

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL )  
SERVICES, )  
 )  
Petitioner, )  
 ) Case No. 03-2041PL  
vs. )  
 )  
CLIFFORD EUGENE KEIFFER, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Notice was provided and on January 6, 2004, a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes (2003). The hearing location was the St. John's County Agricultural Center, Conference Room, 3125 Agricultural Center Drive, St. Augustine, Florida. The hearing was conducted by Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner: David J. Busch, Esquire  
Department of Financial Services  
612 Larson Building  
200 East Gaines Street  
Tallahassee, Florida 32399-0333

For Respondent: Joseph O. Stroud, Jr., Esquire  
Rogers, Towers, P.A.  
1301 Riverplace Boulevard, Suite 1500  
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STATEMENT OF THE ISSUE

Should discipline be imposed by Petitioner against Respondent's insurance agent licenses as, Life (2-16), Life and Health (2-18), and Health (2-40), held pursuant to Chapter 626, Florida Statutes?

PRELIMINARY STATEMENT

By an Amended Administrative Complaint in Case No. 61528-03-AG, Petitioner has accused Respondent of various violations in the solicitation and sale of group health benefits insurance policies, or contracts related to several customers in association with TRG Marketing, L.L.C. (TRG). By his acts Respondent is alleged to have violated provisions of Chapters 624 and 626, Florida Statutes, subjecting him to discipline in accordance with those chapters and Florida Administrative Code Chapter 4-231.

On April 10, 2003, Petitioner served Respondent with the original Administrative Complaint in Case No. 61528-03-AG. Respondent disputed the underlying facts in the administrative complaint in an election of rights form received by Petitioner on May 16, 2003. On June 2, 2003, the case was forwarded to the Division of Administrative Hearings to assign an administrative law judge to conduct a formal hearing. The case was assigned and noticed to be heard August 6, 2003. Following two continuances, the case was heard on the date described. Over

objection Petitioner was allowed to amend the Administrative Complaint in Case No. 61528-03-AG. The amendment was allowed by order dated June 24, 2003.

At hearing Petitioner presented the testimony of Bruce Chambers, Vicki Brown, Alicia Moore, and Linda Davis as its witnesses. Petitioner's Exhibits numbered 1 through 39 were admitted as evidence. Respondent testified in his own behalf. Respondent's Exhibits numbered 1 through 9 were admitted as evidence.

Consistent with the instruction given at hearing, counsel for Petitioner produced a matrix setting forth the number of prosecutions from January 1, 2002, until the hearing date and their disposition in relation to TRG. The matrix pertains to the sale of the TRG health plan through Florida insurance agents who were disciplined for those activities. The individual licensees are identified, and the disciplinary sanctions imposed are depicted in the matrix. The parties, in particular Respondent, were allowed to offer the document summarizing imposition of discipline in other cases for comparison to Respondent, in the event Respondent was found in violation of provisions within the Amended Administrative Complaint in Case No. 61528-03-AG. The matrix is received for those purposes, to be used in conjunction with Petitioner's disciplinary guidelines should a violation of the insurance law be established.

At the end of April or early May 2001, Respondent called the offices of Petitioner. The topic concerned TRG, as Respondent testified at hearing. In response, an unidentified person told Respondent, "Yes, TRG is an ERISA program (ERISA refers to the Employment/Retirement Income Security Act of 1974). They have been operating in Florida for about 18 months and we have no complaints." This conversation took place before Respondent became affiliated with TRG. The purpose of the call and the response made, as argued in the course of the hearing and through subsequent written argument following the hearing, was to try and establish that Respondent had acted with "due diligence" before becoming involved with TRG. The issue of due diligence will be discussed in more detail. Preliminarily, the statement which Respondent attributed to the unknown person he spoke to by telephone in the Petitioner's office is hearsay as defined at Section 90.801(1)(c), Florida Statutes (2003). The statement attributable to the unknown person Respondent spoke to by telephone, is a statement that may not be found as a fact when considering hearsay exceptions set forth in Section 90.803, Florida Statutes (2003), in particular, Section 90.803(18). In the absence of any showing that the unknown individual was acting in a representative capacity, under specific authorization from Petitioner or as agent concerning a matter within the scope of duties performed for the Petitioner, that

statement cannot be received for fact-finding purposes standing alone. Nor has it been shown as supplementary or an explanation of other competent evidence as envisioned by Section 120.57(1)(c), Florida Statutes (2003).

The hearing transcript was filed on January 28, 2004. The parties timely filed proposed recommended orders on or before the extended deadline for submission of those pleadings. The proposed recommended orders have been considered in preparing the recommended order.

#### FINDINGS OF FACT

##### The Parties

1. Petitioner was created in accordance with Section 20.13, Florida Statutes. Petitioner has been conferred general power by the Legislature, to regulate the insurance industry in Florida, in accordance with Section 624.307, Florida Statutes. Chapter 626, Florida Statutes, grants Petitioner the authority to license and discipline insurance agents doing business in Florida.

