FLORIDA
DEPARTMENT OF
FINANCIAL
SERVICES

ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA
IN THE MATTER OF:

MICHAEL D. CARLL and
JAMES W. CRAIN, JR.
_____/

CASE NOS. 86221-06-AG
86177-06-AG

FINAL ORDER

THIS CAUSE came on for consideration and final agency action on a Recommended Order rendered on January 31, 2007, after a hearing conducted pursuant to Sections 120.57(1) and 120.569, Florida Statutes, by Administrative Law Judge Daniel Manry. The transcript of proceedings, the exhibits introduced into evidence, the Proposed Recommended Orders, the Recommended Order, and applicable law, have all been considered during the promulgation of this Final Order.

RESPONSE TO EXCEPTIONS

Exceptions from Michael D. Carll

1. Respondent Carll takes exception to the Administrative Law Judge's findings of fact in Paragraphs 52, 56, and 59 to the effect that Mr. Carll "knew or should have known" that the plan sold contained misrepresentations and that the refund promise it contained was false. Respondent asserts that these findings represent a violation outside the scope of what was charged in the Administrative Complaint. However, a review of the Administrative Complaint confirms that the Petitioner indeed alleged that Respondent Carll made misrepresentations of false and worthless promises. (Paragraphs 8, 23, 25, 30, 32, 38, 40, 46, and 48 of the Administrative Complaint). Actual and/or constructive knowledge is implicit in the concept of

misrepresentation. In Section 626.9541(1)(a), Florida Statutes, knowledge is an element of misrepresentation. Further, Respondent Carll was also charged with a lack of fitness or trustworthiness [Section 626.611(7), Florida Statutes]. Knowledge is not even necessary for that charge. There is competent substantial evidence in the record in support of the challenged findings that Respondent Carll either knew (actual knowledge) or should have known (constructive knowledge) that his representations of the written plan were not true (Tr. 358, 360-361, 422-424). Constructive knowledge may be proven by circumstances, [*City of Jacksonville v. Foster* 41 So.2d 548 (Fla. 1949)]. The written plan document, itself, is internally inconsistent, and thus contains material misrepresentations (Exhibits P-5, P-12 and RN-1). Moreover, when contrasted with Respondent Carll's oral representations, additional competent, substantial evidence of serious misrepresentations comes to light. The Administrative Law Judge could reasonably find from the plan's language that a trained insurance agent either knew or should have known that it contained inherent misrepresentations. The exception is therefore rejected.

2. Respondent Carll takes exception to the Administrative Law Judge's finding of fact in Paragraph 58 that "acts committed by the respondents were willful." Respondent asserts that this finding represents a violation outside the scope of what was charged in the Administrative Complaint. However, a review of the Administrative Complaint shows that Petitioner alleged that Respondent Carll made misrepresentations or false and worthless promises, (Paragraphs 8, 23, 25, 30, 32, 38, 40, 46, and 48 of the Administrative Complaint). Although the record indicates that Mr. Carll was not the author of the deceptive plan document (Mr. Crain was), Respondent Carll testified that he was responsible for selling the plan, and that he sold it (Tr. 355, 362-368, 389, and 413). Thus, it was Respondent Carll who was in the singular position of presenting the written plan to customers, and making oral representations to

the customers. The record shows that Respondent Carll, a licensed and trained insurance agent, made no independent examination of the content of the written plan before he offered it for sale. (Tr. 358, 422-424.) In Paragraphs 52, 53, and 58 of the Recommended Order, the Administrative Law Judge found that Respondent Carll knew or should have known of the plan's misrepresentations, that he was in a fiduciary relationship with those to whom he sold that plan (some of whom were previous customers), and that he sold this plan to those customers. The record contains competent substantial evidence to support those findings. (Tr. 358-361, 422-424) The exception is therefore rejected.

3. Respondent Carll takes exception to the Administrative Law Judge's finding of fact in Paragraph 51 that Mr. Carll "did not exercise ordinary diligence, much less the reasonable skill and diligence required of an insurance agent, to examine the plan for misrepresentations and false promises." Respondent asserts that this finding represents a violation outside the scope of what was charged in the Administrative Complaint. However, a review of the Administrative Complaint confirms that the Petitioner was charged with a lack of fitness and trustworthiness. A failure to exercise diligence in evaluating the product sold demonstrates a lack of fitness. The plan document (Exhibits P-5, P-12 and RN-1), is internally inconsistent, and replete with misrepresentations and false promises. In conjunction with Mr. Carll's testimony regarding his knowledge of the product, the evidence establishes that Mr. Carll either knew or should have known that the plan that he sold to elderly customers contained false promises and misrepresentations (Tr. 355-361). Respondent Carll violated a fiduciary duty to his insurance clients by selling the plan. The Administrative Law Judge expressly found that Respondent Carll's defense of "ignorance" to the charge of a lack of fitness and trustworthiness was contradicted by the evidence. The Administrative Law Judge had the opportunity to observe the

demeanor of the witnesses. The trier of the fact is privileged to weigh the evidence. *See Roman v. Unemployment Appeals Commission* 711 So.2d 93 (Fla. 4th DCA, 1998). The Administrative Law Judge did not conclude that Carll was ignorant of the misrepresentations. However, if Mr. Carll were ignorant of the Plan's deceptive provisions he could still be found unfit due to incompetence. The exception is therefore rejected.

