STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, Petitioner, vs. AUGUSTUS PETER FRANZONI, Respondent.	)	Case No. 02-3578PL

RECOMMENDED ORDER

This cause came on for formal hearing, pursuant to notice, before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted in Bunnell, Florida on January 7, 2003. The appearances were as follows:

APPEARANCES

For Petitioner: Richard J. Santurri, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Augustus Peter Franzoni, pro se
43 Cimmaron Drive
Palm Coast, Florida 32313

STATEMENT OF THE ISSUES

The issue to be determined in this proceeding concerns whether the Respondent's licenses as an insurance agent in the State of Florida should be subjected to discipline and sanction

for alleged violations of certain provisions of the Florida Insurance Code as set forth in the First Amended Administrative Complaint and treated herein.

PRELIMINARY STATEMENT

This cause arose when the Department of Financial Services (Department) filed a one-count complaint against the Respondent, Augustus Peter Franzoni, a licensed Florida insurance agent, on August 20, 2002. The complaint alleged that he violated certain provisions of the Insurance Code. On September 9, 2002, Respondent elected to request a formal proceeding pursuant to Section 120.57(1), Florida Statutes. On September 23, 2002, the Department moved for leave to amend the Administrative Complaint and that unopposed motion was granted on October 10, 2002. The First Amended Administrative Complaint superceded the original Administrative Complaint.

The First Amended Complaint contains one count alleging that the Respondent failed to advise a consumer of material facts, made material misrepresentations of fact to a consumer, sold a consumer an unsuitable product and failed to use due diligence before advising a consumer to purchase a product.

The cause came on for hearing as noticed. The Petitioner introduced 24 documents into evidence, numbered 1 through 21, as well as Petitioner's 23, 25 and 31. All of those exhibits were admitted into evidence. The Respondent introduced 18 exhibits

into evidence marked as Exhibits 1 through 18. The Respondent's Exhibits 1-4, 6, 7, 9-13, 15, 16, 17b, 17g, 17h, and 17i were admitted without objection. The Respondent's exhibits 5, 8, 14, 17a, 17c, 17d, 17e, and 17f were admitted only as corroborative hearsay. The Petitioner presented four witnesses and the Respondent two witnesses.

Upon concluding the proceeding, a transcript was ordered and proposed recommended orders were timely filed, after the granting of one extension of time. The proposed recommended orders have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Respondent was licensed by the Department at all times material hereto as a as a life, health and variable annuity agent. Sometime in 1993 the Respondent met future client Margaret Buchholz, at a financial services seminar conducted in part by the Respondent. Upon the conclusion of that seminar, Ms. Buchholz told the Respondent that she would like to make an appointment with him to discuss her financial situation and financial services she might need. She had recently lost her husband and had moved to Florida from Minnesota. She was retired at the time and remains so.

2. She had certain investments she had undertaken while living in Minnesota apparently consisting of mutual funds. She

was dissatisfied with the services of her broker in that state concerning management of that investment. She desired to liquidate that investment and re-invest her funds in an appropriate investment through a Florida broker or agent. She also wished assistance in settling medical bills from her husband's last illness, particularly in determining the amount of her liability for those bills versus that which should be paid by medicare. She requested the Respondent's assistance in this regard as well.

3. Sometime in 1993 or 1994, the company the Respondent was affiliated with performed an estate plan for Ms. Buchholz. Additionally, because she desired a safe investment for the proceeds of the investments she had liquidated after ending her relationship with the Minnesota broker, the Respondent and his wife Thelma Franzoni, who is also an agent, sold Ms. Buchholz a total of six annuities. The total money invested in the six annuities was $167,256.15. The commission for the sale of these annuities totaled $15,191.44. That amount was paid to the agency involved, Ameri-Life and Health Services, the broker with which the Franzonis were employed at the time. The total commissions paid to the Respondent from that broker, Ameri-Life, was $7,227.52.

