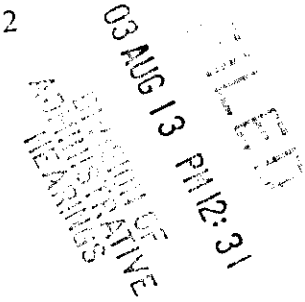
5-19-03

STATE OF FLORIDA
OFFICE OF FINANCIAL REGULATION

AP

REM-Clos

STATE OF FLORIDA, OFFICE OF FINANCIAL INSTITUTIONS AND SECURITIES REGULATION Petitioner, v. JAMES A. TORCHIA, Respondent.	Administrative Proceeding No.: 3208-S-2/01 DOAH Case No.: 02-3582
STATE OF FLORIDA, OFFICE OF FINANCIAL INSTITUTIONS AND SECURITIES REGULATION Petitioner, v. EMPIRE INSURANCE, INC., and JAMES A. TORCHIA, Respondent.	Administrative Proceeding Nos.: 3089-S-2/01, 3089a-S-2/01 DOAH Case No.: 02-3583



FINAL ORDER AND NOTICE OF RIGHTS

On March 26, 2002, the Office of Financial Regulation, formerly the Office of Financial Institutions and Securities Regulation, the statutory successor to the Department of Banking and Finance ("Office") filed an Amended Administrative Complaint alleging the Respondents offered and sold unregistered securities to Florida investors, and acted as unregistered dealers in violation of sections 517.07 and 517.12, Florida Statutes respectively. The Administrative Complaint was referred to the Division of Administrative Hearings, ("DOAH") and on February

11-12, 2003, a full evidentiary administrative hearing was held. On May 19, 2003, Administrative Law Judge ("ALJ") Robert E. Meale of the Division of Administrative Hearings submitted his Recommended Order, a copy of which is attached hereto as Exhibit A. Respondents filed exceptions to the Recommended Order on June 3, 2003.

Upon review of the record, the Office, being authorized and directed to administer Chapter 517, Florida Statutes, the Florida Securities and Investor Protection Act ("Securities Act"), hereby enters the following Final Order adopting the Findings of Fact and Conclusions of Law of the Recommended Order subject to the modifications herein below. Such modifications, however, are for clarification purposes only. The modifications are consistent with, and do not materially alter the basis for, the ALJ's ultimate recommendation and suggested penalty. Accordingly, as set forth below, the ALJ's recommendation and suggested penalty are adopted and incorporated herein by reference, as the Final Order of the agency.

STANDARD OF REVIEW

When reviewing a recommended order, an agency may adopt a recommended order as the final order of the agency. § 120.57(1)(l), Fla. Stat. (2002). However, with respect to a recommended order's conclusions of law or interpretations of administrative rules, in its final order, an agency,

> may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

§ 120.57(1)(l), Fla. Stat. (2002). With respect to findings of fact,

> [t]he agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

§ 120.57(1)(l), Fla. Stat. (2002). Competent substantial evidence "is defined as 'such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.'" Manassa v. Manassa, 738 So.2d 997 (Fla. 1st DCA 1999)(citing DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957). The evidence "should be 'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.'" Id. "Neither may an agency's responsibility to determine if substantial evidence supports the administrative law judge's findings of fact be avoided by merely labeling, either by the administrative law judge or the agency, contrary findings as conclusions of law." Gross v. Dept. of Health, 819 So.2d 997, 1001 (Fla. 5th DCA 2002).

Finally, an agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action. § 120.57, Fla. Stat. (2002).