2. Petitioner issued Respondent license No. A140590. At times relevant to the inquiry, Respondent has been licensed in Florida as agent for insurance in Life (2-16), and Life and Health (2-18). On December 2, 1992, Respondent had been issued a Health (2-40) license, but that license is no longer valid having been voluntarily cancelled. The cancellation occurred at

a time previous to December 18, 2003, when a license history document was prepared, Petitioner's Exhibit numbered 1.

3. Respondent conducts business as an insurance agent under the name Business Insurance Cafeteria. The business is located at 828 Hamilton Avenue, St. Augustine, Florida.

4. Respondent has been licensed as an insurance agent for over 50 years, 44 years of which have been in Florida. Acting as an insurance agent has been Respondent's principal occupation. During that time the emphasis in his business has been on health insurance.

#### TRG Affiliation

5. In April 2001, an acquaintance and insurance agent Ellen Averill introduced Respondent to Robert Trueblood, Sr. Respondent understood that Mr. Trueblood was the Managing General Agent for TRG. Mr. Trueblood, at the time, was from Hobe Sound, Florida. Mr. Trueblood gave information to Respondent about TRG pertaining to its involvement in the insurance business. Mr. Trueblood told Respondent that individuals within TRG were personal friends of Mr. Trueblood.

6. In turn, Respondent made a call to Petitioner at the end of April or first part of May 2001. Someone that he spoke to, whose identity and position within the Petitioner's hierarchy was not established in the record, made a comment which cannot be established as fact given its hearsay nature.

Nonetheless, following this conversation, Respondent became affiliated with the TRG organization which Respondent understood to be an ERISA program, not subject to Petitioner's oversight. At that time, Respondent's knowledge of what an ERISA program entailed was based upon reading he had done in the past. Respondent was of the impression that the ERISA program was under the auspices of the federal government, as opposed to the state government. Respondent had never taken specific courses concerning the ERISA program before his engagement with TRG. Respondent's involvement with TRG was his first effort to market what he considered to be ERISA program insurance.

7. When Respondent commenced his participation with TRG, he believed that an ERISA program was instituted by a document filed with the Department of Labor outlining insurance benefits and that TRG had put up reserves associated with the ERISA program. Respondent did not obtain anything in writing from the Department of Labor concerning TRG as an ERISA program. To begin with, Respondent believed that ERISAs had to involve 51 or more lives in being before coverage could be obtained. Again, this was not a market that Respondent had worked in but he understood that ERISAs involved coverage of that number of individuals. From conversations with Mr. Trueblood and Tom Dougherty, another managing General Agent for TRG, of Cocoa Beach, Florida, Respondent became persuaded that ERISAs could be

marketed to companies with a single life being insured or two to three lives in a small group market.

8. Respondent relied on Mr. Trueblood when Mr. Trueblood told Respondent that ERISA, as a federal program did not have to be licensed by the state. Mr. Dougherty made a similar comment to Respondent. Ms. Averill also commented to Respondent concerning her impression about TRG as an ERISA program. From this record, Respondent was not officially told by persons within the Petitioner's agency, that the TRG program was an ERISA program that did not have to be licensed in Florida.

9. TRG provided Respondent marketing material. Respondent was impressed with the "very professional" appearance of that material. Respondent's Exhibit numbered 1 admitted into evidence is constituted of material provided to Respondent by TRG. It refers to the TRG health plan under "the Redwood Group." It refers to marketing under an organization identified as Premier Financial Group USA, Inc. It describes PPO networks available with the TRG products. The document refers to the TRG/USA health plan (the Redwood Group, L.L.C./USA Services Group, Inc.) and various versions of employer health and welfare benefit plans and a client fee schedule effective May 1, 2001, for enrollees in the 80/60 plan and 90/70 plan. Participant co-pays for physician office visits are related. Those plans identified in the material describe the amount of deductibles



according to age groups and participation by members and additional family participants. The TRG document speaks of benefits attributable to the 80/60 and 90/70 health plans. This information contained comments about the Redwood Companies- Corporate Overview.

10. Respondent's Exhibit numbered 1 comments upon the ERISA program and the provision of health benefits for employees through self-funded employee health and welfare benefit plans as a means, according to the document, to exempt those plans from state insurance regulation.

11. Respondent's Exhibit numbered 1 touts what it claims are savings to be derived compared to current health insurance plans held by prospective purchasers.

12. Respondent's Exhibit numbered 1 contains an associate application agreement setting forth policies and procedures that Respondent would be obligated to meet as an associate with TRG acting as an independent contractor.

13. Respondent's Exhibit numbered 1 contains an application format for prospective enrollees in the TRG preferred provider plans to execute in applying for coverage.

14. Respondent's Exhibit numbered 1 refers to Robert W. Trueblood, Sr., as being affiliated with Premier Financial Group, USA Inc., under the TRG banner.

15. Mr. Trueblood sent Respondent's Exhibit numbered 1 to Respondent.

16. Respondent began his contacts with TRG in May 2001 and wrote his first enrollment contract in association with TRG in August or September 2001.

