\_\_  
  )

Case No. 02-2370PL

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on August 6, 2002, in Clearwater, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: James A. Bossart, Esquire  
Department of Insurance  
Room 612, Larson Building  
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Tallahassee, Florida 32399

For Respondent: Elihu H. Berman, Esquire  
Post Office Box 6801  
Clearwater, Florida 33758

STATEMENT OF THE ISSUES

The issues presented are whether two separate sales of unregistered securities to elderly persons demonstrate a lack of fitness or trustworthiness to engage in the business of insurance in violation of Section 626.611(7), Florida Statutes

(2001); and, if so, what penalty, if any, should Petitioner impose against Respondent's license. (All chapter and section references are to Florida Statutes (2001) unless otherwise stated.)

#### PRELIMINARY STATEMENT

On May 1, 2002, Petitioner filed an Administrative Complaint against Respondent. Respondent timely requested an administrative hearing.

At the hearing, Petitioner presented the testimony of four witnesses and submitted 12 exhibits for admission into evidence. Respondent testified in his own behalf, called an additional witness, and submitted four exhibits for admission into evidence.

The identity of the witnesses and exhibits, and any attendant rulings, are set forth in the Transcript of the hearing filed on August 21, 2002. Petitioner and Respondent timely filed their Proposed Recommended Orders ("PRO"), respectively, on October 20 and 19, 2002.

#### FINDINGS OF FACT

1. Respondent is currently licensed in this state as an insurance agent pursuant to license number A124652. The license authorizes Respondent to perform the duties of an agent for health and life insurance and variable annuity agent. Respondent is not licensed to sell securities.

2. Petitioner is the state agency responsible for regulating the business of insurance in this state. Petitioner is not authorized to regulate the sale of securities.

3. On September 18, 1998, Respondent sold eight shares of unregistered securities in Palm Beach Investment Group, Inc. (Palm Beach) to Mr. and Mrs. Anthony and Lucille Fusco (Fusco) for \$40,000. On January 5, 1998, Respondent sold 18 shares of unregistered securities in Palm Beach to Mrs. Gladys Speth (Speth) for \$90,000.

4. The Department of Banking has jurisdiction over the sale of unregistered securities by unlicensed individuals. The Department of Banking disciplined Respondent for the sales of unregistered securities to Fusco and Speth. On November 10, 1999, Respondent and the Department of Banking entered into a Settlement Stipulation and Final Order whereby Respondent admitted he violated Sections 517.07 and 517.12 by offering for sale or selling unregistered securities while he himself was not authorized to sell securities. Respondent did not dispute these facts at the administrative hearing of this case.

5. The Administrative Complaint alleges that Respondent violated Sections 626.611(7)(9)(13), 626.621(2)(3) and (6), and 626.9541(1)(e)1 when he sold unregistered securities to

Fusco and Speth. In Petitioner's PRO, however, Petitioner admits that Respondent could not have violated any statute other than Section 626.611(7) because Respondent did not engage in the business of insurance when he sold securities to Fusco and Speth. In relevant part, Petitioner states:

Petitioner concedes that the alleged conduct does not involve insurance transactions and therefore cannot be considered transactions under Respondents [sic] insurance licenses. As a result, no violation of the other enumerated statutes has occurred.

Petitioner's PRO at 11, paragraph 5.

6. The only remaining issue that Petitioner asserts is whether Respondent violated Section 626.611(7). A licensee violates Section 626.611(7) if he or she demonstrates a lack of fitness or trustworthiness to engage in the business of insurance. Petitioner asserts that Respondent violated Section 626.611(7) by engaging in a business other than the business of insurance in a manner that demonstrates a lack of fitness or trustworthiness to engage in the business of insurance.

7. Neither Fusco nor Speth are experienced investors. Neither buys or sells stock or securities and neither has any training or education in investing. Mr. and Mrs. Fusco are retirees, as is Speth. Fusco invested \$40,000 of their life

savings, and Speth invested \$90,000 from a personal injury settlement.