4. Respondent Carll takes exception to the Administrative Law Judge's finding of fact in Paragraph 60 that Mr. Carll did not "use reasonable skill and diligence to determine that the plan he sold included misrepresentations and false promises" nor did he "exercise ordinary diligence, which would have disclosed the misrepresentations and false promises in the plan." Respondent asserts that this represents a violation outside the scope of what was charged in the Administrative Complaint. However, the Administrative Complaint alleged a lack of fitness as to Respondent Carll. This allegation relates directly to Respondent Carll's failure to use reasonable skill and diligence to determine that the plan he sold included misrepresentations and false promises. The Administrative Law Judge's finding is directly related to Respondent Carll's defense of ignorance as to the charge of a lack of fitness and trustworthiness. Ordinary diligence would have revealed that the plan was virtually worthless and deceptive. Respondent Carll should have protected his clients by refusing to sell the product. The record contains competent substantial evidence to support the challenged findings (Tr. 355-361, 422-424). The exception is therefore rejected.

5. Respondent Carll takes exception to the Administrative Law Judge's finding of fact in Paragraph 53 that he enjoyed a fiduciary relationship with the referenced insureds, which arose from previous sales of health insurance, in that Mr. Carll did not have a prior relationship with Ms. Clareus. The finding does not expressly state that Respondent Carll had a previous

relationship with Ms. Clareus. There is competent substantial evidence on the record to support this finding in that Respondent Carll did previously sell insurance to certain of the insureds. Specifically, the testimony cited by the Administrative Law Judge in Paragraph 53 of the Recommended Order (Tr. 360-361), is competent substantial evidence supporting the finding. Moreover, regardless of previous experience with any particular person, an insurance agent is always, as a matter of law, in a fiduciary relationship with those to whom he or she offers an insurance product. *Natelson v. Department of Insurance*, 454 So.2d 31 (Fla. 1st DCA 1984). Thus, the matter of Respondent Carll's previous relationship, or lack thereof, with Ms. Clareus is immaterial to the challenged finding. Therefore, the exception is rejected.

6. Respondent Carll takes exception to the Administrative Law Judge's finding of fact in Paragraph 35 that the plan misrepresented the access to discounted caregiver services. However, there is competent substantial evidence on the record in support of this finding. Specifically, the plan document speaks for itself, (Exhibits P-5, P-12 and RN-1). The Administrative Law Judge specifically cited the first sentence on page 4 of the plan, (Exhibit RN-1), which reads, "If a member joins the association they [sic] are guaranteed the homecare discounts provided for in the contractual agreement." This is a misrepresentation because under Mr. Crain's reading of the plan, the guaranteed discounts are provided only upon occurrence of improbable and undisclosed contingencies (Tr. 598-600). The exception is therefore rejected.

7. Respondent Carll takes exception to Endnote 5 to the effect that Mr. Carll was involved in the sale of the plan to Ms. McClurkin. There is competent substantial evidence on the record in support of this finding. Mr. Carll testified that he told Ms. McClurkin that her Penn Treaty Policy could pay the discounted service fee in the plan. (Tr. 407-408). The exception is therefore rejected.

8. Respondent Carll takes general exception to the Administrative Law Judge's findings that misrepresentations had occurred, based on his argument that a promise is not false until it is actually broken. For example, Respondent Carll contends that since Ms. Frakes has not requested services she has not been defrauded. This argument is without merit. There is competent substantial evidence in the record to support the finding that misrepresentations were made by Mr. Carll to the insureds to who he sold the plan (Exhibits P-5, P-12 and RN-1). The statute violated in this regard, Section 626.611(7), Florida Statutes, addresses a lack of fitness and trustworthiness. There is no requirement that an insured actually sustain monetary damage for an agent to violate that statutory section. The plain meaning of the word, "trustworthiness" does not require that a promise has been broken. An agent can obviously be found untrustworthy based on the intention to break a promise to an insured. The misrepresentation itself is all that is required. Moreover, the undisputed record evidence is that of the approximately $192,000 in premiums collected from the insureds in question, as of June 19, 2006, Home Care had only $946 in its bank account (Paragraphs 49, 50 of the Recommended Order). Neither claims nor refunds could be funded from that meager source, and no other source for the payment of claims or refunds was identified by either Respondent. The exception is therefore rejected.