17. Beyond that time, Respondent was notified on November 27, 2001, that effective November 30, 2001, a cease and desist order had been issued against TRG's offering its health coverage in Florida.

18. The commissions earned by Respondent in selling the TRG health insurance product ranged from five to seven percent. Respondent earned less than \$1,000.00 in total commissions when selling TRG health insurance products.

19. The persons who participated with TRG in its preferred provider plan were referred to the claims administrator of USA Services.

20. Participants in the TRG preferred provider plan sold by Respondent received information outlining the benefits. Participants received medical I.D. cards. This information was provided directly to the participants. Respondent was aware of the information provided to the participants. An example of this information is set out in Respondent's Exhibit numbered 2.

21. In offering the TRG health coverage, Respondent told his customers that this plan was not under the purview of the Department of Insurance in Florida, that this was an ERISA program. Respondent told his customers that any problems experienced with the program could be addressed through resort to the federal court. Respondent did remind the customers that making the Florida Department of Insurance aware of their claims could create a record in case they went to federal court.

22. Respondent is familiar with the prohibition against acting as an insurance agent for companies not authorized to transact business in Florida. But he held to the opinion that TRG was an ERISA program under the federal auspices and not subject to Petitioner's control.

23. At the inception, Respondent believed that offering the TRG health insurance coverage would be an acceptable choice. That proved not to be true. When it was discovered that TRG would not pay claims related to health coverage for policies Respondent sold to his customers, Respondent made an attempt to find replacement coverage.

24. To this end, Respondent had received information reflected in Respondent's Exhibit numbered 5. The document discussed the prospect that insurance would be provided from the Clarendon Insurance Company (Clarendon), using the provider Network Beechstreet, with Baftal/Quik Quote Insurance Brokers in

Plantation, Florida, being involved in the process to substitute coverage for TRG. Baftal is the shorthand reference for Bertany Association for Travel and Leisure, Inc. Baftal is an insurance agency.

25. Respondent made some explanation to his customers insured through TRG of the prospect of using Clarendon to take over from TRG, which had not honored any of the claims for reimbursement made by Respondent's customers. A copy of this December 28, 2001, correspondence from Respondent to TRG's insureds who had been sold policies through Respondent, is reflected in Respondent's Exhibit numbered 6.

26. As described in Respondent's Exhibit numbered 7, Baftal sent information concerning health care coverage to business owners, to include Respondent's customers, as described in the Amended Administrative Complaint. This correspondence indicated that the benefit plan would become effective December 1, 2001, upon condition that the insured meet applicable underwriting standards. This communication was made following receipt of premiums paid by the insured. Reimbursement for claims were to be processed through Advancement Administration in Maitland, Florida.

27. Baftal did not assume the claims that had not been honored by TRG, and Clarendon did not become the insurer for those customers.

28. Baftal did not follow through with the offer to provide health benefits to Respondent's customers who had begun with TRG. On February 11, 2002, as evidenced by Respondent's Exhibit numbered 8, Baftal wrote the customers to advise that health benefits would not be provided. That exhibit mentions American Benefit Plans through a Mr. David Neal and some intention for Mr. Neal's organization to provide a benefits program, including insurance through Clarendon, as administered through Advanced Administration. The Baftal communication goes on to say that Baftal had learned that Clarendon was not an insurer on the program, that the only insurer on the program was an offshore insurance company about which Baftal had not received credible information. The letter remarks that premiums paid to Baftal by the customers were being returned.

29. On April 4, 2002, as related in Respondent's Exhibit numbered 9, TRG wrote to persons who were identified as health plan participants, to include Respondent's customers who are the subject of the Amended Administrative Complaint. The letter stated that due to a problem with USA Services Group, the claims administrator on November 30, 2001, when the TRG plan ended, claims were not being paid. The correspondence remarks about difficulties with USA Services experienced by TRG, promising that TRG would fulfill obligations to the customers who were participants in the health plan. Contrary to this promise, TRG

has not honored claims for those customers who are the subject of the Amended Administrative Complaint.

30. On December 12, 2001, as reflected in Respondent's Exhibit numbered 4, Petitioner had written consumers who had enrolled in the TRG health plan to advise that the Petitioner did not consider the TRG health plan to be an ERISA program. Under the circumstances, the correspondence indicated that TRG should have sought authorization from Petitioner to sell health plans in Florida, which had not been done. The correspondence refers to some acknowledgement by TRG that it was not an ERISA program and needed to be licensed in Florida to conduct business. The correspondence advises the consumer to cease payment of any further premiums to TRG, to include the cancellation of automatic bank drafts for payment of premiums. The correspondence advises the consumer to obtain replacement insurance through Florida licensed insurance companies or HMOs. The letter goes on to remind the consumer of certain plans that were not licensed in Florida to conduct business because they were perceived to be illegitimate companies. The communication urged the consumer not to enroll in those health insurance plans. Respondent was made aware of this communication.

Count I: Vicki Brown

31. Vicki Brown has a business known as Rainbows End Ranch located in St. Johns County, Florida. This is a one-person business involving boarding and training of horses.