8. Mrs. Fusco had never purchased shares of stock before. Her father had lost a great deal of money in the 1929 market crash and there was a long-standing family prejudice against stock.

9. Fusco had business experience with Respondent prior to the time that Respondent sold Palm Beach securities to Fusco. That prior experience is relevant to the perspective and understanding that Fusco brought to the Palm Beach transaction.

10. Sometime in 1998, while Respondent worked with a previous employer, Respondent solicited Fusco to invest funds in a Certificate of Deposit (CD). Fusco did so and believed they were completing a similar transaction when they later purchased Palm Beach securities from Respondent.

11. After Respondent sold the CD to Fusco, but still in 1998, Respondent changed his employment to Evergreen National (Evergreen). Respondent telephoned Fusco and informed them that he had moved to Evergreen and that he was selling a very good security that they might be interested in purchasing. Mrs. Fusco explained to Respondent that they were not interested in securities, but they would be interested in

purchasing a CD similar to the one they had previously purchased from Respondent.

12. Fusco made an appointment to visit Respondent at his office. At Respondent's office, Mrs. Fusco stated unequivocally that Fusco desired to purchase only a CD. Fusco wanted no risk to their funds, and they made that clear to Respondent.

13. Respondent represented to Fusco that Respondent was selling a CD that was fully guaranteed and insured against any loss. Respondent represented that Fusco would be investing in a proportionate share of a jumbo CD issued by Palm Beach, that they would enjoy a 14 percent return on their investment, and that their investment was insured by the Federal Deposit Insurance Corporation (FDIC) and the Great American Insurance Company (Great American).

14. Respondent provided Fusco with various brochures about the investment that verified Respondent's representations that the investment was an insured, safe way to earn a high interest rate. Fusco relied on the representations contained in those brochures and those made by Respondent.

15. Fusco was still somewhat hesitant to invest their funds. Respondent then brought into his office Darrin Carlson, the president of Evergreen (Carlson). Carlson

reiterated to Fusco that the investment was insured and was completely safe and without risk.

16. Fusco elected to invest \$40,000 to purchase a CD. They gave a check to Respondent, and Respondent promptly remitted the check to Palm Beach.

17. On September 18, 1998, Fusco signed a document entitled Subscription Agreement. The terms of the Subscription Agreement state that it is an application for Fusco to purchase shares of stock in Palm Beach. The agreement is clearly not an application to purchase a CD. In fact, no reference is made in the document to any CD or to Fusco's \$40,000.

18. Fusco did not understand the terms of the Subscription Agreement. Respondent did not explain the terms of the agreement to them. Fusco relied on the representations made by Respondent.

19. Approximately three weeks later, Fusco received a stock certificate in the mail issued by Palm Beach showing that they owned eight shares of stock in Palm Beach. The certificate makes no reference to any CD or Fusco's \$40,000 investment. Fusco was confused and upset.

20. The stock certificate does not document that the Fusco's owned any CD or any share in a CD. Furthermore,

Respondent offered no evidence of the use of the funds by Palm Beach.

21. Fusco contacted Respondent. Respondent assured Fusco that this was the "way things were done," and their investment was safe. Fusco trusted Respondent and relied on the representation by Respondent.

22. In May of 1999, Fusco received a letter from Palm Beach informing Fusco that they would receive a full refund of their money plus interest as of June 7, 1999. Palm Beach did not deliver on its promise.

23. When Fusco did not receive any money from Palm Beach, Fusco contacted Respondent. Respondent assured Fusco that their investment as safe, that they were insured, and that they would soon receive their money.

24. Fusco has never received the original \$40,000 or any interest payment from Palm Beach. Palm Beach has never provided an accounting to Fusco showing the value of their investment. Fusco has suffered a loss of \$40,000 plus accumulated interest at a fair market value rate.