9. Respondent Carll filed a document on March 9, 2007, titled "Responses to the Department's Response to Carll's Exceptions to the Administrative Law Judge's Recommended Order." The Petitioner filed a motion to strike the filing based on the lack of any authority authorizing such a filing. There is no statutory or rule authority for the filing of such a pleading. Accordingly, the motion is granted and the document at issue is stricken from the record.

Exceptions from James W. Crain. Jr.

1. Respondent Crain takes exception to the Administrative Law Judge's finding of fact in Paragraph 6 of the Recommended Order contending that Section 626.839, Florida Statutes, is inapplicable to this case because the agents involved were not acting "on behalf of an insurance agency." However, there is competent substantial evidence on the record in support of the finding that Mr. Crain is a health insurance agent and is the president and sole shareholder of an insurance agency. Respondent Crain does not dispute the truth of these facts. The issue raised is as to the applicability of Section 626.839, Florida Statutes, to sales not performed by an agency. As suggested by Mr. Crain, this is irrelevant to the ultimate findings in this case. The misrepresentations in this case were created by Mr. Crain himself. The fact that his misrepresentations were utilized by agents who may not have been acting on behalf of an insurance agency does not have an impact on the responsibility of Mr. Crain for his own acts and the acts of agents operating at his direction. There is competent substantial evidence in the record for the finding that Mr. Crain is a health insurance agent who is the president and sole shareholder of a health insurance agency. The finding that reads, "Mr. Crain is personally and fully liable for the acts of the selling insurance agents within meaning of Section 626.839, F.S.," is a conclusion of law rather than a finding of fact. It is a correct summary of what Section 626.839, Florida Statutes provides. The Administrative Law Judge did not make a finding as to whether the agents were acting on behalf of the agency. Therefore, the exception is rejected.

2. Respondent Crain takes exception to the Administrative Law Judge's finding of fact in Paragraph 30, which states that the plan included deceptive terms that would sound to elderly women like insurance terms. There is competent substantial evidence on the record in support of this finding. Specifically, the plan document is itself evidence (Exhibits P-5, P-12 and RN-1) in support of this finding. It contains the insurance-like terms identified by the

Administrative Law Judge. As for how the terms sound to elderly women, there appears to be no direct evidence as to the impression the terms made on the elderly women to whom the plan was sold. However, there are terms in the plan such as "Eligible Persons," "Effective Date," "Elimination Period," "Limitations and Exclusions," and "Benefit Discount Period" that any reasonable person reading the plan would conclude "sound like" insurance terms. The Administrative Law Judge, applying a reasonable person standard, could fairly infer that the terms at issue routinely appear in insurance documents based on a layman's familiarity with insurance terms. The Administrative Law Judge could also reasonably infer that this fact would be more likely to be true in the case of elderly insureds. This aspect of the finding is thus supported by competent substantial evidence in the record. The exception is therefore rejected.

3. Respondent Crain takes exception to the Administrative Law Judge's finding of fact in Paragraph 32 to the effect that the terms of the plan were "purposefully confusing." There is competent substantial evidence in the record in support of this finding; specifically, the plan document, itself (Exhibits P-5, P-12 and RN-1). That document is replete with examples of misrepresentations. For example, the plan mischaracterizes companion and homemaker services as "in-home care." Further, there is no reliable basis for the plan's statement that its services are offered at "almost one-half of the normal average cost in your area." The term "24-hour care" is a mischaracterization of the service offered. The word "discount" implies that there is an established fee to which a discount is applied (there is not). The reference to "recuperation" implies that the service is available to be used by people with medical conditions (it is not). The comparison to nursing homes deceptively suggests that health care services are provided. The reference to "a large group association" implies use of economies of scale as opposed to merely calling workers on a case-by-case basis and negotiating a price, as was the case here. The words,

"All employees bonded, insured and fully screened" strongly suggests that there are indeed on-staff employees and that they have been bonded, insured, and fully screened, which is not the case. The definitions of the terms "Eligible Persons" and "limitation and exclusions" fail to include the presence of a medical condition as a basis to deny homemaker services. The definitions of "Effective Date" and "Elimination Period Means" [sic] imply the exclusion period is for the first 90 days of membership not the 90 day period after a request for service, which is actually the case. The "Definition of 24-hour Care" contains a hidden exclusion not included in the definitions of "Eligible Person" or "Limitations and Exceptions." The hidden exclusion contains the vague words "unmanageable" and "requires" which could be given various readings. This allows for arbitrary denial of service. The sentence reading, "Members may request service at any time during their membership association," is inconsistent with the unreasonable requirement that the member must request services 60 or 90 days before they will become eligible for the "discount." The description of the providers as "licensed home care agencies" is inconsistent with testimony in the record that providers will be individuals who answered help wanted ads. Finally, the Administrative Law Judge found the promise to pay a 120% refund not credible because it is unfunded and contingent upon the arbitrary whim of the Respondent. For all the reasons stated above, there is competent, substantial evidence in the record to support the finding. The exception is therefore rejected.