RULINGS ON RESPONDENTS' EXCEPTIONS

EXCEPTION 1: Respondents have taken exception to the ALJ's Statement of the Issue. Specifically, Respondents suggest that the ALJ's Statement of the Issue fails to consider the question of whether the Office had jurisdiction to regulate the products sold, and that the ALJ "failed to properly consider how the Florida Legislature regulates Viatical Settlement Agreements." See Respondents' Exceptions to Recommended Order ("Exceptions"), ¶ 1. First, with respect to the Office's jurisdiction to regulate the products sold, such jurisdiction is directly

dependent upon whether the product sold constitutes a security subject to Chapter 517, Florida Statutes. See § 517.03, Fla. Stat. The Respondents' suggestion is without merit. The Statement of the Issue, as presented by the ALJ, squarely contemplates whether the product sold constitutes a security, and thus the issue upon which jurisdiction rests. Second, the Respondents' suggestion that the ALJ failed to consider the applicability of Chapter 626 is plainly incorrect. The ALJ directly addresses the applicability of Chapter 626 at paragraphs 98 through 115 of the Recommended Order. Accordingly, Respondents' Exception 1 is without merit, clearly does not demonstrate any abuse of discretion by the ALJ, and is hereby rejected.

EXCEPTION 2: Respondents have taken exception to paragraphs 3 through 6 of the Recommended Order on the basis that the ALJ relied on facts not in evidence or misconstrued the facts presented at hearing. Respondents do not identify the legal basis for the exception, and do not include appropriate and specific citations to the record. Notwithstanding, the thrust of Respondents' argument appears to be that the ALJ's use of the term, "broker or dealer," indicates that the ALJ somehow erred because the terms "do not exist under industry standards or the Viatical Settlement Act." See Exceptions, ¶ 2. The Respondents are plainly incorrect. The Viatical Settlement Act specifically defines Viatical Settlement Brokers at section 626.9911(4), Florida Statutes. Moreover, the ALJ's use of the term "broker or dealer" is immaterial to the outcome in this case. Exception 2 fails to demonstrate that the ALJ's findings at paragraphs 3 through 6 are unsupported by any competent, substantial evidence, accordingly, Respondents' Exception 2 is rejected.

EXCEPTION 3: In Exception 3, Respondents fail to identify the disputed portion of the Recommended Order by page number or paragraph, do not identify the legal basis for the

exception, and do not include appropriate and specific citations to the record. Accordingly, the Office need not rule on the exception. See Ch. 2003-94, § 5 at 7, Laws of Fla.

EXCEPTION 4: Respondents have taken exception to "any reference made by the ALJ to section 517.301, Florida Statutes on the basis that "any and all claims relating to fraud in the offer and sale of securites ... were dismissed... ." Exceptions, ¶ 4. While the Office's Amended Administrative Complaint did not include counts based on violations of section 517.301, references in the Recommended Order to section 517.301 are harmless. The ALJ expressly found that section 517.301 was not relevant in the present instance, and ultimately, no part of the ALJ's recommendation is founded upon section 517.301. See Recommended Order, ¶ 72. Further, the Office expressly finds that its Final Order, which adopts the recommendation and penalty suggested in the Recommended Order, is not based in any part on a violation of section 517.301. Since any reference to section 517.301 is harmless, and the penalty imposed by the Recommended and Final Orders in this case are not founded upon a violation of section 517.301, Florida Statutes, Respondents' Exception 4 is moot, and is hereby rejected.

EXCEPTIONS 5 and 6: In Exceptions 5 and 6, Respondents have taken exception to paragraphs 5 through 11 of the Recommended Order. The gravamen of Exceptions 5 and 6 is that the ALJ failed to properly consider Chapter 626, Florida Statutes. Again, Respondents' are plainly incorrect. The ALJ squarely addresses the applicability of Chapter 626 at paragraphs 98 through 115 of the Recommended Order. Accordingly, Respondents' Exceptions 5 and 6 are rejected.

EXCEPTION 7: Respondents have taken exception to paragraph 14 of the Recommended Order on the basis that the Finding of Fact in paragraph 14 is not supported by the record. Specifically, Respondent urges that, "the disclosure states that the investor will

receive a fractional interest in a policy which is held in a trust not create a trust in the name of the investor." Respondents' reckless review of the record is yet again evident. In fact, the disclosure states expressly that, "PARTICIPANT directs a different trust services company ... to establish a trust (or a fractional interest in a trust) in the name of the PARTICIPANT." See Petitioner's Exhibit 6, page 10. Accordingly, the finding at paragraph 14 of the Recommended Order is supported by competent, substantial evidence, and Respondents' Exception 7 is rejected.