32. Ms. Brown was interested in obtaining permanent health insurance, in that her COBRA policy was expiring. As a consequence, she was referred to Respondent by a friend.

33. Respondent met Ms. Brown at her place of business. She explained to him her health insurance needs. Respondent suggested obtaining health insurance through TRG. Ms. Brown agreed. Ms. Brown paid \$165.00 to TRG by check to cover the premium for September 2001. Two additional amounts of \$165.00 were withdrawn from her checking account to pay premiums to TRG for the months that followed.

34. Subsequently, Ms. Brown received Petitioner's December 12, 2001, letter informing her that TRG was not allowed to conduct business in Florida, Petitioner's Exhibit numbered 13. Beyond that point, Ms. Brown had difficulties in her attempt to be reimbursed for her medical treatment, presumably covered by the TRG plan, by seeking reimbursement through another insurance firm other than by TRG. That process was pursued through Baftal in relation to insurance offered by Clarendon.

35. Ms. Brown made Respondent aware that she had problems with reimbursement and of the receipt of Petitioner's letter. Respondent told her not to worry about the situation, that things were going to be taken care of by Clarendon taking over where TRG left off.

36. Ms. Brown received Respondent's form correspondence dated December 28, 2001, explaining the switch from TRG to Clarendon, Petitioner's Exhibit numbered 6.

37. Ms. Brown also received information from Advancement Administration concerning Clarendon as the insurance company, Beechstreet as the provider network, mentioning Baftal/Quik Quote Insurance as brokers, Petitioner's Exhibit numbered 7.

38. Following her difficulties with TRG, on January 2, 2002, Ms. Brown wrote a check to the Baftal Escrow Account in the amount of \$513.40 for premiums in relation to Clarendon. As can be seen, the payment to Clarendon represented an increase in premium compared to TRG.

39. The check for \$513.40 had been written out to LPI Clarendon and changed by Respondent to reflect the Baftal Escrow Account.

40. In January 2002, Ms. Brown called Respondent and was told that the paperwork he was filling out was wrong and that he needed to complete new forms for Baftal "Insurance Brokers."



According to Respondent, that explained why the coverage through Baftal had not gone into effect.

41. Ms. Brown had received Petitioner's Exhibit numbered 11, the communication from Baftal calling for additional information as a prerequisite to obtaining insurance benefits effective December 1, 2001. Information provided in the document concerning issues related to her coverage was not useful to Ms. Brown when she made inquiry consistent with the instructions contained in the document.

42. Concerning her claims for reimbursement, Ms. Brown had a health problem with her throat. In addressing the condition, she was told by her primary care doctor, that when trying to arrange for a specialist to attend her care through the Beechstreet Provider Network, which was part of the health care offered through the Baftal Agency, it was reported that Beechstreet was bankrupt. Then Ms. Brown called Respondent to ask his advice. Respondent told her he was not sure how to respond "right now things are in a haywire." Beyond that point Ms. Brown found out that Clarendon, part of the Baftal arrangement was not going to insure her business. In particular, Ms. Brown received the February 11, 2002, communication from Baftal commenting that insurance would not be provided through Baftal, remarking that Clarendon was not an

insurer. This communication is Petitioner's Exhibit numbered 12.

43. After the TRG and Baftal experiences, Ms. Brown tried to be placed on her husband's health insurance policy but had trouble getting a certificate to allow her to obtain that coverage. This was in relation to the need for the existence of continuing coverage before being placed on the husband's policy.

44. Fortunately, Ms. Brown was eventually able to get insurance through her husband's policy.

45. Ms. Brown was dismayed by the difficulty experienced in obtaining health insurance when she discovered that TRG and Baftal would not meet her health insurance needs.

46. From the evidence, it has been determined that the TRG plan purchased by Ms. Brown was the 80/60 plan with the \$1,000.00 deductible. Although Ms. Brown testified that her medical bills in the period in question would total close to \$1,000.00, the evidence found in Petitioner's Exhibit numbered 8, constituted of medical bills around that time do not approximate than amount.

47. Ms. Brown had received a TRG benefit handbook and membership card, Petitioner's Exhibits numbered 9 and 10, associated with her participation in the 80/60 plan with a \$1000.00 deductible and co-pay of \$10.00 for a physician office visit and \$20.00 for a specialist office visit.

48. In summary, none of the companies from whom Ms. Brown purchased insurance through Respondent, commencing with TRG, have paid for any of her claims for reimbursement for medical care during the relevant time period. In addition to not receiving a reimbursement for premiums paid to TRG, Ms. Brown did not receive the return of her premium paid to Baftal either.

Count II: Alicia Moore

49. Alicia Moore at one time was employed by Respondent. The position Alicia Moore held with Respondent's insurance agency was that of general office clerk. Ms. Moore has never been licensed in any capacity by Petitioner, related to the sale of insurance and has not taken courses to educate herself about the insurance business. In addition to her employment with Respondent, she purchased health insurance through Respondent with TRG around September 2001.