4. Through the course of their dealings and contacts a friendly relationship developed between the Franzonis and

Ms. Buchholz. After Ms. Buchholz purchased the annuities the Franzonis visited her on a number of occasions. During one of those occasions a home health care product was sold to Ms. Buchholz by Ms. Franzoni. Sometime after that sale a new product which included long-term care or "nursing home care" was introduced to the market and Ms. Franzoni felt that this would be a more comprehensive plan and would be more cost effective and suitable to Ms. Buchholz. Ms. Franzoni contacted Ms. Buchholz and arranged an appointment.

5. During that appointment an application was taken for that new insurance product and during the meeting Ms. Buchholz complained to the Respondent concerning the low interest rate she was earning on her annuities. She asked if he had anything that would pay her better than that. (This meeting was sometime in 1999, 4-5 years after she purchased the annuities.) The Respondent told Ms. Buchholz that indeed he had a new product called a viaticated insurance benefit. Ms. Buchholz asked that he explain it to her and he explained the product and left a viaticated insurance benefits participation disclosure statement or booklet with Ms. Buchholz, asking her to read it. He asked her after reading it to list any questions that she might have. He reviewed the complete disclosure package with her, explaining it to her. At a subsequent meeting the questions Ms. Buchholz

had were presented to the Respondent and he explained the viaticated insurance benefit type of investment to her again.

6. In response to Ms. Buchholz's concern about the low income or low interest rate of return, the Respondent recommended that she could liquidate some of her annuities and use the proceeds to fund the viaticated insurance benefit investment he recommended to her. Consequently, at his recommendation she liquidated three of her annuities to use the proceeds for that purpose.

7. Pursuant to the annuity contracts entered into in approximately 1994, the surrender charges, at the stage of the life of the annuities when Ms. Buchholz surrendered or cashed them, totaled $12,103.38. Ms. Buchholz maintains that the Respondent failed to disclose those surrender charges to her and that those surrender penalties would have prevented her from deciding to liquidate those annuities and re-investing the proceeds had she been aware of them. The Respondent maintains that he did disclose the surrender penalties and that moreover, Ms. Buchholz knew of them because on three separate occasions she either signed or received official letters, documents or notices indicating to her the fact of and the amounts of the surrender charges involved in her "cashing in" of the subject annuities, starting with the original annuity contracts entered into in approximately 1994. She signed for and received the

checks for the cashing of the annuities, which were accompanied by a disclosure of the surrender penalty amounts and details, by which she could again learn before she elected to receive and negotiate the checks.

8. Ms. Buchholz received the annuity checks some three weeks before the viaticated insurance benefit investment was made. The Respondent contends that during those three weeks she could have still returned the money to the annuity company and cancelled her surrender of those annuities. In fact, she was advised in writing by companies that she actually had 60 days to return the funds and reinstate her annuities without penalties. This was after she had been informed in writing of the surrender charges.

9. The Respondent explained the viaticated insurance benefits participation disclosure booklet or statement to Ms. Buchholz. He advised her also to read it after he left their meeting concerning the investment issue and to write down any questions he might have to present to him at a later meeting. He reviewed the complete "due diligence packet" with her, explaining it as well. The questions that she had were then presented to the Respondent and he answered them at a subsequent meeting. The viaticated insurance benefits were discussed between Mr. and Mrs. Franzoni and Ms. Buchholz on at least two meetings or occasions. At one of those meetings, the

later one, she decided to purchase the viaticated insurance benefits. At a third meeting the application was completed.

10. In the course of discussion of the prospect of investing in the viaticated insurance benefits investments or contracts, the Respondent did represent to Ms. Buchholz that she could earn or would have an opportunity to earn a rate of return of approximately 14 percent per year or 42 percent over the three-year maturity period or life of the viaticated benefit investment contracts. The record is not clear, however, that the Respondent represented the 14 percent return as an absolute guarantee to Ms. Buchholz. Indeed, the subject participation agreements or contracts, in evidence, provided to her by the Respondent, show that 14 percent was not an actual guarantee because, although it would be so if the investment contract matured in the projected three-year period (i.e. the viator died), if the maturity date extended longer than that, because the viator had not yet expired, the annualized return rate or percentage would be correspondingly lower. Conversely, if the viator expired sooner than the three-year period referenced in the agreements, the corresponding annual rate of return percentage would be higher.