EXCEPTION 8: In Exception 8, Respondents fail to identify the disputed portion of the Recommended Order by page number or paragraph, do not identify the legal basis for the exception, and do not include appropriate and specific citations to the record. Accordingly, the Office need not rule on the exception. See Ch. 2003-94, § 5 at 7, Laws of Fla.

EXCEPTION 9: Respondents have taken exception to paragraph 25 of the Recommended Order on the basis that it, "continues to misinterpret the transaction." Exceptions, ¶ 9. Respondents' exception is merely an attempt to reargue the weight of the evidence, and such argument is beyond the scope of agency review. See Brogan v. Carter, 671 So.2d 822, 833 (Fla. 1st DCA 1996). The ALJ's findings at paragraph 25 of the Recommended Order are supported by competent, substantial evidence, accordingly, Respondents' Exception 9 is rejected.

EXCEPTION 10 - 12: Respondents' Exceptions 10 through 12 take exception to paragraphs 44, 51, and 63 of the Recommended Order on the basis that there was no evidence presented suggesting that each of the investors purchased the ABS program through Respondents. Contrary to the Respondents' assertion, the record includes competent, substantial evidence regarding the sales of the ABS program to each purchaser identified in Exceptions 10 – 12. See Petitioner's Exhibit 1 (admitted without objection). Accordingly, Respondents exceptions 10 – 12 are rejected.

EXCEPTION 13: Respondents have taken exception to paragraphs 80 and 81 on the basis that "there was no testimony that the FinFed/ABS as structured [sic] pooled the investor's funds." Exceptions, ¶ 13. On the contrary, the record contains ample competent, substantial evidence to support the ALJ's conclusion that the investors' investments were pooled in the present case. In fact, the Respondents' own exception exemplifies this point by acknowledging that the interests purchased by the investors were fractionalized interests. As explained by the ALJ in paragraph 82 of the Recommended Order such fractionalization required that, "the funds of multiple investors were necessarily pooled when the escrow agents paid them to FinFed," in order to accumulate a "sufficient sum to purchase an entire insurance policy." See Recommended Order, ¶82. The ALJ's conclusion is supported by competent, substantial evidence in the record, accordingly, Respondent's Exception 13 is rejected.

EXCEPTION 14: Respondents have taken exception to paragraphs 84 and 85 of the Recommended Order. The exception states that the findings in paragraphs 84 and 85 rely on "facts not at issue." Exceptions, ¶ 14. Conversely, however, the exception goes on to expressly acknowledge that the life expectancy of the viator is an unfixed term "contingent on the life and/or death of the insured." Id. Thus, in essence the Respondents' own exception actually supports the very findings to which the Respondents take exception, i.e. that the terms of the growth and income plans are unfixed. Since the Respondents' own exception actually supports the ALJ's findings, and because the ALJ's findings are supported by competent, substantial evidence, Respondents' Exception 14 is rejected.

EXCEPTION 15: Respondents have taken exception to paragraphs 90 – 92 of the Recommended Order on the basis that they "rely on facts not in evidence." Review of the record, however, reveals that the ALJ's findings are supported by competent, substantial

evidence. The correspondence cited in paragraph 92 of the Recommended Order appears in Petitioner's Exhibit 1 which was admitted without objection at the hearing. In addition to the fact that the ALJ's findings are supported by the record, the case cited in Respondents' exception, SEC v. Life Partners, 87 F.3d 536 (D.C. Cir. 1996), is not controlling in the present case. As noted by the ALJ at paragraph 94 of the Recommended Order, Petitioner has joined the long line of states that have rejected the Life Partners analysis. In so noting, the ALJ has made clear that the conclusion in the Recommended Order, and correspondingly of this Final Order, is not dependent on the analysis presented in Life Partners. Accordingly, Respondents' Exception 15 is rejected.