50. Ms. Moore purchased the TRG health insurance policy in the interest of her husband's subchapter S corporation, small business. Her husband's name is Randy Moore. The name of the company operated by the husband is M-3 Enterprises, Inc. The husband's company has one employee, Randy Moore. The Moores resided in St. Augustine, Florida, at times relevant to the inquiry.

51. The husband's business had been insured for health coverage by Humana, until Humana determined that it was not willing to provide health insurance for the company and the Moores decided that the individual policies offered by Humana in substitution for the group policy were too expensive.

52. The Moores chose TRG for health insurance after Respondent had discussed several health insurance plans including individual or group policies. The reason for the choice was the premium price.

53. On September 19, 2001, Randy Moore paid \$434.00 for the health insurance premium to Redwood Group, in the interest of obtaining health insurance from TRG. On November 2, 2001, an additional \$434.00 was debited from the checking account for M-3 Enterprises, to TRG for premiums related to the health insurance coverage.

54. Ms. Moore recalls Respondent telling her that the TRG health plan was an ERISA plan but she has no knowledge about ERISA plans being regulated under federal law. In that connection, Ms. Moore commented in a statement given by affidavit, that Respondent told her that TRG was not regulated by Petitioner. Respondent explained to Ms. Moore that the premium payments to TRG were lower in costs because TRG was an ERISA program.

55. TRG sent correspondence to the Moores as participants in the health plan. This is found as Petitioner's Exhibit numbered 15. It enclosed a membership issued to Randy Moore setting forth the \$10.00 co-pay for a physician visit, \$20.00 co-pay for a specialist office visit, and \$50.00 co-pay for emergency room visits associated with the participation in Plan 8033. The nature of the plan that the Moores had was a member-plus family. The cover letter listed the telephone number for the claims administrator USA Services to address claims or customer services questions. Ms. Moore also received a packet from TRG explaining the process of filing claims for health care.

56. After obtaining the TRG health coverage, Ms. Moore and her son received treatment for medical conditions contemplated under the terms in the TRG plan. Notwithstanding the submission of information for reimbursement related to the charges, the charges were not paid under the TRG plan. The total of these claims was approximately \$727.00. That \$727.00 was less co-payments already made for the medical services.

57. Ms. Moore made the Respondent aware that TRG was not reimbursing her for medical bills. Respondent gave Ms. Moore the telephone number for Tom Dougherty, Managing General Agent for TRG, expecting Mr. Dougherty to be able to assist Ms. Moore in dealing with outstanding medical bills. Ms. Moore called

Mr. Dougherty several times, but this did not lead to the payment of the medical bills.

58. Ms. Moore also sent TRG a certified letter in August 2002 concerning bills outstanding since October 2001, attaching the bills and information concerning payment of premiums for the coverage. This is reflected in Petitioner's Exhibit numbered 18.

59. Petitioner's Exhibit numbered 21 is a compilation of information concerning the outstanding medical bills, and a statement from Medical Accounts Services, Inc. (Medical Accounts) concerning a current balance on June 17, 2002, of \$229.00. The Moores had to make an arrangement to repay the money which was being collected through Medical Accounts.

60. It is not clear from the record the exact nature of the member with family plan that had been purchased by the Moores. Consequently, the deductible in force when claims were submitted for reimbursement is not readily apparent. Ms. Moore in her testimony was unable to recall the amount of the deductible for the policy issued from TRG. It does appear from a review of the fee schedule associated with the 80/60 plan and the 90/70 plan offered by TRG, that the premium payments made did not entitle the Moores to coverage associated with a \$500.00 deductible or \$250.00 deductible. The other possible amount for the deductible, by process of elimination is \$1,000.00.

61. The Moores received correspondence dated November 28, 2001, sent to Randy Moore as a TRG enrollee, indicating that the coverage would end effective November 30, 2001, and reminding Mr. Moore that, according to the correspondence, he would have to find other health coverage as of December 1, 2001. This correspondence, as with other similar correspondence that has been discussed, promised to continue to process claims for covered services incurred before the coverage ended. The TRG letter terminating coverage for the Moores was received by the Moores five days after the date upon which the correspondence indicated that the coverage would no longer be in effect. This circumstance was very disquieting to Ms. Moore. The claims by Ms. Moore and her child were within the covered period for the TRG policy as to their dates. The letter received from TRG is Petitioner's Exhibit numbered 17.

62. Ms. Moore spoke to Respondent about obtaining coverage when TRG discontinued its coverage. Respondent suggested that the Moores affiliate with Baftal.

63. The Moores made a premium payment to Baftal but within a week of being accepted for coverage, Baftal wrote to advise that coverage had been declined. Beyond that time, the Moores obtained coverage from Medical Savings Insurance, a company that they still use for health insurance.

64. Concerning Baftal, by correspondence dated February 11, 2002, Baftal wrote the Moores as a member, the form letter that has already been described, in which the Moores were told that they would not be provided health benefits. Given the problem described with Clarendon Insurance Company, the letter noted the return of the premium paid for coverage through Baftal. A copy of the letter sent to the Moores is Petitioner's Exhibit numbered 19. Baftal did not reimburse the Moores for the outstanding claims totaling approximately \$727.00.