Respondent Crain also contends that the Administrative Complaint did not allege that the plan was willfully confusing or misleading, and thus Respondent Crain was deprived of proper notice. However, a review of the Administrative Complaint shows that Petitioner alleged that Respondent Crain "misrepresented that the Home Care Membership Plan would provide access to homemaker providers and would provide actual homemaker and home medical care

services..." (Paragraphs 25, 32, 40, and 48 of the Administrative Complaint) and that he made "false and worthless promises" (Paragraphs 27, 34, 42, and 50 of the Administrative Complaint). The plan document was the mode of communication used to make the misrepresentations and false promises, and the plan was written by Respondent Crain. The Administrative Complaint thus provided due notice of the alleged violations. Also, Paragraph 10 of the Administrative Complaint describes misrepresentations, and then reads "However, upon closer reading, the Home Care Membership Plan, despite its cost, only purports to provide access to discount homemaker service providers...." Adequate notice only requires a meaningful opportunity to prepare and defend against an allegation of a complaint *See, Lucero v. Lucero,* 793 So.2d 144 (Fla. 2nd DCA 2001). By alleging and describing the false promises and misrepresentations the Petitioner made regarding the plan, the Petitioner easily met the notice provisions of case law. Therefore, the exception is rejected.

4. Respondent Crain takes further exception to the Administrative Law Judge's finding of fact in Paragraph 32 that the terms of the plan induced the four elderly women to "draw the desired inference." There is evidence that the women bought the plan. They obviously bought the plan to receive the promised benefits. It is reasonable for the Administrative Law Judge to infer that the purchasers expected a benefit (discounted home or medical care services) at no additional charge, in exchange for their money. There is competent substantial evidence on the record in support of this finding. The plan document (Exhibits P-5, P-12 and RN-1), contains several comparisons to nursing homes, implying that a service similar to what is provided in a nursing home will be provided by the plan. When viewed in conjunction with testimony establishing that, based on what they were told, the consumers expected discounted health care services at no additional charge (Tr. 85), there is competent substantial evidence to support the

Administrative Law Judge's finding. For the reasons stated above, there is competent, substantial evidence in the record to support the finding. The exception is therefore rejected.

5. Respondent Crain takes exception to the Administrative Law Judge's finding of fact in Paragraph 34, contending that the Administrative Complaint did not charge him with "misrepresenting access to discounted caregiver services that a purchaser acquired upon payment of a membership fee" or with making "false and worthless promises of access to discounted caregiver services." Thus, Respondent argues that he was deprived of proper notice of the allegation. However, a review of the Administrative Complaint confirms that Petitioner alleged that Respondent Crain "misrepresented that the Home Care Membership Plan would provide access to homemaker providers and would provide actual homemaker and home medical care services...." (Paragraphs 25, 32, 40, and 48 of the Administrative Complaint), and that he made "false and worthless promises" (Paragraphs 27, 34, 42, and 50 of the Administrative Complaint). The plan document (Exhibits P-5, P-12, and RN-1), contains numerous misrepresentations as identified in paragraph 3 above. As previously stated, the falsity and worthlessness of the promises is established by Respondent's own testimony as to the lack of reserves and employees, and by his fanciful interpretation of the plan language (Tr. 588, 633). It is the plan document that contains the promises made. It is apparent that these are the promises to which the Administrative Complaint refers. Thus, there is competent substantial evidence in the record to show that Respondent Crain was given due notice of the charges against him. The exception is therefore rejected.

6. Respondent Crain takes exception to the Administrative Law Judge's finding of fact in Paragraph 35, as to the misrepresentative nature of the plan. However, there is much competent substantial evidence in the record to support this finding. Specifically, the plan, itself,

was quoted by the Administrative Law Judge in Paragraph 35 (Exhibits P-5, P-12 and RN-1), relative to "guaranteed" homecare discounts, but as was noted in Paragraph 36 of the Recommended Order, the Respondents could not identify a care-giver obligated to provide those "guaranteed" discounts. Additionally, the other misrepresentations are more fully described in paragraph 3 above. For the reasons stated above, the exception is therefore rejected.