EXCEPTIONS 16: Respondents have taken exception to paragraph 96 of the Recommended Order. The basis for the Respondents' exception is unclear. The Respondents take exception to the ALJ's finding, yet in support of the exception simply recite, with emphasis, the very statutory provision cited by the ALJ in paragraph 96 of the Recommended Order. Respondents then simply go on to suggest summarily that they have "set forth" that the transactions at issue in this case are no different than other transactions that are exempt under Chapter 517, Florida Statutes. Respondents do not identify the legal basis for the exception nor do they include appropriate and specific citations to the record. Notwithstanding, as found by the ALJ at paragraph 97 of the Recommended Order, the record in this case demonstrates by competent, substantial evidence that the investors in this case did not purchase an insurance or endowment policy. Accordingly, Petitioner agrees with the ALJ's conclusion that no exemption in Chapter 517 applies, and Respondents' exception is rejected.

EXCEPTION 17: Respondents have taken exception to paragraph 97 of the Recommended Order apparently on the basis that the ALJ's conclusion that the investors did not

purchase insurance policies is not supported by the record. The exception is without merit. The ALJ's conclusion is clearly supported by competent, substantial evidence as illustrated by the contract between the investor and ABS which is comprised of the Letter of Instruction to Trust, Disbursement Letter of Instruction, and the Participation Agreement. See Petitioner's Exhibit 1. The content of these documents clearly support the ALJ's conclusion. The Letter of Instruction to Trust ("LIT") expressly recognizes that the insurance policy benefits (even if they had existed) are not assigned to the investors but rather to an intermediate trust. Specifically, the LIT states that, "[t]he VI BENEFITS which are obtained with PARTICIPANT'S funds shall be assigned to this trust." The LIT also declines to articulate any particular insurance policy number, the interest in which policy is transferred to the investors. Rather, the LIT recites only the alleged ***trust*** number in documenting the trust interest supposedly purchased by the investors. Moreover, the Disbursement Letter of Instruction ("DLI") contemplates that the escrow agent with whom the investor's money is initially deposited, shall receive on behalf of the investor, "[a] copy of the irrevocable, absolute assignment, executed in favor of Participant and recorded with the trust account as indicated on the assignment of VI benefits...." The DLI, like the LIT, also recites only to a trust number—not an insurance policy number—in identifying the purported interest of the investor. In addition to the evidence provided by the LIT and DLI, the record is devoid of any evidence that would suggest that an investor's interest is in a specific life insurance policy, or that the interest is recorded with any life insurance company. The ALJ's finding is supported by competent, substantial evidence. Accordingly, Respondents' Exception 17 is rejected.

EXCEPTION 18: In Exception 18, Respondents fail to identify the disputed portion of the Recommended Order by page number or paragraph, do not identify the legal basis for the

exception, and do not include appropriate and specific citations to the record. Accordingly, the Office need not rule on the exception. See Ch. 2003-94, § 5 at 7, Laws of Fla.

EXCEPTION 19: Respondents have taken exception to paragraphs 107 through 111 of the Recommended Order. Respondents apparently object on the basis that the ALJ was "relying on case law," and "not dealing with the issues at hand." Exceptions, ¶ 19. The gravamen of the ALJ's conclusion at paragraphs 107 through 111 is that concurrent jurisdiction exists with respect to the transactions at issue in this case. It is not improper for the ALJ to rely on case law to reach this legal conclusion. Moreover, the suggestion that the ALJ is not dealing with the issues at hand is simply without merit. The ALJ has directly and fairly dealt with the issues at hand, and Respondents have not alleged that there was any error in procedure at the hearing or prior to the hearing. Respondents' Exception 19 is rejected.