Count III: Bruce Chambers

65. Bruce Chambers was another customer who bought TRG health insurance from Respondent.

66. Mr. Chambers was a Florida resident at the time he purchased the TRG coverage. Mr. Chambers and his wife moved to Florida from Georgia earlier in 2001. When they moved, the prior health insurance coverage that the Chambers held carried a high premium given Ms. Chambers diabetic condition. Moving from one state to the next also increased that premium. Under the circumstances, the Chambers agreed to purchase the TRG Health Plan.

67. At one time related to the transaction promoted by Respondent, Mr. Chambers believed that TRG was licensed in Florida. He held this belief even in the instance where Respondent had commented that TRG was an ERISA program.



Mr. Chambers also executed a coverage disclaimer in November 2001, upon a form from Respondent's agency noting that the health, welfare program applied for was not under the auspices of the Florida Department of Insurance. This is found as Petitioner's Exhibit numbered 36.

68. After purchasing the TRG policy, the wife developed an illness, and costs were incurred for services by the family's personal physician and for hospitalization. In addition Mr. Chambers had medical expenses. Exclusive of co-pays and the deductibles that are applicable, Mr. Chambers paid \$7,478.46 for the health care he and his wife received. None of that amount has been reimbursed through TRG as expected under the terms of the TRG coverage.

69. Mr. Chambers paid \$487.00 a month, plus \$18.00 in other fees, for two months related to coverage effective October 1, 2001, extending into November 2001, a total of \$1,010.00 in premiums and fees paid to TRG. No premiums and fees paid to TRG have been reimbursed.

70. The amount of premium paid by Mr. Chambers corresponds under the client fee schedule in effect May 1, 2001, associated with the TRG Health Plan, as pertaining to an 80/60 plan for a member and family with a \$1,000.00 deductible.

71. Petitioner's Exhibit numbered 26 is constituted of the calculation of the expenses, \$7,478.46 and attaches billing

information, some of which is for services and care received prior to December 1, 2001, and some of which is for services and care beyond that date.

72. When Mr. Chambers discovered that TRG was not reimbursing the costs which it was obligated to pay for health care received by the Chambers, he contacted the Respondent and TRG to gain satisfaction. He also contacted Petitioner.

73. When Mr. Chambers enrolled in the TRG plan he received the transmittal letter enclosing his benefits card, Petitioner's Exhibit numbered 23. The membership card identified his participation in plan 8033, with a co-pay for physician office visits of \$10.00, specialty office visits of \$20.00, and emergency room visits of \$50.00.

74. Mr. Chambers received notice from the Petitioner, presumably the December 12, 2001, notification concerning the lack of authority for TRG to business in Florida and the advice that CHEA (Consumer Health Education Association) was not authorized to do business in Florida either.

75. On December 20, 2001, the Chambers wrote Respondent concerning the unavailability of insurance through TRG and CHEA. The Chambers asked Respondent to give them advice about a list of "small group market carriers" they understood to offer health plans. This letter to Respondent is found within Petitioner's Exhibit numbered 25.

76. Also, within Petitioner's Exhibit numbered 25 was a copy of the letter from Respondent to TRG insureds dated December 28, 2001, which made mention of Clarendon as an alternative to TRG. Within that same exhibit is correspondence dated January 21, 2002, from the Respondent to enrollees in the TRG plan, to include the Chambers, discussing Baftal and the prospect that the latter company might honor TRG claims.

77. Finally, Petitioner's Exhibit numbered 25 contains an August 21, 2002, letter from Mr. Chambers to TRG asking TRG to pay for its portion of the medical expenses as reimbursement.

78. Petitioner's Exhibit numbered 27 is the December 1, 2001, application by Mr. Chambers to obtain medical benefits through CHEA. The application also refers to EOS Health Services. This predates Petitioner's warning about CHEA and EOS being licensed to do business in Florida. On December 1, 2001, Mr. Chambers paid \$487.00 for premium payments to EOS Health Services and provided a voided check for future payments for premiums by automatic withdrawal from his account. This effort was made as a follow on to obtain health coverage when TRG no longer provided health insurance to the Chambers.

79. To obtain health coverage, Mr. Chambers paid \$1,465.88 to the Baftal Escrow Account. This payment was made by a check dated January 14, 2002. That money was refunded by Baftal on

January 12, 2002, and no coverage was offered through that company for health insurance.

80. Mr. Chambers had been provided information about the opportunity to obtain insurance from Baftal as reflected in Petitioner's Exhibit numbered 31.

81. Respondent had also suggested that Mr. Chambers apply for health insurance from American Benefit Plan, following the discontinuance of the TRG coverage. Mr. Chambers applied for that coverage by documents dated February 18, 2002, in the interest of his company, Bruce A. Chambers, CFP. Information concerning that application is found in Petitioner's Exhibit numbered 32. American Benefit Plans was listed by Petitioner as an entity not allowed to conduct business in Florida in the December 12, 2001, letter of advice to insurance consumers following the problem with TRG.