11. In any event, she had the opportunity to earn a higher return than the four and one-half percent she was receiving on the previous annuity investments. In the event, the viaticated

insurance benefit did not mature in the three-year period, a "bailout provision" was provided in the contract whereby she would be paid if she "cashed out" of the contracts at the rate of 15 percent for the three-year period or a guaranteed five percent per year (simple interest) on the bailout provision.

12. Ms. Buchholz used the proceeds from the liquidation of the annuities to purchase four viatical benefit contracts through the Respondent as sales agent, through Jeffery Paine, the escrow agent for American Benefits Services (ABS) and Financial Federation Title and Trust Company (FinFed). Additionally, she used "qualified," tax deferred proceeds from the surrender of the annuities to purchase viatical benefit contracts through the Respondent as sales agent, through Pensco, Inc., an administrator of self-directed IRA's and pension funds. The total amount for the viaticals purchased through Pensco was $61,788.12. An additional $26,764.00 was held by Pensco in a cash account to fund mandatory monthly IRA disbursements. Ms. Buchholz gave the Respondents two checks, one in the amount of $88,582.12 payable to Jeffery Paine, and one in the amount of $42,344.02 payable to Pensco pension services. These checks were in payment for the purchase of the viatical insurance benefit contracts at issue.

13. Ultimately, it was revealed that the principals of ABS and FinFed. the viatical settlement brokers, were engaging in a

"Ponzi scheme" whereby more viaticated investment contracts were sold to investors, such as Ms. Buchholz, than the companies ABS and FinFed had policies or funds with which to pay off investors. Consequently, through federal criminal proceedings, several of these principals were convicted and incarcerated. Ms. Buchholz ultimately lost approximately $100,000.00. The ABS/FinFed companies are in bankruptcy and the trustee in bankruptcy has paid investors including Ms. Buchholz, at the present time, approximately 23 percent of the investment principal. More reimbursements may be in the offing as the bankruptcy administration progresses.

14. The escrow agent for the companies and the investors was Jeffery Paine, an attorney licensed by the Florida Bar Association. It was his duty and responsibility, as stated in the viaticated insurance benefits participation agreement disclosures, to ensure that the policies actually existed and were paid up in full force and effect. He was responsible to ascertain that they had survived the typical two-year contestable period, and that the life expectancies of the terminal viators had been investigated and documented by a state certified medical professional or physician. This was not the responsibility of the Respondent or other agents like him.

15. Indeed agents such as the Respondent do not have access to medical records of viators. The duty to examine them

is performed by the viatical settlement provider or escrow agent. The Respondent was not responsible for payment of premiums on any policies because the viatical settlement provider or escrow agent had a premium reserve account to provide payment of any necessary premiums. Indeed most of the policies involved in the subject case were covered under "waiver of premium" provisions, whereby, as is typically the case with life insurance policies, when the insured person becomes terminally ill or disabled, the premium is waived by the insurance company,

16. It is probably true that Ms. Buchholz did not totally understand the nature of viatical investments and did not understand all risks associated with the investment; she rather relied on the Respondent based upon his representation. She admitted to not remembering everything about the details of the transactions and the documents she signed and admitted that she did not read much, if any, of the documents related to the viatical investments or to the annuities which she had owned previously. For his part, the Respondent made a fairly detailed due diligence investigation, as did his wife (who reported to him), to ascertain that the policies and the companies with whom he would be dealing in selling viatial benefit contracts were bona fide, duly-licensed and reputable companies, operating in good faith. This evidence by the Respondent tends to be borne

out as to its creditability because the Respondent's wife, after this due diligence investigation, invested $51,000.00 of her own money and the Franzonis also sold viatical benefit contracts to several of their own family members. The Respondent's showing that he was unaware of the "Ponzi scheme" and illegal and criminal acts of the principals of the company he represented is deemed credible and is accepted.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. Sections 120.569 and 120.57(1), Florida Statutes. The standard of proof to discipline a licensee such as the Respondent is one of clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Florida 1987).