EXCEPTION 20: Respondents have taken exception to paragraph 112 of the Recommended Order. In paragraph 112, the ALJ states "the potential for interagency conflict is nonexistent," because the Viatical Settlement Act and Chapter 517, Florida Statutes are regulated by the same agency. Respondent takes exception and suggests this conclusion is incorrect. Respondents' exception is noted in part, and the following clarification is hereby made. While the Office of Insurance Regulation and the Office of Financial Regulation (formerly the Office of Financial Institutions and Securities Regulation) are administratively housed within the Department of Financial Services, each office is autonomous from DFS, and from each other, with respect to its regulatory and enforcement functions. This clarification, however, is immaterial to the conclusion in this case. Thus, while paragraph 112 of the ALJ's Recommended Order is modified consistent with the foregoing, the Respondents' Exception 20 is moot.

EXCEPTION 21: In Exception 21, Respondents fail to identify the disputed portion of the Recommended Order by page number or paragraph, do not identify the legal basis for the exception, and do not include appropriate and specific citations to the record. Accordingly, the Office need not rule on the exception. See Ch. 2003-94, § 5 at 7, Laws of Fla.

EXCEPTIONS 22 - 23: In Exceptions 22 and 23, Respondents have taken exception to paragraphs 98 – 111 of the Recommended Order. The essence of the ALJ's conclusions at paragraphs 98 – 111 of the Recommended Order is that because the transactions at issue in this case constitute securities, the Office has concurrent jurisdiction to regulate the transactions at issue. In opposition to the ALJ's conclusion, Respondents suggest that the ALJ "fails to understand the definitions set forth in the Viatical Settlement Act and clearly fails to apply these definitions to the facts at hand," and that the ALJ's conclusion must be incorrect because "if the Legislature, had intended to require Viatical Settlement Agents to register with the Department of Banking and Finance, pursuant to Chapter 517, it would have said so in § 626.994 of the Florida Statutes." Exceptions, ¶¶ 22, 23. Respondents' exceptions are without merit.

First, nothing in paragraphs 98 through 111 of the ALJ's Recommended Order suggests that the ALJ improperly applied or failed to consider the definitions set forth in the Viatical Settlement Act. On the contrary, the ALJ expressly contemplates the relevant definitions provided by Chapter 626, Florida Statutes at paragraph 100 of the Recommended Order.

Second, the ALJ's conclusions with respect to the applicability of Chapter 626 are not inconsistent with any prior existing statute as suggested by Respondents. Chapter 626 does not contain any language that could even remotely be construed as an express preemption of Chapter 517. See Lowe v. Broward County, 766 So.2d 1199 (Fla. 4th DCA 2000) (stating, "[f]or the legislature to expressly preempt an area, the preemption language of the statute must be specific;

"express preemption cannot be implied or inferred."). Thus if preemption does exist, it must be implied. The Florida Supreme Court, however, has made clear that implied preemption is not favored under Florida law. Specifically, the Court has stated that, in cases where one statute is alleged to have repealed another, "the general rule ... is that implied repeals are not favored and will not be upheld in doubtful cases." Flo-Sun, Inc. v. Kirk, 783 So.2d 1029, 1035 (Fla. 2001)(citing State v. Digman, 294 So.2d 325 (Fla.1974). "Moreover, before making a determination that a subsequent statute has impliedly repealed one previously enacted, there should appear either a positive repugnancy between the two statutes or a clear legislative intent that the later act prescribes the only governing rule." Id. (citing Atkinson v. State, 156 Fla. 449, 23 So.2d 524 (1945)); See also City of Punta Gorda v. McSmith, Inc., 294 So.2d 27 (1974)(stating, "the general rule of legislative construction presumes later statutes are passed with knowledge of prior existing laws, and favors a construction which gives each a field of operation, rather than have one meaningless or repealed by implication.").