82. Mr. Chambers wrote two checks, one in the amount of \$628.60 to Independent Managers Association and one for \$799.68 to the Association of Independent Managers, Petitioner's Exhibits numbered 35 and 33 respectively. The two checks were written on February 18, 2002. Those checks were voided in relation to payment for monthly insurance premiums and association dues. The effect was to not accept those checks for premium payments to obtain health insurance.

83. On March 5, 2002, ACH Corporation of America wrote Mr. Chambers stating that because of incorrect procedures, or untimely submission, health coverage would not be extended, pertaining to an application for Ultra Med Choice EPO. Ultra Med was another health insurance business which Petitioner in its December 12, 2001, correspondence to health care consumers had been identified as unlicensed to conduct health insurance business in Florida. The letter declining coverage from ACH and application information for a policy sought to become effective December 1, 2001, is found within Petitioner's Exhibit numbered 34. This application was in relation to Bruce Chambers, CFP as employer.

84. Mr. Chambers remains out of pocket for payments he had to make for health care extended, principally to his wife, for which TRG was obligated to provide reimbursement in part. None of the other policies that Mr. Chambers attempted to obtain worked out to substitute for the TRG obligation for reimbursement for health care claims.

85. Eventually the Chambers were able to obtain health insurance. At present the Chambers have a two-man group policy through Mr. Chambers' business to provide health coverage.

86. Because of the problem with health insurance coverage, Ms. Chambers was required to return to work. Her employment was outside Mr. Chambers' company, as well as within his company.

87. As a result of Ms. Chambers' failure to make payments to Flagler Hospital, where Ms. Chambers had received care, under terms that should have involved TRG providing reimbursement for costs, the bills were turned over to a collection agency compromising the credit standing of the Chambers. For the most part, the credit problems have been resolved.

#### Due Diligence

88. As established by testimony from Linda Davis, Analyst II in Petitioner's Jacksonville Office, there is a means to determine whether an insurance company has the necessary certificate of authority to conduct insurance business in Florida. This is accomplished by resort to the electronic data base maintained by Petitioner. A certificate of authority is an indication that the insurance company has completed the necessary requirements to be licensed or authorized to sell insurance in Florida. As established through Petitioner's Exhibit numbered 39, TRG/USA Health Plans, TRG Marketing L.L.C. was not authorized to do business in Florida.

89. An insurance agent licensed in Florida, to include the time frame envisioned by the Amended Administrative Complaint, would have had access to the data base identifying whether an insurance company had the necessary certificate of authority to conduct insurance business in Florida and could properly have been expected to seek this information before engaging in the

sale of products from a company such as TRG. Rather than avail himself of that opportunity, Respondent made some form of inquiry to Petitioner on the subject of TRG, while apparently ignoring the more fundamental consideration of whether TRG had been granted a certificate of authority to conduct its business in Florida, which should have been pursued. Ascertaining the existence or nonexistence of a certificate of authority, constitutes "due diligence" incumbent upon an agent before engaging in the sale of insurance from a prospective insurance company.

#### Respondent's Disciplinary History

90. Petitioner has not taken disciplinary action against Respondent before this case.

#### CONCLUSIONS OF LAW

91. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2003).

92. This is a disciplinary case. Therefore, Petitioner has the burden of proving the allegations in the Amended Administrative Complaint by clear and convincing evidence. See § 120.57(1)(j), Fla.Stat. (2003); see also Department of Banking and Finance, Division of Investor Protection v. Osborne Stearn and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington,

510 So. 2d 292 (Fla. 1987); and Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3rd DCA 1998).

93. Respondent's conduct under consideration pertains to his affiliation with TRG and the solicitation and sale of health insurance group policies to his customers Vicki Brown, Alicia Moore, and Bruce Chambers. Further, the case involves problems experienced by those customers when they sought reimbursement for charges related to health care received under terms of the TRG policy.

94. The three-count Amended Administrative Complaint associated with the named customers alleged that the Respondent violated the following statutory provisions and is subject to discipline for his misconduct. In turn those provisions are:

§ 624.11(1), Fla. Stat. (2001).

(1) No person shall transact insurance in this state, or relative to a subject of insurance resident, located, or to be performed in this state, without complying with the applicable provisions of this code.

§ 626.611, Fla. Stat. (2001).

--The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, solicitor, adjuster, customer representative, service representative, or managing general agent, and it shall suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any



one or more of the following applicable grounds exist:

\* \* \*

(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 appointment.

§ 626.621, Fla. Stat. (2001)

--The department may, in its discretion, deny an application for, suspend,, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, solicitor, adjuster, customer representative, service representative, or managing general agent, and it may suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist under circumstances for which such denial, suspension, revocation, or refusal is not mandatory under s. 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.

\* \* \*

(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 or detrimental to the public interest.

§ 626.901(1), Fla. Stat. (2001).