18. Section 626.611, Florida Statutes, provides, in pertinent part:

> The Department shall deny, suspend, revoke, or refuse to renew or continue the license of any agent, solicitor, or adjuster or the permit of any service representative, supervising or managing general agent, or claims investigator, and it shall suspend or revoke the eligibility to hold a license or permit of any such person, if it finds that as to the applicant, licensee, or permittee any one or more of the following applicable grounds exist:

(5) Willful misrepresentation of any insurance policy or annuity contract or willful deception with regard to any such policy or contract. [Section 626.611(5), Florida Statutes.]

(7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.

(8) Demonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or permit.

19. Section 626.621, Florida Statutes, provides, in pertinent part:

The Department may, in its discretion, deny, suspend, revoke, or refuse to renew or continue the license of any agent, solicitor, or adjuster or the permit of any services representative, supervising or managing general agent, or claims investigator, and it may suspend or revoke the eligibility to hold a license or permit of any such person, if it finds that as to the applicant, licensee, or permittee any one or more of the following applicable grounds exist under circumstances for which such denial, suspension, revocation, or refusal is not mandatory under Section 626.611:

(2) Violation of any provision of this code or of any other law applicable to the business of insurance in the course of dealing under the license or appointment.

(5) Violation of the provision against twisting, as defined in Section 626.9541(1)(l).

(6) In the conduct of business under the license or appointment, engaging in unfair methods of competition or in unfair or

deceptive acts or practices, as prohibited under part IX of this chapter, or having otherwise shown himself or herself to be a source of injury or loss to the public.

(9) If a life agent, violation of the code of ethics.

20. Section 626.9541, Florida Statutes, provides, in pertinent part:

(1) The following are defined as unfair methods of competition and unfair or deceptive acts or practice.

(a)1 Misrepresentations and false advertising of insurance policies. Knowingly making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, or comparison with misrepresents the benefits, advantages, conditions, or terms of any insurance policy.

(k)1 Knowingly making a false or fraudulent written or oral statement or representation on, or relative to, an application or negotiation for an insurance policy for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual.

(1) Twisting.--Knowingly making any misleading representations or incomplete or fraudulent comparisons or fraudulent material omissions of or with respect to any insurance policies or insurers for the purpose of inducing, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, pledge, assign, borrow on, or convert any insurance policy or take out a policy of insurance in another insurer.

21. Section 626.9911, Florida Statutes, provides, in pertinent part:

> (4) "Viatical settlement broker" means a person who, on behalf of a viator and for a fee, commission, or other valuable consideration, offers or attempts to negotiate viatical settlement contracts between a viator resident in this state and one or more viatical settlement providers . . . . a viatical settlement broker is deemed to represent only the viator and owes a fiduciary duty to the viator to act according to the viator's instructions and in the vest interest of the viator.
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> (5) "Viatical settlement contract" means a written agreement entered into between a viatical settlement provider, or its related provider trust, and a viator. The agreement must establish the terms under which the viatical settlement provider will pay compensation or anything of value, which compensation or value is less than the expected death benefit of the insurance policy or certificate, in return for the viator's assignment, transfer, sale, devise, or bequest of the death benefit or ownership of all or a portion of the insurance policy or certificate, in return for the viator's assignment, transfer, sale, devise, or bequest of the death benefit or ownership of all or a portion of the insurance policy or certificate of insurance to the viatical settlement provider. A viatical settlement contract also includes a contract for a loan or other financial transaction secured primarily by an individual or group life insurance policy, other than a loan by a life insurance company pursuant to the terms of the life insurance contract, or a loan secured by the cash value of a policy.
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> (7) "Viator" means the owner of a life insurance policy or a certificate holder under a group policy insuring the life of an

> individual with a catastrophic or life-threatening illness or condition who enters or seeks to enter into a viatical settlement contract. This term does not include a viatical settlement purchaser or a viatical settlement provider or any person acquiring a policy or interest in a policy from a viatical settlement provider, nor does it include an independent third-party trustee or escrow agent.
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> (9) "Viatical settlement purchase agreement" means a contract or agreement, entered into by a viatical settlement purchaser, to which the viator is not a party, to purchase a life insurance policy or an interest in a life insurance policy, which is entered into for the purpose of deriving an economic benefit.
>
> (11) "Viatical settlement sales agent" means a person other than a licensed viatical settlement provider who arranges the purchase through a viatical settlement purchase agreement of a life insurance policy or an interest in a life insurance policy.