The exceptions made by the Respondents clearly do not illustrate a positive repugnancy between Chapter 517 and Chapter 626. On the contrary, the statutes have, and continue to harmoniously coexist, complementing each other to achieve the legislative purpose of protecting investors from fraudulent schemes such as that instituted by ABS in the present case. Further underscoring the fact that Chapter 626 should not be interpreted as preempting Chapter 517 is the fact that the Florida Legislature has been to unwilling expressly preempt Chapter 517 by the enactment of Chapter 626. Since the statutes are not positively repugnant to one another, and there is no express preemption between Chapter 626 and Chapter 517 such preemption should not now be read into the statutory scheme.

Accordingly, Respondents' Exceptions 22 and 23 are rejected.

EXCEPTION 24: In Exception 24, Respondents fail to identify the disputed portion of the Recommended Order by page number or paragraph, do not identify the legal basis for the exception, and do not include appropriate and specific citations to the record. Accordingly, the Office need not rule on the exception. See Ch. 2003-94, § 5 at 7, Laws of Fla.

FINDINGS OF FACT

1. The Office adopts, and incorporates herein by reference, the Findings of Fact in the Recommended Order subject to the clarifications that follow. In rendering the clarifications that follow, the Office is mindful of the ALJ's role as fact-finder, and the Office's duty to accept the ALJ's Findings of Fact if supported by competent, substantial evidence in the record. Moreover, the Office is mindful that it may not merely label findings of fact as conclusions of law simply to avoid a complete review of the record prior to any modification of the findings.

2. The modifications herein below are for clarification purposes only. The modifications are consistent with, and do not materially alter the basis for, the ALJ's recommendation at page 44 of the Recommended Order. Neither is the agency attempting to alter the ALJ's suggested penalty. Ultimately the ALJ's recommendation and suggested penalty are each fully adopted and incorporated herein by reference, as the Final Order of the agency.

3. Paragraph five (5.) of the Recommended Order is modified with respect to its conclusion that, "the trust beneficiaries, who are the investors from whom ABS had obtained the funds to pay FinFed, held equitable title to the policies." See Recommended Order, ¶ 5. Specifically, upon review of the record, the Office finds first that there is no competent, substantial evidence in the record to establish that any of the investors were actually named beneficiaries of any trust related to the ABS program. In fact, the record is devoid of copies of any trust agreement.

Second, review of the entire record shows that there is simply no competent, substantial evidence in the record suggesting that there is any basis for the conclusion that the investors received an equitable interest in any particular life insurance policy. In fact, there is no evidence that any of the investors were made beneficiaries of any life insurance policy purchased by ABS; that any investor received a valid assignment to the benefits of a particular life insurance policy; or that any investor received any financial instrument collateralized by an interest in a particular life insurance policy. Moreover, the documents memorializing the contract between the investor and ABS affirmatively suggest the opposite conclusion, i.e. that the investors did not obtain an equitable interest in a life insurance policy.

The contract between the investor and ABS is comprised of the Letter of Instruction to Trust, Disbursement Letter of Instruction, and the Participation Agreement. See Recommended Order, 8. In the first instance, the Letter of Instruction to Trust ("LIT") expressly recognizes that the insurance policy benefits (even if they had existed) are not assigned to the investors but rather to an intermediate trust. Specifically, the LIT states that, "[t]he VI BENEFITS which are obtained with PARTICIPANT'S funds shall be assigned to this trust." See Petitioner's Exhibit 1. The LIT also declines to articulate any particular insurance policy number, the interest in which policy is transferred to the investors. Instead, while describing in vague terms the characteristics of an insurance policy, the LIT recites only the alleged ***trust*** number in documenting the trust interest supposedly purchased by the investors.

In the second instance, the Disbursement Letter of Instruction ("DLI") contemplates that the escrow agent with whom the investor's money is initially deposited, shall receive on behalf of the investor, "[a] copy of the irrevocable, absolute assignment, executed in favor of Participant and recorded with the trust account as indicated on the assignment of VI benefits...."