25. Respondent also sold unregistered securities to Speth. Sometime in January 1999, Respondent visited the home of Speth. Speth had recently received \$90,000 as a personal injury settlement and was looking for a secure investment.



26. Speth wanted a risk-free investment. She told Respondent that she would purchase a CD, but had no interest in purchasing stock. Respondent suggested that Speth invest in a proportionate share of a jumbo CD to be issued by Palm Beach that would yield a 14 percent return. Respondent represented that the CD would be insured and risk free.

27. Respondent showed Speth various brochures claiming that the investment was fully insured by the FDIC as well as other insurance companies. Respondent did not inform Speth that there was a risk she could lose her entire investment.

28. Speth gave Respondent a check for \$90,000 made out to Palm Beach to invest in a CD with a one-year maturity date. Speth subsequently received a stock certificate in the mail from Palm Beach showing that she owned 18 shares of Palm Beach stock. Speth was puzzled, telephoned Respondent, and told him that she thought she had purchased a CD. Respondent represented to Speth that her money was safe and fully insured.

29. Speth has not received either her original investment or any interest on that investment. Palm Beach has not provided Speth with an accounting showing the value of her investment. Speth has suffered a loss of \$90,000 plus accumulated interest at a fair market value rate.

30. Respondent sold investments to Fusco and Speth that were not appropriate for their age, skill, and investment objectives. Both Fusco and Speth clearly expressed the maximum aversion to risk. Neither Fusco nor Speth would have invested in Palm Beach if they knew they were investing in stock. Both Fusco and Speth intended to purchase a CD or a proportionate share of a CD that was insured by the FDIC and Great American. At no time were their investments insured by the FDIC or any insurance company.

31. Respondent had actual knowledge of the investment goals and skill of Fusco and Speth. Respondent believed that he was selling an investment vehicle that was appropriate to the knowledge, skill, and goals of Fusco and Speth.

32. Prior to selling any securities in Palm Beach, Respondent undertook several independent inquiries that are fairly characterized as a form of due diligence. Some of Respondent's efforts toward due diligence are relevant to the unauthorized sale of unregistered securities. Other efforts are relevant to the nature of the investment as a secured investment.

33. Palm Beach represented in a letter to Respondent that the securities offered for sale were exempt from registration. Carlson believed the securities were exempt and assured Respondent that Respondent did not need a license to

sell the securities. Carlson went on-line to the web site of the Securities and Exchange Commission (SEC) and obtained a letter from private securities attorneys stating that the securities were exempt.

34. Carlson believed that the securities were insured by Great American and obtained a copy of a financial institution bond with a limit of \$5 million. Carlson represented to Respondent that any investment in Palm Beach securities was an insured investment. Respondent thought that he had verified the matter by telephoning the office of Great American and obtaining verbal assurances that the Palm Beach investment was insured.

35. Respondent had a good faith belief that the securities he offered to Fusco and Speth, in part, were appropriate to the clients' investment goals because Respondent believed the securities satisfied the risk aversion expressed by Fusco and Speth. Respondent believed the securities were risk-free because he believed they were insured.

36. Respondent knew the Palm Beach securities he offered to Fusco and Speth, in part, were not appropriate to the clients' investment goals because the securities were stock in a company and that neither Fusco nor Speth wanted to invest in securities. The first paragraph of the Securities Agreement

clearly states that the investor is purchasing stock in Palm Beach. Respondent had actual knowledge that he was selling securities to Fusco and Speth and that neither wanted to purchase securities.

37. Respondent has demonstrated in two separate transactions a willingness to sell a product to a person that the person did not desire to purchase. Even though the products sold were securities, rather than insurance, and even though Respondent believed the products represented the risk-free investment sought by Fusco and Speth, the willingness to sell securities to persons who have expressly stated that they do not want to purchase that type of product demonstrates a lack of fitness or trustworthiness to engage in the business of insurance within the meaning of Section 626.611(7).