22. Section 626.9912, Florida Statutes, provides, in pertinent part:

> (1) After July 1, 1996, a person may not perform the functions of a viatical settlement provider as defined in this act or enter into or solicit a viatical settlement contract without first having obtained a license from the Department.

23. Section 626.99235, Florida Statutes, provides, in pertinent part:

> (1) No personal shall misrepresent the nature of the return or the duration of time to obtain the return of any investment related to one or more viatical settlements

sold by a viatical settlement provider or related provider trust.

(2) The viatical settlement provider and the viatical settlement agent, themselves or through another person, shall provide in writing the following disclosures to any viatical settlement purchaser or purchaser prospect:

(a) That the return represented as being available under the viatical settlement purchase agreement is directly tied to the projected life span or one or more insureds.

(b) If a return is represented, the disclosure shall indicate the projected life span of the insured or insureds whose life or lives are tied to the return.

(c) If required by the terms of the viatical settlement purchase agreement, that the viatical settlement purchaser shall be responsible for the payment of insurance premiums on the life of the insured, late or surrender fees, or other costs related to the life insurance policy on the life of the insured or insureds which may reduce the return.

(d) The amount of any trust fees, commissions, deductions, or other expenses, if any, to be charged to the viatical settlement purchaser.

(e) The name and address of the person responsible for tracking the insured.

(f) The group policies may contain limitations or caps in the conversion rights, that additional premiums may have to be paid if the policy is converted, and the party responsible for the payment of such additional premiums shall be identified.

(g) That the life expectancy and rate of return are only estimates and cannot be guaranteed.

(h) That the purchase of a viatical settlement contract should not be considered a liquid purchase, since it is impossible to predict the exact timing of its maturity and the funds may not be available until the death of the insured.

(i) The name and address of the person with the responsibility for paying the premium until the death of the insured.

The written disclosure required under this subsection shall be conspicuously displayed in any viatical settlement purchase agreement and in any solicitation material furnished to the viatical settlement purchaser by such viatical settlement provider, related provider trust, or person, and shall be in contrasting color and in not less than 10-point type or no smaller than the largest type on the page if larger than 10-point type. The department is authorized to adopt by rule the disclosure form to be used. The disclosures need not be furnished in an invitation to inquire, the objective of which is to create a desire to inquire further about entering into a viatical settlement purchase agreement. The invitation to inquire may not quote rates of return, may not include material attendant to the execution of any specific viatical settlement purchase agreement, and may not relate to any specific viator.

24. Section 626.9927, Florida Statutes, provides, in pertinent part:

(1) A violation of this act is an unfair trade practice under Section 626.9521 and 626.9541 and is subject to the penalties provided in the insurance code. Part X of this chapter applies to a licensee under

> this act or a transaction subject to this act as if a viatical settlement contract and a viatical settlement purchase agreement were an insurance policy.

25. Section 626.99277, Florida Statutes, provides, in pertinent part:

> (1) It is unlawful for a person in the advertisement, offer, or sale of a viatical settlement purchase agreement to misrepresent that such an agreement has been guaranteed, sponsored, recommended, or approved by the state, or any agency or officer of the state or by the United States or any agency or officer of the United States.
>
> (6) A person may not represent that the investment in a viatical settlement purchase agreement is "guaranteed," that the principal is "safe," or that the investment is free of risk.

* * * *

26. The undersigned has carefully considered and weighed the testimony adduced by the Petitioner and the Respondent on direct and cross-examination and has conducted a thorough and repetitive review and reading of the relevant agreements, disclosure statements, and other documents (transactional documents) involved in both the surrender of Ms. Buchholz's annuity, investments and related to her investments in the viatical contracts. Although Ms. Buchholz testified that if she had known she would incur the surrender penalties or charges from the liquidation of the annuities that she would have not

liquidated them and would have not entered into the viatical investments, her testimony can be accorded little weight in relation to the documentary evidence which belies it. In her testimony, particularly on cross-examination, she revealed very little clarity of memory concerning the details of the transactions involved in the surrender of the annuities and involved in engaging in and undertaking the viatical investments at issue.