See Petitioner's Exhibit 1. There is no indication in the record that would suggest that an investor's interest is in a specific life insurance policy or that the interest is recorded with any life insurance company. On the contrary, the interest is only to be recorded with the supposed trust account. The DLI, like the LIT, also recites only to a trust number—not an insurance policy number—in identifying the purported interest of the investor. Ultimately, the record demonstrates no more than that the investors held a contractual interest in an investment contract that purportedly entitled them to receive income generated by the trust.

In addition to the contractual documents themselves supporting this modification, the conclusion in the Recommended Order that the investors "held equitable title to the policies" must be modified because it is contradictory to the findings of the United States Bankruptcy Court for the Southern District of Florida in the bankruptcy case of ABS and its associated entities. See Kozyak v. ABS Trust, Adv. No. 00-2554-BKC-RBR-A (within In Re: Financial Federated Title & Trust, Inc. a/k/a Asset Security Corp. a/k/a Viatical Asset Recovery Corp., a/k/a Quad-B-LTD., a/k/a American Benefits Services, Inc., Case No. 99-26616-BKC-RBR), Order Granting Trustee's Motion for Summary Judgment Against ABS Trust, July 9, 2001. In Kozyak, the court explicitely determined that only ABS had an interest in what few viaticated insurance policies were actually purchased by ABS. See id. Specifically, in examining the question of who had an interest in the policies, the Kozyak court determined unequivocally that, "the ABS Policies were not assigned or transferred, and the beneficial interests in the ABS Policies are property of the estate." Id. Thus, as a matter of law, at the time this case was heard, the Bankruptcy Court for the Southern District of Florida had already determined that the investors in this case did not have an interest in any life insurance policy obtained by ABS. In

accordance with this determination, this Office is compelled to reject the contrary conclusion in the Recommended Order.

Finally, as noted in the Recommended Order at paragraphs 20 and 21, the ABS scheme in this case turned out to be a fraudulent "Ponzi" style scheme. As noted in paragraph 21 of the Recommended Order, in at least some cases no insurance policy even existed. Accordingly, the investors cannot be said to have gained an equitable interest in an insurance policy, when such policy does not even exist.

Based on the foregoing, this Office is compelled to reject the conclusion that the investors held an equitable interest in a life insurance policy. The Office expressly finds that this modification is as reasonable or more reasonable than the conclusion which it modifies. Accordingly, paragraph five of the Recommended Order is modified in accordance with the foregoing analysis, and adopted to the extent that it does not conflict therewith.

CONCLUSIONS OF LAW

4. The Office hereby adopts and incorporates by reference the Conclusions of Law set forth in the Recommended Order.

FINAL ORDER

Having ruled on the exceptions filed in this matter and upon review of the complete record of this proceeding, the recommendation in the Recommended Order is hereby adopted, and it is accordingly ORDERED:

A. Respondents, James A. Torchia and Empire Insurance, Inc., shall cease and desist from all present and future violations of Chapter 517, Florida Statutes, and the rules duly promulgated thereunder; and

B. Respondent, James A. Torchia, shall pay an administrative fine in the amount of $120,000. The fine shall be paid by certified check or money order within 30 days of the docketing of this Final Order. The fine shall be payable to "Director – Office of Financial Regulation" for the Securities Anti-Fraud Trust Fund. Payment shall be delivered to the Agency Clerk, Office of Financial Regulation, Legal Services Office, 200 E. Gaines Street, Fletcher #526, Tallahassee, FL 32399.

DONE and ORDERED this 12th day of August, 2003, in Tallahassee, Leon County, Florida.

Don B Saxon

DON B. SAXON, Director,
Office of Financial Regulation

NOTICE OF RIGHTS TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE OFFICE OF FINANCIAL REGULATION, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Final Order was sent to Robert E. Meale, Administrative Law Judge, Division of Administrative Hearings, DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060, and Barry S. Mittelberg, Mittelberg & Nicosia, 8100 N. University Drive, Suite 102, Fort Lauderdale, Florida 33321, counsel for Respondent, by U.S. Mail, on this 12th day of August, 2003.

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cc: Rick White, Deputy Director
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