As to the issue of notice, also raised in this exception, a review of the Administrative Complaint confirms that Petitioner alleged that Respondent Crain "misrepresented that the Home Care Membership Plan would provide access to homemaker providers and would provide actual homemaker and home medical care services....", (Paragraphs 25, 32, 40, and 48 of the Administrative Complaint), and that he made "false and worthless promises," (Paragraphs 27, 34, 42, and 50 of the Administrative Complaint). As Respondent Crain was the author of the written plan document, those allegations regarding the plan constituted due notice to the Respondent that he was being accused of making misrepresentations and false promises. Accordingly, the exception is rejected.

7. Respondent Crain takes exception to the Administrative Law Judge's finding of fact in Paragraph 36, by asserting that the lack of identification of caregivers to provide services does not provide a basis to distinguish this plan from the plan reviewed in *Liberty Care Plan v. Department of Insurance*, 710 So.2d. 202 (Fla. 1st DCA 1998). However, unlike the plan in *Liberty*, not only did the Respondent fail to identify the providers, but it was also established through Respondent's own testimony that no providers were under any obligation to provide services to members of the plan at the discounted price promised by the Respondent (Tr. 588, 633). The absence of providers evidences the illusory and deceptive nature of the Plan. The exception is therefore rejected.

8. Respondent Crain takes exception to the Administrative Law Judge's finding of fact in Paragraph 37, asserting a lack of evidence that Mr. Crain lacked "the practical ability to ensure that a caregiver would provide home care services at any price, much less the discounted prices promised in the plan." There is competent substantial evidence on the record in support of this finding. More specifically, Respondent Crain, himself, testified that there were no contracts in place with service providers. Mr. Crain's alleged *ad hoc* personal experience in being able to hire people at a low price was the only method chosen to fulfill that obligation of the plan, and he had not at any relevant time hired anyone for that purpose (Tr. 588-591). The Plan members could place their own ads and get the same service at the same price without the added cost of the middleman. The exception is therefore rejected.

9. Respondent Crain takes exception to the Administrative Law Judge's finding of fact in Paragraph 38, that the lack of an enforceable right to service, and the practical ability to secure service were material facts that Respondent Crain willfully failed to disclose. However, there is competent substantial evidence on the record in support of this finding. Specifically, the plan repeatedly refers to the services being offered at a "discount". (Exhibits P-5, P-12 and RN-1). This representation is completely inconsistent with the Respondent's actual practice, which was to go into the market *after* the service is requested, and have the consumer pay whatever fees the market demanded (Tr. 588-591). The false promise of a "discount" is very material to a consumer. Additionally, as previously stated, the use of the phrase, "All employees bonded, insured, and fully screened," inescapably implied the then present existence of an employment relationship with those providers, which was not the case. The Administrative Law Judge's finding of willfulness is supported by the numerous, blatant inconsistencies between what the plan promised and what the plan actually provided. The exception is therefore rejected.

10. Respondent Crain takes exception to the Administrative Law Judge's finding of fact in Paragraph 39 that Mr. Crain's testimony as to his ability to deliver services was not credible. There is competent substantial evidence on the record in support of this finding. Mr. Crain testified as to how he found and screened prospective providers (Tr. 581-586). Additionally, Respondent Crain testified about hiring someone to work a 24-hour shift as a care-giver for $94.00. That is $3.92 per hour (Tr. 590). Respondent Crain further testified that the *provider* would pay the expense of bonding and insurance out of that amount (Tr. 586). The Administrative Law Judge was within his province as the trier of fact to conclude that Mr. Crain's testimony that he could hire people, as needed, to work 24 consecutive hours for what amounts to far less than minimum wage was not credible. It is the sole prerogative of the Administrative Law Judge to weigh the evidence, including the credibility of witnesses. The exception is therefore rejected.

11. Respondent Crain takes exception to the Administrative Law Judge's finding of fact in Paragraph 46 that Mr. Crain willfully made a false refund promise. There is competent substantial evidence on the record in support of this finding. The plan (Exhibits P-5, P-12 and RN-1), and Mr. Crain's testimony regarding the plan (Tr. 597-600), establish that the misrepresentations were willful. Respondent Crain knew that he had no premium monies left to pay refunds. The total inability to meet any refund obligations as of June, 2006 is proof of an unmistakable intention to default on the promises made in the plan. The exception is therefore rejected.

12. In his next exception, Respondent Crain appears to merely comment upon the Administrative Law Judge's finding of fact in Paragraph 47, which states "Mr. Crain is the sole arbiter of the entitlement to a refund and the amount of the refund to be paid. For example, Mr.