27. She maintains she did not know about the surrender charges associated with cashing in her annuities. However, the documentary evidence clearly shows that on at least three occasions she was advised in writing of the itemization associated with the return of her investment monies related to the surrender of the annuities. This advice included itemization of the surrender charges, the net money due her from liquidating the annuities, as well as the total investment value credited to her in the annuities at the point of their liquidation. Moreover, upon being tendered the net check represented by the liquidation of her investment in the annuities, she was again advised by the annuity companies that she still had 60 days in which she could elect to change her mind and return the funds or the checks and re-instate the annuities, if she so desired. She elected not to do so, but

instead to proceed with investment in the viatical contracts at issue.

28. The testimony of Mr. Canover, her companion, although he was present at some of the meetings, does not reveal that he was privy to or heard all of the conversations, nor that he was present at all of the meetings between the Respondent, his wife and Ms. Buchholz. Thus his testimony is not deemed to corroborate her contention in her testimony that she did not know about the surrender penalties and that she would not have liquidated the annuities if she had known of the surrender charges. While she may not have recalled that the surrender charges were levied against her annuity investments or deducted therefrom, at the time of her testimony at hearing, she certainly had to have known at the time of the transactions because she was supplied the information concerning them in writing and signed the relevant documents necessary to liquidate her annuities. Thus, she is charged with knowledge of the surrender penalties and with her acquiescence in the liquidation of the annuities and their re-investment in the viatical agreements or contracts. Clear and convincing, persuasive evidence that the Respondent made a material misrepresentation by failing to disclose the surrender penalties or charges or to discuss this information with Ms. Buchholz has not been established. The statutory sections charged in the Amended

Complaint and referenced in paragraph 13 of the Petitioner's Proposed Recommended Order, Conclusions of Law, have not been proven to have been violated.

29. Due to the same or similar considerations regarding the weight, creditability and credibility of the above-referenced testimony and evidence, it has not been established with clarity and persuasiveness that the Respondent actually told Ms. Buchholz's that the purported viatical investments were a safe, low risk investment, guaranteed to earn a 14 percent return per year. It was not clearly and convincingly established that this was a misrepresentation of material facts nor that the representation was made in this manner.

30. Ms. Buchholz, who quite understandably has ample reason to wish to find the Respondent blameworthy, testified that the Respondent told her that the investments were guaranteed "to earn 14 percent per year." The Petitioner maintains that the Respondent represented that the viaticals were a low-risk investment, guaranteed to earn 14 percent a year and that this was a misrepresentation of material facts, that viaticals are really high-risk investments that do not pay a guaranteed yearly rate of return. The Petitioner contends that had Ms. Buchholz known that viaticals were a high-risk investment she would not have invested in them.

31. This postulation is not supported by the clear, convincing, persuasive evidence however. In this regard Ms. Buchholz's memory is not very extensive concerning the events surrounding these transactions and the meetings she had with the Respondent. It is thus not very clear concerning what the Respondent actually said or represented to her concerning the rate of return and whether or not it was guaranteed. He may well have referenced 14 percent per year as an annualized calculation, based upon the contractually provided 42 percent return over the three-year maturity date or period of the viatical investments involved (measured by the medically-estimated life expectancies of the terminally ill viators or insureds involved in the life insurance policies which underlie the investment contracts at issue). The transaction documents in evidence, including the viaticated insurance benefits participation disclosure documents, clearly disclosed that a 36 month maturity date applied to the viatical investment contracts at issue, determined by the appropriately credentialed medical person making such an estimate of the remaining life expectancy of the terminally ill viators involved in the subject policies.

32. Thus, the difference between the amount Ms. Buchholz invested and the amount she would receive from the life insurance policy benefits once the policy benefits were paid on the death of the viators involved, would be a 42 percent

appreciation. If it were paid to her at the end of the three-year expected maturity date then the return would be 14 percent per year. If it were paid before that time, because the viator died earlier than expected in a given situation, then the annualized return would be greater. Correspondingly it would be less if the viator died beyond the three-year expected or estimated maturity date.