(1) No person shall, from offices or by personnel or facilities located in this state, or in any other state or country, directly or indirectly act as agent for, or otherwise represent or aid on behalf of another, any insurer not then authorized to transact such insurance in the state in:

(a) The solicitation, negotiation, procurement, or effectuation of insurance or annuity contracts, or renewals thereof;

(b) The dissemination of information as to coverage or rates;

(c) The forwarding of applications;

(d) The delivery of policies or contracts;

\* \* \*

(h) The collection or forwarding of premiums;

95. Respondent holds license A140590, as an agent, in the categories of Life (2-16) and Life and Health (2-18). As such, he is subject to the aforementioned provisions when considering his conduct under terms set forth in the Amended Administrative Complaint.

96. Clear and convincing evidence was presented to prove that TRG was an insurer not authorized to transact insurance in this state and that Respondent served as agent for TRG in the transaction of insurance in the relevant time period.

97. Section 624.10, Florida Statutes (2001), defines transacting insurance as:

"Transact" with respect to insurance includes any of the following, in addition to other applicable provisions of this code:

- (1) Solicitation or inducement.
- (2) Preliminary negotiations.
- (3) Effectuation of a contract of insurance.
- (4) Transaction of matters subsequent to effectuation of a contract of insurance and arising out of it.

98. Respondent has violated Section 624.11, Florida Statutes, and Section 626.901(1), Florida Statutes (2001), in relation to transactions with Vicki Brown, Alicia Moore and Bruce Chambers by doing business with TRG, an unauthorized insurance company whose policies were sold to those customers.

99. Respondent did not exercise due diligence in ascertaining TRG's status with Petitioner as an insurer before engaging in business with that company. Respondent did not take reasonable steps to discover whether TRG was authorized to transact insurance in Florida.

100. The question was raised concerning the nature of the insurance purchase made by the three customers from TRG with Respondent serving as agent. Was it under the auspices of the Employee Retirement Income Security Act of 1974 (ERISA), 29

U.S.C. § 1001 et. seq., preempting those transactions from consideration under Petitioner's regulatory authority in Florida? Any intent by Respondent to rely upon the doctrine of preemption, in the assertion that the health plans purchased by Respondent's customers from TRG were ERISA plans, is a form of defense and the burden to prove facts necessary to establish that defense resides with Respondent. The proof necessary concerns questions of fact when examining whether the subject plan is "an employee welfare benefit plan" sponsored by a single employer or union, recognized under ERISA and preempted from state regulation. See Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed. 2d 55 (1987); and Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489 (9th Cir. 1988), cert. denied 492 U.S. 906, 109 S. Ct. 3216, 106 L.Ed. 2d 566 (1989). See also Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

101. Respondent bears the burden of establishing the defense given the prima facie showing by Petitioner that TRG was not authorized to transact insurance in Florida. He has not met that burden.

102. When considering Respondent's conduct in the transactions at issue, it is with the recognition that Respondent has a fiduciary relationship, both with his customers and the insurance company. See Natelson v. Department of

Insurance, 454 So. 2d 31 (Fla. 1st DCA 1984). With this in mind, clear and convincing evidence has been shown that Respondent violated Section 626.611(7) and (8), Florida Statutes (2001). In all transactions complained about, the facts reported demonstrate that from the inception Respondent acted naively, if not irresponsibly, when conducting business for TRG and in his attempts to resolve the problems experienced by his customers in advancing their claims for reimbursement. This failure evidences a lack of fitness and reasonably adequate knowledge and technical competence to engage in those transactions.

103. While it cannot be said that Respondent engaged in unfair methods of competition, or pursued unfair or deceptive acts or practices, it has been shown that Respondent caused injury, by the disruptive results that followed the sale of the TRG policy to each of his customers, including financial loss. Consequently, as established by clear and convincing evidence, Respondent has violated Section 626.621(6), Florida Statutes (2001).

104. Given the violations described in the preceding paragraphs, clear and convincing evidence was presented that Respondent has also violated Section 626.621(2), Florida Statutes (2001).

105. In addition to the penalties that have been explained before, Petitioner has the opportunity to impose discipline consistent with Sections 626.681, and 626.691, Florida Statutes (2001), in association with possible administrative fines and probation as means of punishment.

106. In recommending a penalty for the misconduct, resort is made to the guidelines set forth in Florida Administrative Code Rule Chapter 4-231, in particular, Florida Administrative Code Rules 4-231.040, 4-231.080, 4-231.090, 4-231.110 and 4-231.160. In addition, the matrix concerning prior disciplinary actions taken against other licensees affiliated with TRG is available. The matrix has limited utility, in that it does not describe the underlying facts of those cases. It does describe a range of punishment.

#### RECOMMENDATION

Upon the consideration of the facts found and the conclusions of law reached, it is

#### RECOMMENDED:

That a Final Order be entered finding Respondent in violation of Sections 624.11, 626.611(7) and (8), 626.621(2) and (6), 626.901(1), Florida Statutes (2001); suspending his licenses for nine months; placing Respondent on two-years probation; and requiring attendance at such continuing education classes as deemed appropriate.

DONE AND ENTERED this 2nd day of April, 2004, in  
Tallahassee, Leon County, Florida.



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CHARLES C. ADAMS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
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this 2nd day of April, 2004.

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.