Crain paid Ms. Muller 120 percent of her membership fee but paid only a prorated amount to Ms. Clareus." Respondent Crain's comment purports to explain why Ms. Clareus received a prorated refund, whereas Ms. Muller received a 120% refund. Respondent asserts that the prorated payment to Ms. Clareus was a business decision to please a disgruntled customer. That explanation does not remove Respondent Crain from the role of sole arbiter. It confirms that he had that absolute, arbitrary power. The fact that refunds were paid does not negate the fact that based on Mr. Crain's reading of the plan he could have denied them, or the next refund request. There is competent substantial evidence on the record in support of the finding that Mr. Crain is the sole arbiter of the entitlement to the refund and the amount of the refund to be paid (Tr. 610). The exception, if one was intended, is therefore rejected.

13. Respondent Crain takes exception to the Administrative Law Judge's finding of fact in Paragraph 48 that the promise to refund 120% of the membership fee is worthless. There is competent substantial evidence on the record in support of this finding. Specifically, the plan (Exhibits P-5, P-12 and RN-1), in conjunction with testimony in the record, establishes that the 120% money back guarantee is false. Paragraph 17, page 7 of Exhibit RN-1 provides the 120% money back guarantee. The first sentence after the heading reads, "If the association cannot provide homemaker and companion services at the discounted rate as governed by this contract, the company shall pay the member all fees paid plus an additional 20%." According to Mr. Crain, the entitlement to discounted services under the contract is contingent upon 90 days passing from the initial request for services (Tr. 597), and the lack of "a medical situation involved" (Tr. 600). Under that illusory reading of the contract, even Eva Muller, to whom the refund was made, was not entitled to it. Under the interpretation applied by Mr. Crain, to be entitled to the refund, members must request service to which they are not entitled, wait 90 days,

and have no "medical situation" which might make the services desirable in order to receive the 120% refund in fees. Under this draconian standard, not expressed in the contract, it is virtually impossible for anyone to become entitled to the refund. Moreover, as of June 19, 2006, the amount of money available to honor the refund obligation was grossly inadequate. Thus, the record evidence shows that the refund representation was correctly characterized by the Administrative Law Judge as "worthless." The exception is therefore rejected.

14. Respondent Crain takes exception to the Administrative Law Judge's finding of fact in Paragraph 49, arguing that there exists no statutory reserve requirement for the plan involved in this case. However, the lack of a specific statutory reserve requirement is irrelevant. The fact that the Respondent failed to fund the plan *in any way* evidences a lack of intent to provide either the supposedly discounted services or, in lieu thereof, a refund of 120% of the monies paid. There is competent substantial evidence on the record in support of this finding (Exhibit R-7 at page 1879). The exception is therefore rejected.

15. Respondent Crain takes exception to the Administrative Law Judge's finding of fact in Paragraph 50 that the promise is "worthless." There is competent substantial evidence on the record in support of this finding as discussed above in Paragraphs 13 and 14 (*see also* Mr. Crain's testimony at Tr. 597-600 and Exhibit R-7 at page 1879). For the same reasons, the exception is rejected.

16. Respondent Crain takes exception to the Administrative Law Judge's finding of fact in Paragraph 52 that he knew or should have known that the plan contained misrepresentations. He asserts that the plan contains no misrepresentations. However, as demonstrated above, there is competent substantial evidence on the record in support of the

challenged finding. Such misrepresentations are described in Paragraph 3 above. Other record misrepresentations include but are not limited to the following:

On page 598 of the record, Mr. Crain stated that the plan's 90-day elimination period starts on the day of the service request while the implication from the definitions in the plan is that it starts upon the first day of membership. Exhibit P-5 at page 178 contains the following:

> ***Effective Date-*** *The plan is effective the day the contract is signed as long as the company approves it and the membership fee is paid. A 90 day elimination period means that the new member must first pay the normal rate exclusively provided from our providers.*
> ***Elimination Period Means*** *[sic] - The first 90 days the member has to pay the normal rate for home care provided exclusively by the association providers. Thus the first 90 days the member does not get a discounted rate and has to pay the full or normal rate exclusively from [sic] our providers.*

Based on Mr. Crain's testimony (Tr. 598) that the elimination period starts the day service is requested, the elimination period is not limited to "new" members, and the "first" 90 days could actually begin six years into the plan. The consumer must ask for service and then pay full price for it or do without it for 90 days before receiving "discounted" services.