33. The transactional documents in question provided written disclosure to Ms. Buchholz that the viatical investments provided 42 percent total return over and above her original investment (the annualized amount representing each year of the investment might vary for the above-stated reason). It was also thus disclosed that, at the end of the three-year maturity period, she could elect not to wait for maturity (measured by the death of the viator), if that had not occurred at the end of the three-year period, but rather she could elect to "cash out" her investments and receive, instead, a guaranteed five percent simple interest per year return for the three-year life of the investment at that point, or a total of 15 percent simple interest.

34. Under these circumstances, demonstrated by the evidence, it cannot be truly concluded that these were high-risk investments. They were short term, (approximately three-years) and paid a very favorable return, which was contractually

guaranteed to the investor based upon, in effect, a security interest in life insurance policies irrevocably issued by reputable "A" or better-rated insurance companies. The policies were irrevocably assigned to the benefit of the investors such as Ms. Buchholz, according to the contractual documents and all the representations made by ABS/FinFed, the viatical settlement broker for whom the Respondent was sales agent. These representations were made both to the Respondent and to Ms. Buchholz. Had not the fraud and criminal activity with regard to the investors' money been perpetrated by certain officers and staff of the viatical settlement broker company, the investment would likely have performed just as it was represented.

35. The fraud and misrepresentation was not that of the Respondent in this regard, but rather the fraudulent and criminal misrepresentations and conduct perpetrated against both the Respondent and Ms. Buchholz by the officials of the company which employed the Respondent. Thus clear and convincing, persuasive evidence that the Respondent represented the viatical investments in question as guaranteed, low risk-investments, paying a guaranteed rate of return, as a misrepresentation of material facts which induced Ms. Buchholz to make an alleged "high risk investment" has not been established. Thus, violations of the statutory provisions cited at paragraph 14 of

the Petitioner's Proposed Recommended Order, Conclusions of Law, have not been proven.

36. Section 626.99235(1) and (2), Florida Statutes, are quoted above and provide generally that no person shall misrepresent the nature of the return or the duration of time to obtain the return of any investment related to viatical settlements and that a viatical settlement provider or sales agents, themselves, or through another person, shall provide in writing the disclosures enumerated at paragraphs (2)(a) through (i); the disclosures depicted and quoted above.

37. It has not been demonstrated by clear and convincing persuasive evidence that the Respondent misrepresented the nature of the viatical return and the duration of time to obtain the viatical return. It has not been thus shown that the Respondent failed to provide in writing to Ms. Buchholz the various disclosures quoted above and set forth at Section 626.99235(1) and (2), Florida Statutes. The Respondent "or other person" (such as the escrow agent and other principals of the company, through the transactional documents referenced herein) provided to Ms. Buchholz disclosure that the rate of return was directly related to the projected life span of the insureds; what the projected life spans of the insureds were expected to be, as shown by the maturity dates referenced in the transactional documents, and identified the person responsible

for tracking the insureds and for making payment of any additional premiums should such be necessary. Disclosure was thus made of the person responsible for paying a premium until the death of the insureds as to each policy. In fact the policies in most of these cases would appear to be on "waiver-of-premium" status, since insurance companies commonly have a waiver-of-premium rider in their life insurance policies which waive payment of any premium once an insured becomes terminally ill or disabled, as was the case with the viatical investments at issue.

38. It was also disclosed in writing that the life expectancy and rate of return were only estimates and could not be guaranteed. This is clearly the case because of the inclusion of the option that the investor, such as Ms. Buchholz, could elect not to wait for ultimate maturity, brought on by the death of the relevant insured, but could elect to cash out the investment at the end of the 36-month, normally-expected maturity period, if the viatical investment had not yet matured by the death of the viator at that point. She could then take the lesser, guaranteed five-percent simple interest per year rate of return. Thus the documents clearly disclosed that the life expectancy and rate of return were only estimates.

39. It was also disclosed thusly, in writing, that the purchases of the viatical settlement contracts could not be considered liquid investments, since it was impossible to predict the exact timing of the maturity (based upon when the viator would die) and that the funds may not be available until the ultimate death of the insured, which was not capable of being ascertained with precision. The name and address of the person responsible for paying the premiums until the death of the insured were not the investors, situated as Ms. Buchholz, but rather was the escrow agent and such was disclosed to Ms. Buchholz in writing. In summary it has not been clearly and convincingly demonstrated that the Respondent violated the above provisions and therefore, derivatively, the other statutory provisions cited at paragraph 15 of the conclusions of law in the Petitioner's Proposed Recommended Order.