38. Respondent sold a product to Fusco and Speth that, in fact, was not risk-free. Respondent's due diligence prior to the sale did not include an independent attempt to ascertain whether Palm Beach in fact purchased a jumbo CD with the investments made by Fusco and Speth. Respondent did not disclose his omission to Fusco or Speth. After Respondent entered into a stipulation and final order with the Department of Banking, Respondent continued to represent to Fusco and Speth that their money was safe and that they would receive

their money. Respondent has no prior discipline against his insurance license.

#### CONCLUSIONS OF LAW

39. DOAH has jurisdiction over the subject matter and the parties in this proceeding. Section 120.57(1). DOAH provided the parties with adequate notice of the administrative hearing.

40. The ALJ reserved ruling on two evidentiary issues. One issue involves Petitioner's Exhibit 10, and the other issue involves the judicial doctrine of collateral estoppel.

41. Petitioner's Exhibit 10 is a letter from the FDIC dated March 24, 1999. The FDIC is an agency of the federal government. Respondent's objection to the admissibility of Petitioner's 10 is overruled. The letter is self-authenticating pursuant to Section 90.902(2). The letter bears the signature of an employee of the Federal Deposit Insurance Corporation, acting in her capacity as Deputy Regional Counsel. The letter also qualifies as an exception to hearsay under Section 90.803(8).

42. The parties disagreed at the administrative hearing on the issue of whether the doctrine of equitable estoppel precludes an independent determination that Respondent sold securities to Fusco and Speth. The issue is moot. Petitioner admits in its PRO that Respondent sold securities and,

therefore, did not engage in the business of insurance. Respondent claims as a defense that he sold securities and, therefore, did not engage in the business of insurance. In any event, the Final Order entered by the Department of Banking and Finance and evidenced by Petitioner's Exhibit 2 does not bar Respondent, pursuant to the doctrine of collateral estoppel, from contesting the issues included in the Final Order. The Final Order was the result of a stipulated settlement between the parties rather than an adversarial proceeding in which the issues of fact and law were adjudicated.

43. Petitioner has the burden of proof in this proceeding. Petitioner must show by clear and convincing evidence that Respondent committed the acts alleged in the Administrative Complaint and the reasonableness of any proposed penalty. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

44. Petitioner satisfied its burden of proof. Petitioner showed by clear and convincing evidence that Respondent demonstrated a lack of fitness or trustworthiness to engage in the business of insurance by selling products to individuals in two separate transactions that the individuals expressly stated they did not want to purchase.

45. If the facts were to have shown that the unwanted securities that Respondent sold to Fusco and Speth were risk-free, the risk-free nature of the securities would not have precluded a determination that Respondent was guilty of selling securities to individuals who did not want securities. The risk-free nature of the securities, in such a hypothetical, would have reduced the harm to the purchasers but would not have altered the fact that Respondent sold products to individuals who did not want that particular product.

46. Florida Administrative Code Rule 4-231.030(6) authorizes range of penalties in this case. The authorized penalties include the suspension of Respondent's license for a period that ranges from 6 to 18 months.

47. Rule 4-231.160 sets forth aggravating and mitigation factors that may be considered in determining the penalty to be imposed in a particular case. The significant financial harm to Fusco and Speth are aggravating factors. In mitigation of the penalty to be imposed, Respondent undertook his own independent due diligence before selling any product to Fusco and Speth; received flawed information from the president of Evergreen, a private securities law firm, and Gulf American; and believed in good faith that he was selling

a risk-free investment to Fusco and Speth. Respondent has no prior discipline against his license as an insurance agent.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a Final Order finding Respondent guilty of violating Section 626.611(7) and suspending Respondent's license for nine months.

DONE AND ENTERED this 25th day of October, 2002, in Tallahassee, Leon County, Florida.

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DANIEL MANRY  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 25th day of October, 2002.

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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.