Based on Mr. Crain's testimony at page 588 of the transcript that he has no contracts with providers, there was no "normal rate for home care provided exclusively by the association providers," and there were no "association providers." This means Respondent Crain could charge anything during that first 90 days. On page 600 of the transcript, Mr. Crain indicates that he would deny a request for service in part because there was a "medical situation involved." The plan provides no such basis for a denial. Despite the fact that the plan document makes several references to nursing care, it explicitly *excludes* any nursing care. The largest print on the cover of the plan document reads "....say NO to Nursing Homes!!" The misrepresentation is

intended to suggest that the consumer can receive nursing services at home. The fourth paragraph on the cover refers to "the average price of a nursing home, which is about $5000.00 per month." Based on the list of services contained in the plan, it is essentially a contract for maid, cook, and driver services; therefore the comparison with a nursing home can only mislead the prospective purchaser. Further, based on Mr. Crain's testimony, a medical condition can be used as a basis to deny a request for homemaker services. Given that the contract is marketed to people with medical conditions, who may need homemaker services because of medical disability, such a limitation is unconscionable, and this medical care limitation is not expressly set forth anywhere in the contract. It is a hidden limitation willfully created by Mr. Crain to avoid making good on his spurious promises. The only condition imposed by the language in the plan, on granting a request for services, is passage of the elimination period, which any reasonable person would understand to be the first 90 days of membership (60 days for the "Platinum-plus" version). Thus, the language of the plan is manifestly inconsistent with Mr. Crain's testimony as to how he implemented the plan for his own benefit. The plan blatantly misrepresents the benefits Mr. Crain claims to be offering. The exception is therefore rejected.

17. Respondent Crain takes exception to the Administrative Law Judge's Conclusion of Law in Paragraph 56, again asserting that the Administrative Complaint did not provide adequate notice of the misrepresentation for which the Administrative Law Judge found Mr. Crain to be accountable. A review of the Administrative Complaint shows allegations that Respondent Crain "misrepresented that the Home Care Membership Plan would provide access to homemaker providers and would provide actual homemaker and home medical care services..." (Paragraphs 25, 32, 40, and 48 of the Administrative Complaint), and that he made "false and worthless promises of providing access to homemaker providers and the providing of

actual homemaker and home care services." (Paragraphs 27, 34, 42, and 50 of the Administrative Complaint) This is what the Administrative Law Judge legally concluded in Paragraph 56 that Respondent Crain actually did. Respondent cites to *Ghani v. Department of Health*, 714 So.2d 1113 (Fla. 1st DCA 1998) for the proposition that a licensee must have due notice of what is charged. However, *Ghani* is easily distinguishable as the *Ghani* court overturned an order disciplining Dr. Ghani for failure to arrange transportation which was not charged in the Administrative Complaint. In this case, the Respondent was specifically charged with a lack of fitness and trustworthiness based on numerous, cited misrepresentations made to specific consumers. Similarly, in *Cotrill v. Department of Insurance*, 685 So.2d 1371 (Fla. 1st DCA 1996), cited by the Respondent, the licensee was not charged with the violations for which discipline was ordered. In the present case, Respondent Crain was specifically charged with a violation of Section 626.611(7), Florida Statutes, following a detailed recounting of the acts constituting a violation of the statute, and was found to have violated that same provision. Additionally, the cases, *Chysler v. Department of Professional Regulation*, 627 So.2d 31 (Fla. 1st DCA 1993) and *Klein v. Department of Business and Professional Regulation*, 625 So.2d 1237 (Fla. 2d DCA 1993) are similarly distinguishable. In *Chysler,* a licensee was denied a license based on allegations of misconduct in another state not charged in the Administrative Complaint. In *Klein,* the Medical Licensing Board interjected uncharged disputed issues of fact into an informal proceeding. In contrast, in the instant case, the Administrative Complaint fully described and charged the violation ultimately found. In this exception, Respondent Crain further argues that there is no evidence that he was unwilling or unable to pay the refunds in accordance with the contractual obligation. As noted in the many previous paragraphs dealing with the

plan's refund provision, there is competent substantial evidence in the record to support the challenged conclusion. For the reasons stated herein, the exception is therefore rejected.

18. Respondent Crain also takes exception to the Administrative Law Judge's Conclusion of Law in Paragraph 58 as to his willfulness to mislead. As previously demonstrated, there is competent substantial evidence on the record in support of this finding. *See* Paragraphs 9 and 11 above. For the reasons previously stated herein, the exception is therefore rejected.

19. Finally, Respondent Crain takes exception to the Administrative Law Judge's Conclusion of Law in Paragraph 67 that he committed four violations of Section 626.611(7), Florida Statutes, by failing to create what Respondent describes as a "flawless" home care plan. However, that was not the standard imposed by the Administrative Law Judge. Moreover, the plan was far worse than "flawless." The plan promises valuable services, but is rendered almost worthless by numerous misrepresentations and undisclosed and unreasonable conditions imposed by Respondent Crain to qualify individuals for the services. Moreover, the plan was unfunded. It was therefore illusory. Respondent Crain's reprehensible actions in creating and selling this virtually worthless and deceptive plan more than demonstrated his untrustworthiness and lack of fitness to engage in the business of insurance. The exception is therefore rejected.