40. The Petitioner contends that the Respondent should have exercised due diligence in reviewing the insurance policies to determine whether the policies existed, whether they were underwritten by reputable companies, their face value, the terms of the policies and the dates they were written. It also contends that the Respondent should have reviewed the medical data of the insureds and the insureds' life expectancies. It has not been demonstrated, however, that the Respondent had any legal access to the medical data of the insureds through signed

releases or otherwise, nor to the insureds life expectancy information. Moreover, it was not shown to be the duty of the Respondent to review the insurance policies that the investments were to be placed in. Rather, it was the obligation of the viatical settlement provider to be sure that the policies existed, that the insurance companies were reputable, that the policies were past the contestable period and that the life expectancy was conducted and determined by an appropriate physician or medical personnel. This duty, under the viaticated insurance benefits participation disclosure in evidence as Petitioner's Exhibit 14, was provided in writing to be the responsibility of the viatical settlement provider companies' escrow agent. Thus, clear and convincing evidence has not shown that the Respondent failed to conduct appropriate due diligence investigation in this regard.

41. Beyond that, the Respondent and his fellow agent, his wife, Mrs. Franzoni, conducted a due diligence inquiry into the bona fide, good-faith status of the ABS/FinFed and its licensure status with the Department of Insurance and, as to the escrow agent, with the Florida Bar. The Respondent journeyed to the home office in the Fort Lauderdale area to learn more about the operations and product of the viatical settlement provider, ABS/FinFed Company. At a seminar or meeting with company representatives, the Respondent and other agents asked numerous

questions designed to ascertain all possible information concerning the operations of the company and its financial operational and licensure status. The Respondent received no information from the Department, the Florida Bar or otherwise to indicate to him that the ABS/FinFed and related persons or entities were other than properly licensed and in good standing in their operations.

42. Contractually, the Respondent was not permitted access to or possession of any of the medical information or insurance policies, but rather relied on the escrow agent and other company personnel for assurances as to the specifics of the policies, their coverage and the other items concerning diligent inquiry referenced above. Thus, clear and convincing, persuasive evidence has not demonstrated that the Respondent failed to exercise due diligence before recommending the subject viatical investments.

43. Finally, it was not shown by clear and convincing evidence that the viatical investment was totally unsuitable for Ms. Buchholz. Because of the above findings and conclusions it was not established that the investments themselves were a high-risk investment. Rather, it was revealed by hindsight that the company purveying those investments duped the Respondent, Ms. Buchholz and other investors like her. The company and its chief operatives were themselves the "high-risk" attendant to

the investment transactions and not the investments and related contractual relationships themselves. In more plain terms, the "high-risk" was not the investments, but the criminals who were managing the investments.

44. It is not shown by clear and convincing persuasive evidence that the investment contracts themselves were high-risk investment instruments and transactions. Although one might question whether the Respondent exercised flawed judgment in selling such an investment to a 74-year-old retired widow, who may not, and indeed probably did not understand all the technical details and ramifications of it, it has not been demonstrated that in doing so he violated Section 626.611(7)(8)(9), Section 626.621(2), and Section 626.621(5), Florida Statutes, by clear, convincing, persuasive evidence.

45. In summary, the undersigned has carefully weighed and considered the testimony and judged its credibility, creditability and competency and has done likewise with regard to the related documentary evidence. The plight of Ms. Buchholz and the other investors is certainly sad and regrettable. The fact that the Respondent's own wife and family members were also investors and victims in the subject arrangement lends credibility to the Respondent's premise that he had no deceitful or otherwise nefarious intent and did not engage in the subject transactions in an unfit and untrustworthy manner. The overall

probative value of the evidence is more supportive of the Respondent's positions than that of the Petitioner.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED:

That a Final Order be entered dismissing the subject Amended Administrative Complaint.

DONE AND ENTERED this 27th day of June, 2003, in Tallahassee, Leon County, Florida.

____
P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 27th day of June, 2003.

COPIES FURNISHED:

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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.