Exceptions from Department of Financial Services

1. The Petitioner Department of Financial Services takes exception to the Conclusion of Law found in Paragraph 66 and the recommendation at Page 26 that the Respondents' licenses be suspended for 24 months rather than revoked. Section 626.611, Florida Statutes, explicitly authorizes revocation or suspension of an insurance agent's license. Petitioner

is correct that Rule 69B-231.160(1), F.A.C., does allow for an increase of a penalty based on aggravating factors. Therefore, revocation is certainly an available penalty contrary to the Conclusion of Law contained in Paragraph 66 of the Recommended Order, that the rule "does not authorize revocation". Therefore, to the extent the Administrative Law Judge concludes that the rule does not authorize revocation, that conclusion is rejected. The Petitioner further argues that the penalty of revocation is justified based upon the aggravating circumstances in this case; the age or capacity of the victims, and financial gain to the agents. However, in Paragraph 67 of the Recommended Order the Administrative Law Judge does indicate consideration of mitigating and aggravating factors. The Recommended Order, however, does not quantify the impact of each mitigating and aggravating factor. One may infer from the lack of adjustment in the penalty that in the judgment of the Administrative Law Judge the mitigating and aggravating factors balanced out each other. Although there indeed appears to be more aggravating than mitigating factors in this case, the recommendation of the Administrative Law Judge is within the range of penalties permitted by Section 626.211, Florida Statutes, as interpreted by Rule Chapter 69B-231, F.A.C. In the absence of a clear error in judgment by the Administrative Law Judge, and given the lengthy 24 month suspension recommended by the Administrative Law Judge, the Department will defer to the Administrative Law Judge's calculation of the penalty. Petitioner's exception is therefore accepted in part and rejected in part, as indicated above.

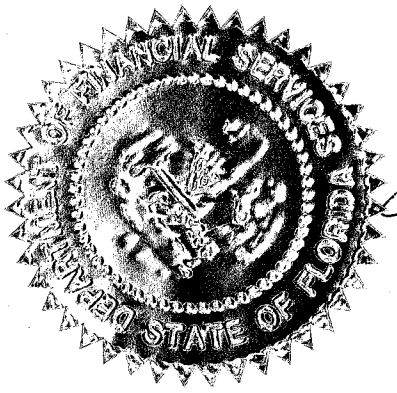
IT IS HEREBY ORDERED that the Findings of Fact made by the Administrative Law Judge are adopted as the Department's Findings of Fact. The Conclusions of Law made by the Administrative Law Judge, with the exception of Paragraph 66, which is rejected as provided herein, are adopted as the Department's Conclusions or Law. A true and correct copy of the Recommended Order is hereby incorporated by reference and attached hereto as Exhibit A.

The Administrative Law Judge's recommendation that the Department enter a Final Order finding the Respondents guilty of violating Section 626.611(7), Florida Statutes for the reasons stated herein, and suspending their insurance licenses for 24 months from the date the proposed agency action becomes final, is ACCEPTED as being the appropriate disposition of this case.

ACCORDINGLY, Respondents Michael D. Carll's and James W. Crain, Jr.'s licenses and eligibility for licensure as insurance agents in the State of Florida are SUSPENDED for a period of 24 months beginning upon the entry of this order.

Pursuant to Section 626.641(4), Florida Statutes, during the period of suspension, the Respondents shall not engage in or attempt or profess to engage in any transaction or business for which a license or appointment is required under the Insurance Code or directly or indirectly own, control, or be employed in any manner by any insurance agent or agency or adjuster or adjusting firm. Pursuant to Section 626.641(1), Florida Statutes, Respondents' licensure shall not be reinstated except upon request for such reinstatement, and the Respondents shall not engage in the transaction of insurance until their licenses are reinstated. The Department shall not grant such reinstatement if it finds that the circumstance or circumstances for which the licenses were suspended still exist or are likely to recur.

DONE and ORDERED this 1st day of May, 2007.



Karen Chandler

KAREN CHANDLER
DEPUTY CHIEF FINANCIAL OFFICER

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of the Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla.R.App.P. Review proceedings must be instituted by filing a petition or Notice of Appeal with the General Counsel, acting as the agency clerk, at 200 East Gaines Street, Tallahassee, FL 32399-0333, and a copy of the same and the filing fee with the appropriate District Court of Appeal within thirty (30) days of the rendition of this Order.

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